

"Let us come to the Communists—these brave revolutionaries whose revolution consists not in application of intelligence but in trying to find out what is happening 5,000 miles away, and trying to copy it, whether it fits in or not with the present state of India Unfortunately, our friends of the CPI have so shut their minds and have so spent all their time and energy in learning a few slogans of the past that they are quite unable to appreciate what is happening in India. In fact, these great revolutionaries of the CPI have become great reactionaries."

It is these forces that seem to be now running the Congress Party and I do not know what is going to happen to this Congress Party. I would like to appeal to the good sense of genuine Congressmen to rise the revolt against the Congress Party and the Government and see that justice is done and confidence is brought back to the people in the Supreme Court of India.

13 53 hrs.

BUSINESS OF THE HOUSE

THE MINISTER OF PARLIAMENTARY AFFAIRS (SHRI K. RAGHU RAMAIAH) : I have risen not in accordance with the peroration of the hon. Member there. I have risen only to make a submission. Since there are a number of speakers on our side as also on their side, I have discussed the matter with all the leaders here and it is the consensus that this debate should go on till 6 p.m. and the non-official resolutions which are under discussion be postponed. Of course, formal business like introduction and all that may be done at 6 p.m. The Law Minister accordingly will be called at 5.15 p.m.

SHRI INDRAJIT GUPTA (Alipore) : This may be a special circumstance but it should be made clear that this sort of elbowing out of private members' business should not be a precedent.

SHRI PILOO MODY (Godhra) : And not without our permission.

SHRI SAMAR GUHA (Contai) : I have to introduce three Bills to-day. What will happen to them?

MR. CHAIRMAN : You may be permitted to introduce the Bills just before 6 p.m.

13.55 hrs.

DISCUSSION RE APPOINTMENT OF CHIEF JUSTICE OF INDIA — *Contd.*

SHRI C. M. STEPHEN (Muvattupuzha) :

It is indeed a real pleasure to rise immediately after, if I may say so, the pleasant speech of my friend Mr. Viswanathan. In the same spirit in which he has tried to convince us that we are on the wrong side, it is my endeavour to persuade my hon. friend that he is labouring under an illusion. It is quite amazing to me to see that so much of dust and din and fret and fume is being kicked up on a question which is quite a normal action on the part of the President of India, namely, the appointment of Chief Justice of India. Public discussion both here in the House and outside has brought out in bold relief two aspects, namely, an area where there is complete agreement and an area where there is complete disagreement.

Now, with regard to the competence of the President to make the appointment, with respect to the qualification of the new incumbent to occupy that place, with respect to the contention that the President has done no unconstitutional act, going by the letter of the Constitution of India,—on all these points, I don't think there is any rebuttal there is all-round agreement; but, in spite of that, objection is taken on a solitary ground. The ground is this, that there has been a convention that the senior-most judge must be promoted, that there is a violation of that convention, that the violation is *mala fide* and that *mala fide* violation affects the independence and dignity of the judiciary and consequently democracy is in jeopardy. This is the type of argument that is being projected from the other side.

May I begin with the last,—independence of the judiciary? I wonder what exactly my friends mean by the term independence of the judiciary. There are two connotations possible. One is that once the judge is appointed, once a bench is constituted, that judge must have an absolute liberty, liberty of conscience, liberty of judgement, liberty of expression, liberty of action as a judge and he shall be under no fear whatsoever. That is one concept of independent judiciary. Now, as far as we are concerned we are more zealous than anybody else that that position must continue. Once appointment is made there is an in-built

[Shri C. M. Stephen]
guarantee in the Constitution which gives assurance to the judge that he can judge things in accordance with his conscience, fearing nobody, favouring nobody. He has got a guarantee of continuation in service upto his 65th year. He has got guarantee of salary. He has got guarantee of his pension. He has got guarantee of rent-free accommodation. He has got absolute independence to act according to his conscience as a judge. The Constitution gives to the judge complete guarantee in this respect and so, as far as this question is concerned, it is not in jeopardy.

What according to them is now in jeopardy is the second connotation namely, independence in the constitution of a bench, the composition of a bench, the appointment to the bench. It is claimed that this must be independent of the executive, independent of the President. On this point, I respectfully beg to join issue with the opposition.

What is the intention of the Constitution-makers? It is not as if this was not at all discussed in the Constituent Assembly. At that time, when the fathers of the Constitution were discussing the Constitutional provisions, the concerned Article was Article 103 which corresponds to the present Article 124 now. When that Article came up for discussion many proposals were put forth, many amendments were put forth. It was said that the appointment must be subject to the acceptance by the Parliament. It was suggested that this must be on the recommendation of the Chief Justice. Then there was another suggestion that this must be with the approval of the Chief Justice. There was another view that this must be with the consultation with the Chief Justice and that this must be compulsory. All these various points were suggested. All sorts of inhibitions were sought to be put into the whole framework. It was not as though the Constituent Assembly was oblivious of these things when it passed article 103. All these amendments were put forward and discussed.

14.00 hrs.

On the eve of the adoption of this article in the Constituent Assembly, the Chief Justice of the High Courts of India and the Federal Court joined in assension and expressed their opinion on article 103 and they suggested:

"It is suggested that article 193 may be worded on the following or other suitable lines:

"Every judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India".

The foregoing applies *mutatis mutandis* to the appointment of a judge of the Supreme Court. Article 132 may also be suitably amended."

The point that I am labouring on is this. The appointment of the judges of the Supreme Court and the High Courts and the constitution of the Bench was a matter on which the Constituent Assembly spent quite a lot of time before adopting this article. The judicial officers wanted the appointment to be their preserve, and that no appointment should take place without their concurrence. That was what they had asked for. The Constituent Assembly considered this suggestion and those amendments and rejected them.

Therefore, the freedom for the President to make the choice is a matter which was accepted by implication after discussion deliberately, clearly and in well spelt out terms. What is now being sought to be done is to resurrect the ghost of the opinion which the judicial officers sought to inflict on the Constituent Assembly. In the article as it emerged from the Constituent Assembly, there was only one amendment which was accepted. The draft said "The President, after discussion with such High Court judges, as may be necessary". The words 'as may be necessary' were amended to 'As the President may deem proper'. Therefore, the President was given more power than was contemplated in the draft.

The position, therefore, is this. The political authority of this country, the political authority of the people of the country expressed through the Parliament of India and the Parliament of India, through the instrumentality of the Cabinet and the President, the political authority of the people of the country, to make the appointment to the judiciary is a matter settled

by the Constitution and whoever may say whatsoever he chooses, there shall be no dilution of it. That political authority will prevail and must prevail.

Once a judge is appointed, the freedom of the judiciary is absolutely there. Once you give the President the jurisdiction to make a choice, how can you tell him how he should make the choice and what considerations must prevail on him? If you are there, you can make the choice; the people have elected us and we shall make the choice. If the people elect Shri Frank Anthony or Shri Piloo Mody, they can make the choice as they please. There can be no restriction on that. Every citizen of this country if selected is entitled to go to the Supreme Court if he fulfills the qualifications prescribed. One is equal to the other, if the qualifications are fulfilled. Therefore, when you say that this man must be appointed and the other man must not be appointed, then you are going against the fundamental principle of this Constitution. I would make the position a little clearer. You can view the independence of the judiciary in two ways. Once a person is appointed as judge, he is independent; that is agreed, and there is full guarantee in regard to it and there is nothing against it. But if it is said that the appointment should be with the concurrence of the Chief Justice, then I say 'No.' ; If it is said that it should be after compulsory consultation with the judges, then I say 'No.' ; if it is said that it should be with the concurrence of anybody else, then I say 'No.' ; if it is said that it should be after interference by somebody else, then I say 'No.' The political authority of the people to make the appointment to the judiciary is a sacrosanct thing and that will remain and must remain and there can be no compromise on that.

Again, what is the position of the President *vis-a-vis* the Supreme Court; if an *ad hoc* judge is to be appointed to the Supreme Court, the Chief Justice must get the concurrence of the President; if he wants to ask a retired judge to sit on the Bench, he must seek the previous concurrence of the President. If you want to sit in any place other than Delhi, previous concurrence of the President of India is essential. With respect to appointments, no concurrence of anybody; President has got the freedom.

That is the constitutional provision. The President has got a particular position. It is not as though they are independent and far away. Parliament has a supervisory, disciplinary jurisdiction over the judiciary. It can pass a resolution against a particular judge for misbehaviour—the word is not "misbehaviour 'nor' 'misconduct' but misbehaviour—and incompetence and it can remove the Judge. Nevertheless, here are a set of people saying 'We are independent; we will carry on'. That position cannot be conceded. They are independent to the extent of the exercise of judicial functions so long as they remain in office. That is the position.

SHRI ATAL BIHARI VAJPAYEE :
What more do they want?

SHRI C. M. STEPHEN : A decisive in the appointment—that is what is being demanded. That cannot be conceded.

The question of convention is raised. What exactly do you mean by convention? It is not as though the Constitution of India was unaware of the principle of seniority. Take article 60. The President or Acting President shall take oath in the presence of the Chief Justice or in his absence the senior-most Judge. So that principle was known; it was not as though it was not known. Take art. 126. For appointing even an Acting Chief Justice, what is the provision? It says, anyone of the Judges. Even for the Acting Chief Justice, no seniority principle but for swearing in of the President, the seniority principle is accepted. In the former case, the President has freedom of choice. The seniormost principle is not accepted.

Now, is there any high selection post in this country where the principle of seniormost is accepted. Take industrial law. Judges have umpteen times held that for selection posts, seniority is irrelevant. Take the judiciary. For appointments to the High Court Bench, is the seniority of the subordinate Judge relevant? I submit not; Selection to the Supreme Court Bench? No principle of seniormost. For appointment of the Chief Justice, the seniormost principle is irrelevant. In all these cases, the principle of seniormost is irrelevant.

In the general law, it is irrelevant. In the administrative law, it does not apply. In the judicial law for appointments, the

[Shri C. M. Stephen] principle of seniority is irrelevant. When this is so in the entire gamut of laws, here is a basic principle now sought to be brought in that in the solitary area of appointment of the Chief Justice of India, seniority should be the rule. Where is the position—I do not understand. Where is the convention built.

Take article 124 which applies to the Supreme Court and art. 217 which applies to the High Courts. In terms one article is similar to the other. If it is contended that in spite of 124, seniority must apply, then in spite of art. 217, also seniority must apply? But seniority has never applied in the case of promotions in or from the High Courts. It has never applied even though the appointments were in consultation with the Chief Justice of India from time to time. Therefore, seniority does not come into the picture. Therefore, there is absolutely no convention built up on this. I am very emphatic about it.

What do you mean by convention? What is the purpose of convention? Let me quote a passage from Dicey's *Law of the Constitution*. Convention has got a purpose. Normally the written law must prevail; convention will come only in one case. Dicey says :

"Having ascertained that the conventions of the constitution are rules for determining the exercise of the prerogative, we may carry our analysis of their character a step further. They have all one ultimate object. There end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State, the majority of the electors or the nation".

It is only under that motivation that a convention can develop in spite of or supplementary to the written provisions of the Constitution. Therefore, the question is whether this matter of the appointment of a judge as the Chief Justice of India, has been at variance with every settled principle where promotions are concerned, is this principle absolutely necessary if we are to carry out the will of the people? I beg to differ; we cannot be hamstrung like man that. That is not the intention of

the Constitution. We beg to differ. The simple attempt is to get an entry into the whole thing. This will be very clear from the press conference of Mr. Hegde. May I point out one or two sentences? What is it that he wants? He says that "the Steel Minister, Mr. Mohan Kumaramangalam, was against me because I will not allow packing the Supreme Court with committed judges." (Interruptions) Here is what Mr. Hegde said. Why does he want to remain here? He wants to prevent the appointment of judges by the choice of the Government. That is the mission which he has. He can have his own opinion, but my point is, Mr. Hegde is nobody in this country to decide as to who must be the Chief Justice of the Supreme Court. It is the prerogative of the people of this country expressed through the Parliament of this country, expressed through the Cabinet of this country and decided upon by the President of the country elected by the people of the country. Mr Hegde is just an individual out of the 55 crores of people of this country. If it is his intention to prevent this process, that is a challenge which we have to meet.

Further, he said that "the first and foremost task now was to see that democracy was put on a sound basis. His second point was that selection of judges must be made by independent agencies and not by one of the parties in the litigation, namely, the Government, even though elected." Has Mr Hegde to be given the task of selection?

MR. CHAIRMAN : The hon Member's time is up.

SHRI C. M. STEPHEN : I just want three or four minutes more, Sir. Then, Mr. Hegde says he "would have no objection to the appointment of the Chief Justice on seniority *cum* test basis, only if there were objective tests and an independent machinery."

AN HON. MEMBER : What is wrong?

SHRI C. M. STEPHEN : There may be nothing wrong, but what is it he is asking? He is asking that the appointing authority be somebody else. That is clear. Now, the Constituent Assembly discussed this matter and decided, "No." It rejected that amendment. The Constituent Assembly

upheld the present article. As far as we are concerned, come what may, no independent machinery is needed for the appointment of judges in this country. The political authority will make the appointment. That is the end of the whole matter as far as this point is concerned. (*Interruptions*) We are not prepared to consign it to the Swatantra Party and other people.

One more minute and I shall finish. The Law Commission report was referred to. We have referred to the Law Commission report not as a matter of authority; because the Law Commission said it and so we are implementing it—no. That is not so. We have taken it as one of the arguments in support of the position we have taken. But we do not accept the Law Commission's reports as biblical dictum which is sacrosanct and inviolable. What has the Law Commission said? It said that "it is well accepted that the qualifications needed for a successful Chief Justice are very different from the qualifications which go to make an erudite and able judge. The considerations, therefore, to prevail in making the selection to this office must be basically different from those that would govern the appointment of other judges. In our view, therefore, the filling of a vacancy in the office of the Chief Justice of India should be approached with paramount regard to the considerations we have mentioned. It is, therefore, necessary, to set a healthy convention that appointment to the office of the Chief Justice rests on a special consideration and does not as a matter of course go to the seniormost puisne judge."

This is what I want to emphasise. They want to set up a convention that the seniority is not to be the rule. Then, they go on to say that "if such a convention were established, it would be no reflection on the seniormost judge if he be not appointed to the office of Chief Justice. If one such convention is established, it will be the duty of those responsible for the appointment of a judge to choose a suitable person for that high office, if necessary, from among the persons outside the court." This is what the Law Commission has said.

Where have we done a wrong thing? Much is said about a committed judiciary? I would leave it for some others to deal with. It

is argued that persons appointed to the judiciary must not be committed men. If so, are we not entitled to insist that they should not be persons committed to monopoly houses, persons who are committed to the capitalist way of thinking, persons who are committed against the democratic principles, can we not take a position against these persons? (*Interruptions*).

SHRI G. VISWANATHAN : What about the Government committed to giving licenses to monopolies.

SHRI C. M. STEPHEN : I expected a better interruption from you. In refusing to appoint Hegde as the Chief Justice what have we done? Is Shri Hegde non-committed? Shri Hegde has gone and the next day he came out with a press statement. That statement shows the character of the person. He has exposed himself. Mr. Hegde says that the judiciary was the last bulwark of democracy in India, because the opposition was not strong, the public opinion was not enlightened because of the high rate of illiteracy and press was free only to praise the Government. What is the task of this man? He says that he will stop the Government in the decisions that it is taking. He says that here is a second line of action in the opposition. That is the type of man we have got here. What has he said about the judiciary? He says : persons who are already there are persons of low character. The Supreme Court Judge, the day after he retires casts reflections on the Supreme Court. I request the Law Minister to take action, this man has committed contempt of court and proceedings have got to be taken against him. This Don Quixote is claiming that he is defending democracy and is openly saying: I would be the second line of defence for the reactionary forces in the country even where the opposition is failing. He had appointed himself to that task as a judge. Is it seriously demanded that a person so deeply committed as this should be made the Chief Justice? The man does not deserve to be anywhere near the Supreme Court. The correct step has been taken. I must congratulate the Government. They have discharged their responsibility put on them by the Constitution. We have discharged a great duty to the country and I support the appointment of Mr. A. N. Ray. In conclusion may I say that the

[Shri C. M. Stephen]

political authority will not and must not falter or surrender its authority to make appointment to the judiciary. With respect to the functioning of the judiciary there should be no interference and there should be absolute independence..

SHRI SHYAMNANDAN MISHRA (Begusarai) : I have absolutely no doubt in my mind that the Suppression of the three judges is the most ominous development and, if I may say so, the most catastrophic development since independence. It is perhaps the beginning of the tunnel. One does not know whether there is light at the end of it. And it would depend upon the vigour and the strength of the people of India, whether we will pass through this critical period well. Again this represents the arrogance of a bewildered and rapidly weakening Government. This does not represent strength and the arrogance is not of the really powerful Government.

This is now clear that the Prime Minister of India is rapidly losing her grip over the situation and she is now out to destroy the very fabric of Indian democracy.

It appears, Mr. Chairman, that after having exploited all agencies of the Government, the administration, the mass media even the Election Commission, now the dirty hands of the Executive are reaching out to the bastion of justice and rights which were sought to be made almost impregnable by the Constitution-makers and which had indeed proved to be a pride of this country. But, I must say that this is certainly all of a piece with what is happening disastrously in other spheres of our national life. We find now people wondering what more is in store for them. We have got real economic stagnation and even economic dislocation; we have got political, turmoil and now there is going to be judicial turmoil thus the politics of anarchy now invades the judiciary. The ruling party wants to play the ruinous game in this country. These are the proclivities of a party which wants to bring down democracy and promote personal rule. I congratulate Shri Mohankumaramangalam that at least there is some candour and honesty in his expression. A wag sometime back remarked that there was only one man in the Cabinet of Mrs. Gandhi, that is, Mrs. Gandhi herself and the rest

were women. But, may I add that the most liberated woman in this Cabinet is Shri Kumaramangalam who is the minister without *borgua*. All the rest happen to be ministers with *borgua*. He is a person without a veil and therefore, he is very transparent. I congratulate him. It was indeed a stunned House which heard Shri Mohan Kumaramangalam singing the requiem of an independent judiciary in this country. I was trying to read the expressions on the face of the Prime Minister—I think it is not objectionable—and found that she was very much off colour when Shri Mohan Kumaramangalam was making his speech. Mrs. Gandhi was feeling very much disturbed when Shri Kumaramangalam was delivering his most *amangalam* speech. My hon. friend Shri Maurya quoted the remark of the Prime Minister, when she spoke on the 24th amendment of the Constitution. But, may I say that what the Prime Minister said then is now proving to be a subterfuge, and this is how her intentions are coming out very openly before the people. The Prime Minister has been very busy explaining to the people that she is not a dictator and her Government does not want to pursue a totalitarian policy. But, here is a Minister who has given her a certificate by saying in no uncertain terms that this Government wants to be totalitarian and the Prime Minister is the real dictator of the country.

Now, Mr. Chairman, why has this act of Government created a furor in the country—a consternation in the country? Why is this act of the Government really suspect? There are many evidences which nobody in this country can ignore and the *bonafides* of this Government are really suspect in the matter; its intentions are really colourable. I would even go to the length of saying that this subject is bound to create further suspicion as many stories inside about it are going to come out into the open. I must charge the ruling party with having created a situation in which many things are going to be flung at one another. Only the other day in Bombay Mr. Justice Shelat was greeted with slogans and demonstrations by a wing of the ruling party, although he has not opened his mouth yet on this subject.

The hush-hush and the hole-and-corner manner in which the whole thing has been

done cannot but be noticed by any person. It was almost a conspiratorial approach that was brought to bear on this subject. It has been done in the most uncivilised and boorish manner. The retiring Chief Justice Mr. Sikri said, there was politics involved in it. Could you accuse Mr. Sikri of any personal interest in this matter? What was more, there was, he said, a link between the judgements delivered by them in the fundamental rights case and their supersession. Mr. Sikri said, one could have understood it very well had their claims been ignored after they had delivered judgements in favour of the Government in the fundamental rights case. So, the intention of the Government becomes patently suspect because it is linked with their judgement in this particular case. I was telling you that it has been done in the most uncivilised manner. It has been pointed out by so many hon. members that the retiring Chief Justice came to know of it only from the All-India Radio or from the newspapers the next morning. May I point out that Mr. Justice Mahajan has written in his auto-biography, "*Looking Back*" that he was informed of his appointment as Chief Justice nearly three months before he took over from Dr. Kailas Nath Katju. One would like to know when Mr. Justice Ray was informed of his appointment and when his consent was obtained in this matter. I know all these inconvenient questions would be easily slurred over by the spokesmen of the Government. But in this particular case it is clear that all the past practices have been completely thrown to the winds. The announcement of the new Chief Justice was made probably only a few hours before he was to take office. This is not the way in which we have been going about this matter in the past.

We have got also the testimony of some of the ex-Attorney Generals of India. They have said that this is the most scandalous thing that has happened. They have also found a link with the kind of independence which the superseded judges had shown and the supersession which had overtaken them. Moreover, some of the superseded judges have said certain things which have not been controverted by any person carrying any amount of conviction to us. The Prime Minister's name has been involved in this matter. In fact, it

has been shown that Mr. Justice Hegde wanted to help the Prime Minister and yet he could not save her fair name and reputation to the extent she desired. That was one of the reasons mentioned by some of the hon. Members.

I was saying that all these things would go to point out that the *bona fides* of the Government in this matter could be clearly suspect.

Then I would like to mention one particular thing which relates to out party. I represent a party which received adverse verdict from two of the Judges who have been superseded in this particular case, namely, Mr. Justice Hegde and Mr. Justice Grover who happened to be on the Bench which delivered an adverse verdict against us in the Election Symbol Case. The other judge was Mr. Justice Khanna. But we never said anything against the judges, although we think even now that their judgement in that particular case had been wrong. But that is something different.

I would also like to emphasize that in this matter we do not concern ourselves with the personalities or the personnel change involved. I even go to the length of saying that the suitability of Mr. Justice A. N. Ray had not been in doubt earlier. But now Shri Mohan Kumaramangalam has caused doubt and suspicion, so far as the suitability of Mr. Justice A. N. Ray is concerned.

My hon. friend, Shri Hiren Mukerjee, for whom I have got the greatest respect, said the other day that he had intimate relationship with Mr. Justice A. N. Ray and on the basis of his intimate knowledge about him he was trying to emphasize that it was a suitable appointment. But if you closely go through his observations you will find how contradictory he was. Professor Mukerjee said that Mr. Justice Ray was conservative in his outlook, he has got a liberal approach and yet Professor Mukerjee was hoping that there was going to be a new chapter of socio-economic change in this country. If the new Judge is of conservative outlook and he has got a liberal approach one fails to understand how Professor Mukerjee could claim that there are going to be revolutionary changes in the socio-economic set-up of the country. Indeed such a claim sounds very tall.

[Shri Shyamnandan Mishra]

The point I now want to raise, and I had raised right at the beginning other day is the constitutionality of the act of the Government. May I say here that the hon. Law Minister had clearly tried to mislead the House, so far as this aspect of the matter is concerned. You will remember that I had said that the power to appoint the Chief Justice is derived from article 124(2) of the Constitution. If you go through the observations made by the hon. Law Minister a few days ago, you will find that he tried to tell the House that the power to appoint the Chief Justice does not flow from article 124(2) of the Constitution. He was trying to combine article 124 with article 126, though the latter relates to the appointment of the Acting Chief Justice. May I say that to my mind it is a wholly invalid appointment, it is an unconstitutional appointment, it is an *ultra vires* appointment? Although I do not consider myself to be a great constitutional expert, all the same, I am a humble student of the Constitution and, in my opinion, this is an invalid appointment. Why do I say so? Let me controvert the impression that has been created by the Law Minister on that occasion that the powers for appointment do not flow from article 124(2), so far as the appointment of the Chief Justice of India is concerned. Here again I would quote what Mr. Justice Mahajan has said in his autobiography. In his autobiography he has quoted the Presidential Order which in effect says :

"I, Rajendra Prasad, the President of India, appoint you as Chief Justice of India under Article 124(2).

But here is Shri Gokhale, who to my mind wanted to convey to us that power did not flow from Article 124(2) so far as the appointment of Chief Justice is concerned. My submission is that the requirement of Article 124(2) has not been met and, therefore, it is an invalid appointment. The requirement is that there should be consultation with the judges of the Supreme Court and the judges of the High Court. After consultation, the President may take a different view but the consultation has to take place. Consultation is necessary.

If he asks me the question: why do I consider that consultation is necessary, I would like him to go into the

proceedings of the Constituent Assembly also. Even the *ad hoc* Committee of the Constituent Assembly which had been appointed on the Supreme Court had said that consultation was necessary even with regard to the appointment of the Chief Justice of India. May I also point out what the hon. Prime Minister and Home Minister told the Rajya Sabha some time back when a question was put by Shri A. P. Chatterjee? Shrimati Indira Gandhi replied :

"In any case the appointments of judges in the High Court and Supreme Court as well as of the Chief Justice are made by the President in accordance with the relevant provisions of the Constitution and after appropriate consultations."

(Interruptions).

You ride rough-shod over the Constitution. What the Constitution says will have to be interpreted correctly, and I have quoted the words of the Prime Minister which show that consultations are made when the appointment of the Chief Justice is made, but in this case, till this moment, Mr. Chairman, we have not been told, in spite of repeated enquiries, whether the required consultations under Article 124(2) had taken place. Let the hon. Law Minister tell the House the position in this regard.

SHRI C. N. STEPHEN : Why should that be revealed?

SHRI SHYAMNANDAN MISHRA : The fact of consultation should be revealed. I would not like to go into all that had been said in the Constituent Assembly on this subject and particularly what Dr. Ambedkar, the architect of the Constitution, said. I would refer to another simple aspect of matter which has been ignored by the hon. Minister in this respect.

MR. CHAIRMAN : Please conclude.

SHRI SHYAMNANDAN MISHRA : Since the time of the House has been extended, the benefit of extension has to come to me also.

MR. CHAIRMAN : I will never deny you the benefit. Originally the time allotted to you was 9 minutes. You have taken 22 minutes. Kindly conclude.

SHRI SHYAMNANDAN MISHRA : Now, so much has been made about the report of the Law Commission. May I say, if at all, the Government has acted in direct opposition to the recommendations of the Law Commission, the action of the Government is completely at variance with what the Law Commission had said ?

I would refer to one very simple matter. The Law Commission has said that the permanent incumbent should have a tenure of at least 5-7 years. That is the definite recommendation of the Law Commission. What is going to be the tenure of Mr. Justice A. N. Ray? It is going to be less than 4 years. Even if you find Justice Grover was not suitable for the job, or Justice Hegde was not suitable for the job, according to the recommendation of the Law Commission, Justice A. N. Ray also did not fulfil the requirement regarding tenure. The tenure of the new incumbent should have been somewhere between 5-7 years. His tenure is going to be less than 4 years. So, you are flouting that recommendation of the Law Commission.

Finally, a word about social philosophy and the new criterion which have been set up by this Government. May I say that the Government cannot be credited with any social philosophy? What is then social philosophy? Is it a social philosophy which Judges must observe that we find in this country rising prices, mounting unemployment and deepening and widening of poverty? Is that the kind of philosophy to which Judges are expected to subscribe? So, this is not a question of progress vs. reaction, this is not a question of progress vs. status quo-ism. This is only a question of personal whims and caprices of the executive.

Now, if you think that the voice of the executive must be dominant in the matter of appointment of Judges, then there can be no real separation between the judiciary and the executive. Does this House or does this country stand committed to the idea of separation of the judiciary from the executive or not? If it stands committed to that idea, then we will have to consider whether the executive will have a dominant voice in the appointment of Judges.

This also has to be kept in view that although, according to the Government's

declaration, the Law Commission's recommendation was adopted by the Government in 1960, for 13 years that recommendation of the Law Commission was pigeon-holed. That would conclusively prove that the convention hitherto followed was right in the matter of appointment of Judges and the Government did not do anything to disturb this convention which had prevailed for so many years.

MR. CHAIRMAN : The hon. Member may try to conclude now.

SHRI SHYAMNANDAN MISHRA : I was given to understand by the Minister of Parliamentary Affairs that one would have at least half an hour on such an important subject. Therefore, we had agreed to the extension of time upto 6 O'Clock.

MR. CHAIRMAN : I do not want to get into confrontation with you on that point. I am going according to the schedule given to me. I know that the time has been extended. But you have already taken three times the time due to you. I hope, you would be reasonable.

SHRI SHYAMNANDAN MISHRA : This convention had prevailed after the acceptance of the Law Commission's recommendation for 13 years and the Government did not think it fit to do away with the convention. It is not correct to say that the Government has accepted the recommendation with a view to recasting the whole set-up for socio-economic changes. We have had the regime of Mrs. Indira Gandhi for 7 years. But even during this regime, this was not done.

My submission is that this convention has got the force and sanctity of the Constitution. This is not a mere convention. Even the President of India has got all the powers according to the letter of the Constitution. It is only by convention that the Prime Minister has got all the powers. Otherwise, the letter of the Constitution vests all the powers in the President.

Finally, though I do not want to discuss the conduct of the present President of India, I would like to say that when he was candidate for the Presidential election, the present President of India said that he wanted the convention of the Vice President of India being elevated as the President

[SHRI SHYAMNANDAN MISHRA] to be maintained. This was a claim made by no less a person than the present President of India.

Therefore, such a convention is not merely a thing which could be thrown overboard at any time. In fact, the Constitution is as it has been modified and, as some have gone to the extent of saying, even nullified by conventions. Conventions are as sacrosanct and important as the Constitution itself.

14.47 hrs.

[SHRI SEZHIYAN in the Chair]

SHRI DINESH CHANDRA GOSWAMI (Gauhati) : Hon. Member, Shri Shyamnandan Mishra, has questioned the constitutionality of the decision by which Mr. Justice A. N. Ray has been appointed Chief Justice of India on the ground that the appointment is under article 124(2). May I point out to him that article 124(1) makes a definite distinction between the Chief Justice of India and the other judges and that article 124(2) deals with judges. That too, the consultation, as is apparent from article 124(2), is only discretionary because word used is 'may'. I heard Mr. Frank Anthony saying that the Supreme Court has interpreted 'may' as 'shall'. But will he look to the proviso under that? The proviso says:

"Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

I think, I need not remind him that when in the same provision, the words 'may' and 'shall' are used, under the rule of interpretation, the first one becomes discretionary and the second one only mandatory. Therefore, the word 'may' here is absolutely discretionary, and the argument advanced by Shri Shyamnandan Mishra has no force.

When I was listening to Shri Vajpayee, he was saying that he wanted that there should be a balance between individual liberty and right to property. I thought that, on that count, he would support the appointment of Mr. Justice A. N. Ray because Mr. Justice A. N. Ray has been one of the judges who has tried to maintain a balance between individual liberty

by striking down the MISA provisions and the right to property by holding that property is not a fundamental right. Of course, I can understand that Mr. Vajpayee has tried to become a new socialist. But let me look to his philosophy a few years back when he said—in May, 1970 :

"Mr. Vajpayee said parliament was not empowered to amend the fundamental rights. Even if it did, the people would not allow it. The right to property was a natural right."

When Mr. Vajpayee's view has been overthrown by the people, he has no right to express his opinion in this House.

Hon. Member, Mr. G. Viswanathan, made a good speech. He said that the confidence in the judiciary had been shaken by the decision of the Government. May I point out to him that the confidence in the judiciary was shaken not by the Government but by the judiciary itself, because the highest court, the Supreme Court, started playing politics since it gave the judgement in the Golaknath case. This is not my view. Mr. Setalvad is a very eminent jurist. Let me quote Mr. Setalvad, what he has said about the Golaknath case.

"The majority decision clearly appears to be a political decision, not based on the true interpretation of the Constitution, but on the apprehension that parliament, left free to exercise its power, would, in due course of time, do away with the citizen's fundamental rights including his freedom."

When Mr. Setalvad asked the Chief Justice why he departed from the long-standing rule of the Supreme Court that a very important question of law which has stood the test of time for many years should not be set aside by a slender majority or a small majority of one judge, what was his reply? Here it is said:

"When I happened to meet Chief Justice Subba Rao and Justice Hidayatullah and Wanchoo at a dinner some time later, I told them that a decision involving such far-reaching consequences should not have been arrived at by a slender majority."

"The Chief Justice's answer was that they tried their best to have a larger majority but they could not succeed."

When a particular judgment, instead of respecting a long-standing dictum, a judgment which has stood the test of time, should not be over-ruled by a slender majority the reply was, "We wanted to have the other Judges to our view but as we could not, we have definitely over-ruled the supreme Court's decision". Then they were definitely playing politics. From that time onwards, the confidence, at least of the younger generation, in the Supreme Court has been greatly shaken. Look at the attitude of the Judges in the present case. When the last case was heard we, from the very beginning, found that Mr. Palkhiwala was given a long rope to argue. He was given all the time to argue but the Government Counsel, Mr. Niron De and Mr. Seervai's time was curtailed. There was a decision of the Supreme Court which supported Mr. Palkhiwala's contention and, therefore, it was incumbent on the Judges to give all the time to the other Counsel who were trying to over-rule that decision. But that was not so.

Apart from it, what happened? The Judges, when they found that the Judges were almost equally divided, the Chief Justice tried to hear the case without Mr. Beg and when Mr. Beg was hospitalised, some of the Judges of the Supreme Court—I need not name them—went to the nursing home and pressurised the doctor to give a certificate that Mr. Justice Beg was not capable of standing the strain. I am making these observations with a certain amount of responsibility. If this is the attitude of these Judges, they do not have any moral right to be in the Supreme Court much less to become the Chief Justice. Apart from that, when the entire thing was discussed in the Chamber, when they wanted to hear the without Mr. Beg and when the Government had taken a strong position, what was the attitude of the Judges. These Judges who speak eloquently of the right of the press, on fear of contempt, they did not allow the press to publish what was happening in the Chamber. After all, on these occasions and subsequently, the statements of Mr. Hegde, questioning the competence of Mr. Ray, are political statements they all imply that if by any action the confidence of the

judiciary was shaken in this country, it is not because of the decision of the Government but because the Supreme Court, for a long time, was playing politics in order to protect the rights of the vested interests.

After all, we went to the people asking for a clear mandate on a very specific issue. The issue was whether we the Parliament, is supreme and sovereign and has the right to amend the Fundamental Rights. This was questioned by Mr. Vajpayee and others. What was the verdict of the people? The people gave an unquestionable verdict that Parliament has the right to do so. But what has been the latest judgment? The latest judgment has been that when these Judges found that actually they would be swept away by the people, they have come up with a judgment, 'Yes, Parliament has a right to amend, but not the basic structure'. Do you find the basic structure anywhere defined in the Constitution? What is the basic structure of the Constitution? It is to be determined by the Judges sitting on the top pedestal or is it a political question to be decided by the people whom we represent? Is the basic structure unalterable. In a changing society, the basic concept of the society is changing everyday. And obviously, there cannot be any unchangeable basic thing in the Constitution itself. The Constitution itself will change. Its structure itself, its concept itself will change with the change of time. What is the concept to-day may not be the concept tomorrow. Unfortunately we have certain people here in this House as also outside who are not prepared to see the realities. There are forces all the time who are not prepared for change. They want to maintain the old regime on one pretext or the other and if people do not allow them to do so, they want to maintain it by the judgments of the Supreme Court.

As the two Judges have been superseded—Mr. Justice Hegde and Mr. Justice Grover—I would not utter a word about Mr. Justice Grover because he is still a sitting Judge, though it is very unfortunate that, while he is a Judge, he found a public platform to speak out his own views, at least he had attended a public meeting where certain views were expressed.

What is the attitude of Mr. Justice Hegde? All along the hearing of the case he was making observations more as a politician

[SHRI DINESH CHANDRA GOSWAMI rather than as a judge. I want to quote only a few of his words. He said :

"Government will be pushed to take unwise action for political use. According to Press reports they were pushed to adopt Article 31C in the present form because a particular party threatened to withhold support in the Rajya Sabha if it was not done."

I cannot imagine a judge while interpreting the Constitution and deciding the case and giving his judgment, gives some judgment based on his political thinking. These observations of Mr. Hegde smacks of politics. When Mr. Niren De argued and said that the people have given verdict to the ruling party to make necessary amendment of the Constitution, do you know what Mr. Justice Hegde said? This is what he is reported to have said :

"Mr. Justice Hegde, citing Election Commission's figures, observed that the ruling party had polled only 43.4 per cent of the total votes."

Mr. Justice Hegde should know at least this elementary knowledge that in a multi-party political system absolute majority is not essential, but a party which has got a majority has got the right to take this stand that they have been given the mandate to make the necessary legislative changes. Therefore, I am unable to understand why he should go in for 43.4 per cent or 51 per cent. These things show that he had been deciding cases not really as a judge, but on political philosophy of his own.

There were certain other observations which I should say were unfortunate. Shri Palkhivala said :

"The new Article 31 (C), introduced by the amendment, gave a licence to any Legislature to run amok."

Sir, when such types of statements were made by him there were no comments from the judges. If the people's confidence in the judiciary is to be maintained then the judiciary is also to follow the proper course of things. For putting in the new sense of confidence in the judiciary, I welcome the decision of the Government. Let me say clearly that merely reading out a sentence from the speech of Mr. Mohan Kumaramangalam, de void of its content, will not

really help anybody at all. You can distort a whole speech by misquoting or wrongly quoting or just picking out one sentence from that speech out of context. What the opposition has done is that they have completely distorted his speech.

In conclusion, I wish to say that I wholeheartedly support this stand of the Government. By this decision of the Government, I am sure, a new sense of awareness, a new sense of confidence, has come in the minds of the people, in the toiling down-trodden masses of our people, who are expecting a lot, and also the people of the younger generation, who look forward to the future with hope and confidence

SHRI FRANK ANTHONY (Nominated Anglo-Indians) : Comrade Kumaramangalam—I hope he will feel flattered at the title I have given him—made an inordinately long apology. Strangely enough, he was unable to draw any comfort from countries from where perhaps he draws his social philosophy. He knew, Mr. Chairman, that in practice, those countries, which have the same social philosophy as he has got, are Police States, with avowedly Captive Courts. Ironically, like Satan quoting Scripture, he referred to some countries, which he used to refer to in his comrade jargon—as imperialists. He even referred to the USA and Britain and said 'see, what is happening there'.

15.00 Hrs.

But, as a one time lawyer, for whom I had a fair amount of respect as a lawyer, he knows this that whatever procedures obtain those countries, are governed by certain constitutional procedures and at least by certain democratic convention that have taken deep root. The crucial difference is this that his references to these countries that have struck deep democratic roots are not only mis-leading, but irrelevant for the simple reason that parliamentary democracy is very new to India, it is a precarious plant in India. The roots have not even reached the sub-soil. Pakistan and India have no difference so far as their democratic tradition and democratic experience are concerned and we know what has happened in Pakistan.

As a student of judicial history, Mr. Chairman, and I do not think anybody will disagree with me, that for more than 900 years, the Courts in India were utterly venal and utterly corrupt. It was only from the beginning of the Nineteenth Century—because that was the reflection of the position in Britain, before that even in Britain the judiciary was venal and corrupt—that we in India, began to move towards an upright and independent judiciary. One of the most priceless assets with which independent India was left, was a judiciary which, in the higher reaches, commanded the respect and confidence of all sections of the people.

Shortly before and immediately after Independence, eminent jurists and constitutional pundits were preoccupied as to how to preserve and how to strengthen the independence of the judiciary. I think, at least my friend Mr. Gokhale will concede, that the Sapru Conciliation Committee Report was one of the most important documents in the constitutional evolution of this country. I had the privilege of being one of the members of the Sapru Conciliation Committee. We spent a good deal of time pre-occupying on this subject—the subject of how to insulate the judiciary from any semblance of political patronage, any semblance of political taint. And our proposal was considered by the Constituent Assembly and I believe it commended itself largely to the Constituent Assembly, because I was also a member of that body. May I say this as a member of the Constituent Assembly, that we spent more time on this one single aspect than on any other aspect relating to the judiciary—how to insulate the judiciary in the higher echelons from the taint of political patronage. We discussed it threadbare and we evolved provisions which we believed would keep out this taint of political patronage. My friend Mr. Atal Bihari Vajpayee quoted from Dr. Ambedkar's speech where Dr. Ambedkar underlined that in evolving Article 124, dealing with the appointment of the Supreme Court Judges, he had associated people who would be best qualified to adjudicate their peers. And all of us in the Constituent Assembly subscribed unanimously to this thesis that an independent judiciary was perhaps the greatest bastion of democracy, that it was the only bulwark of the rule of law; and the rule of law to protect whom and to protect what, the rule

of law to protect the citizen against a lawless executive. And it is axiomatic that if the judiciary is to protect the citizen from lawless executive, *ex facie*, the lawless executive could not enter into the appointment of the judiciary: there must be no taint, as I mentioned, of any semblance of any political patronage in the appointment at the higher reaches of the judiciary. We were so preoccupied with this whole concept of preserving or insulating the judiciary from this political pollution that we went to the extent of framing a Directive Principle. That was with regard to the lower reaches of the judiciary, namely the magistracy, because we felt that we had the long and bitter experience of combining in the same person judicial and executive functions, and so we framed a Directive Principle which enjoined that there must be separation of the judiciary from the executive even in the lower reaches. That was the extent to which the Constituent Assembly was concerned. With insulating the judiciary from this political taint and political pollution.

I am sorry to have to say anything against my hon. friend Shri H. R. Gokhale. We had appeared against each other sometimes, and I had a great regard for him when he was a practising member of the Bar. I will not say what has happened to that regard today. But Mr. Gokhale did less than justice to himself when he tried to buttress his arguments. He referred first to the question of seniority, by extracting a sentence out of all context from the recommendation of the Law Commission, something which he suddenly thought of after 15 years of the making of that recommendation. The greatest indictment of Mr. Gokhale has come from the members of the Law Commission themselves, namely M. C. Setalvad, M. C. Chagla and Palkhivala. In a statement which they have signed, they have said that Mr. Gokhale had wrenched out of context that one sentence, and they have used the word 'disingenuous'. But I am bound to say that I do not suppose anybody from the Prime Minister downwards, including most of the Members of this House, have been bothered to look at the Fourteenth Report of the Law Commission. I am sure, Mr. Chairman, you would have looked at it. What was the gravamen of the recommendation of that particular commission presided over by M. C.

[SHRI FRANK ANTHONI]

Setalvad? He has quoted it in his book and he has underlined it. The gravamen was this.

They drew attention to the dismal picture of increasing pollution of the judiciary, increasing political pollution of the judiciary. I cannot quote the exact words. But I shall give you the gist. They said that in the High Courts, wherever they went, they got complaints of this increasing political pollution, of people not fit to be High Court judges being appointed for unworthy, mainly political, reasons; and in order to repel this increasing political pollution—Mr. Gokhale has not referred to all this, they made a specific recommendation, and I had pleaded that that recommendation be adopted, but it does not suit the purpose of an increasingly power-drunk executive. And so, the Law Commission made a recommendation that article 217 be amended.

Article 217 prescribes the condominium for the appointment of High Court judges, that is, consultation by the President with the Chief Justice of India and the Governor and the Chief Justice of the High Court concerned. They said that the word "Governor" be deleted, because the Governor has become a front for Chief Ministers to appoint their own unworthy creatures to the High Court.

Already, there is a precipitous escalation in the quality of our High Court because of this increasing political pollution, because of the extent to which Chief Ministers have been putting in their creatures. I have been friendly with more than one Chief Justice. I know how they had stood out for one or two years against the Chief Minister's nominees and in utter disgust they had given up, because usually they were asked for their concurrence.

The Law Commission also drew attention to this. In the letter by the then Chief Justice S. R. Das, he drew attention to this fact that because of this increasing political pollution, canvassing for judgeships in the High Courts, to use his exact words, had now become the order of the day.

Several years ago, I had argued a case in the Rajasthan High Court. I had then addressed the Bar and they complained about this pollution in the High Courts.

There was a function in the Supreme Court. I was sitting near Chief Justice S.R.

Das I said, 'This is what I was told that aspirants walk the corridors of the Secretariat looking for High Court Judgeships waiting on Ministers', Chief Justice S. R. Das told me 'Mr. Anthony, this is the utter degradation that has taken place', the degradation and debasement because of this political taint. He said if these people only waited on Ministers before, they are waiting today on Deputy Ministers, they are waiting today on Parliamentary Secretaries in the hope of becoming High Court Judges. That was the extent of the political pollution that has taken place and will now completely overwhelm the Supreme Court.

About this supersession, does Mr. Gokhale think that leading members of the Bar, Setalvad, Chagla, Daphtary are all fools? Does he think that the whole Supreme Court Bar, which passed that resolution condemning this appointment, consists of fools? Does he not think that we know and have some semblance of knowledge of the relative qualities of these judges.

Why has everybody been outraged? Everybody has been outraged because of this political coup against the Supreme Court, crude and unprincipled. That is why we have been outraged. Lawyers of any standing in this country have been utterly outraged.

I am sorry Mr. Gokhale again shows evidence of the utter weakness of his case. I suppose he thinks there are very few people in this House who understand the Constitution. So he says openly that what is involved in article 126. My hon. friend, Shyam-nandan Mishra said 'no'. Apart from the headnote, read the plain language of the article. Article 126 only applies to a *pro-tem*, acting, appointment. It has got nothing to do with the appointment of every Judge in the Supreme Court, which art. 124 governs.

Now it has been argued at great length that here consultation may be by the President with such Judges as he may deem necessary. This whole thing, this casuistry, this palpable disingenuousness in the way the Government's case has been argued. Does not Mr. Gokhale know that since independence at least, this has hardened into an acceptance of art. 124? Does he not know that up till this time, always the

outgoing Chief Justice was consulted? Does he not know that other judges were also consulted? Does he not know that we had Jawaharlal Nehru? I often fought with Jawaharlal, but in the final analysis, he was not only a gentleman but he was sensitive and was a democrat. Does he not know what happened in Patanjali Shastri's case? He had a few months to go. Jawaharlal sent for him and asked 'What about Mukerjee taking your place?' But that was the difference between the Supreme Court then and now. Because you have utterly demoralised and corrupted the Supreme Court. Mukerjee said : 'No'. The whole Supreme Court, all the judges of the Supreme Court, threatened to resign. Nehru, democrat as he was, said : 'I will bow to the feelings of the members of the Supreme Court'.

Here we know that there was no attempt to consult the outgoing Chief Justice. I am quite certain that there was no attempt to consult any Judges of the Supreme Court. Deliberately, cynically, you threw article 124 into the wastepaper basket.

Deliberately, cynically, in a brazenly unprincipled way, you throw your own interpretation of article 124 into the waste-paper basket. It savoured of communist styled tactic—the hole-and-corner, conspiratorial, unprincipled political coup that you have perpetrated on the Supreme Court. Who approves you are trying to justify this break of that one line of seniority—the Political Affairs Committee of the Cabinet approved. You place a political stamp on the forehead of Mr. Ray. With great respect, may I ask the Law Minister : which member of that Political Affairs Committee, including himself and Mr. Kumaramangalam, was qualified to judge those Judges? Have they ever sat with them? You argued before them. So have I. I will not tell you, because you may not like it, what my experience has been before Mr. Justice Ray, before whom I have appeared on several occasions. But who are you to arrogate presumptuously to yourself the right to adjudicate the members of the Supreme Court? That is precisely why art. 124 postulated that their peers would be consulted; their peers would know their ability. At least the members of the bar have some good idea of the relative qualities of the Judges. What did you do? See the reaction of Supreme Court Bar.

Look at the affront. Do you think it is easy for me as a person who has been trained in a certain tradition to speak against Judges or the Supreme Court? The whole Supreme court bar has been outraged, utterly outraged. What have you gone and done? I do not know whether you intended it but you have achieved it. You have not only brought the Supreme Court into the vortex of every kind of controversy but you have brought it squarely into utter disrepute, into utter contempt...

SHRI K. D. MALAVIYA (Domaria-ganj) : You have done this.

SHRI FRANK ANTHONY : Shut up; what do you understand about this? Just another comrade, obviously you believe in this ... (Interruptions) You have polluted, and debased the fountain head of justice: that is what you have done ... (Interruptions) I am not a drummer boy like you, my friend, although I am nominated . (Interruptions).

SHRI B. P. MAURYA (Hapur) : You had been a drum boy; I will produce the certificate.

SHRI FRANK ANTHONY : We in the Constituent Assembly framed the Directive Principles to separate judiciary from the executive in the lower reaches. They have utterly perverted the whole spirit of the Constitution. Why? To keep the executive independent of any political taint. What have you gone and done? You have gone and subjoined the Supreme Court to the Executive; you have made it avowedly an appendage of the Executive. That is what you have done by putting the stamp of the political affairs committee on the forehead of Mr. Ray.

I am going to be quite frank because we in the Supreme Court Bar know this. One of your major objectives was this, not yours perhaps. Mr. Gokhale so much as your senior colleague who has master-minded this to remove the road blocks to pack the Supreme Court. We know, Mr. Gokhale, to what extent comrade Motlan Kumaramangalam has been trying to propel his proteges into different courts.

SHRI G. VISWANATHAN : He wanted to become Chief Justice.

AN HON. MEMBER : That would have been a great injustice.

SHRI FRANK ANTHONY : He may yet become the Chief Justice; you never know. But I do not want to mention names. Just one name was bruited around. Mr. Kumaramangalam said that I was not speaking the truth when I told him that Mr. Hegde had been his *bête-noire*; Mr. Hegde was his *bête-noire*. He was terrified of Mr. Hegde. We were on opposite sides in the Kerala University Act case. He lost. Mr. Kumaramangalam was appearing for the communists. But he did say he was terrified because, —you may not agree with Mr. Hegde's policies, I do not want to say much, I have not agreed with Mr. Hegde in many cases; I have appeared before him, but—of his ability there was no doubt. He has been one of the most outstanding Judges that has ever adorned the Supreme Court and you were utterly terrified of Mr. Hegde. You knew : If Mr. Hegde become Chief Justice, and you would have another Mehr Chand Mahajan; he would not allow you move one inch in the direction of lawlessness. He would have kept the whole Supreme Court intact. He would have prevented you from pocking the Supreme Court with your proteges, and all your abject yes-men.

Now the road is open. I only wanted to mention one thing. You wanted for a long time to do something which those independent Judges would never allow, neither Mr. Shelat, nor Mr. Hegde, nor Mr. Grover Mr. Krishna Iyer—I do not know, I know of him, I have read his views; they are utterly subversive of the Fundamental Rights. You have kept him waiting in the wings of the Law Commission. Now, I have no doubt that in the next four or five months, he will find a place. But look at the disservice you have done to Mr. Ray. You have branded him as a Government servant; you have branded him with a brand of Cain, that he allowed himself to be ...

SHRI C. M. STEPHEN : You did this by kicking up a row; you have brought the Supreme Court into disgrace and contempt by kicking up a row over a normal appointment; you are guilty of that ... (*Interruptions*).

SHRI FRANK ANTHONY : You have branded him with a brand of Cain and he allowed himself to be made use of to murder his brother judges. That is the tragedy. See what Mr. Mukherjee did; see what

others did. If Mr. Ray had any self-respect, I say that he would not have accepted this. See what he has gone and done, he has precipitated in the Supreme Court this evil of one Judge cutting the other Judge's throat. Now that you have introduced the political taint in the Supreme Court, what Mr. S. R. Das said has happened with regard to High Courts : one judge cutting the other judge's throat. One judge waiting on this or that Minister. Now, before the next Chief Justice is appointed all your Supreme Court Judges will be lining up in the Secretariat, one canvassing against the other, one trying to outdo the other in handing down judgments in favour of the Government.

I can understand the fact that certain sections of the Communists have welcomed this appointment. I do not know whether you know that some of the little coterie which looks to Mr. Kumaramangalam for judicial preferment in the Supreme Court are hoping that now that the road block is cleared, some of them may come to the Supreme Court. God help us! Not even God may be able to help us. Some of them may be propelled into the Delhi High Court. Even there God won't be able to help us. But comrade Kumaramangalam dyed-in-the-wool communist he is, has let the communist eat out of the Government bag. What has he gone and done? He has put himself forward as the keeper of the social philosophy of the Government.

What is the social philosophy of Comrade Kumaramangalam? Parliamentary democracy, fundamental rights and independent judiciary—these are bourgeois concepts and these are marked down for destruction by his people. This is the social philosophy of Com. Kumaramangalam. I was reading the other day and somebody said that he is very much coming into prominence, because his own people put him into prominence. This little coterie in the Supreme Court, they say that Shri Kumaramangalam is the *de facto* Deputy Prime Minister of India. The Prime Minister eats out of his hands in legal matters. Mohan Kumaramangalam is a likeable chap; he is expensively educated and I should have imagined that he is very likeable and very sociable.

SHRI FILOO MODY : More sophisticated than the rest!

SHRI FRANK ANTHONY : What has the written in this pamphlet? The Communists cannot take power frontally; let us do it by infiltration. That is what Shri Kumaramangalam has done. He has infiltrated; he and his fellow comrades are controlling the levers of economic power. He will now control all appointments in the Supreme Court.

SHRI PILOO MODY : And elsewhere.

SHRI S. M. BANERJEE (Kanpur) : He is talking like Hitler.

SHRI FRANK ANTHONY : My friend who does not know anything about democracy knows less about the law.

SHRI S. M. BANERJEE : We are fighting the election and getting elected whereas he is a nominated Member.

SHRI FRANK ANTHONY : These people who are committed to the murder of democracy are now mouthing slogans of democracy. What does democracy consist of? The first postulate of democracy is the rule of law and the first postulate of the rule of law is an independent judiciary? Against whom is an independent judiciary here—to protect the citizens and the minorities and against the lawlessness of the Government. I, at one time, used to do practically only the criminal side. To-day I do much more constitutional work because, everyday, the largest volume of cases in the High Courts is by the aggrieved citizens. Against whom? Against the lawless Government, against its nepotism, corruption and vindictiveness. Who protects them against these—only an independent judiciary. The other day, I was appearing before one of the judges. He said it in jest probably he meant it also. After this, do you expect any kind of protection against the Government? Who is going to protect the citizens? Indeed, who is going to protect the minorities? For thirty years I have fought almost alone for them in the Supreme Court. Judgments after judgments in the cases that I have argued have handed down a series of decisions vindicating our fundamental rights, especially, under Article 30, Kumaramangalam, in an interval in the Supreme Court, told me one thing. One of the things he told me, probably, when we came out from there during lunch time, was this. 'Mr. Frank Anthony, if at any time I have the power, I shall see that Article 30 is

taken away.' Now he does not have to amend the Constitution. By interpretation, he would see that Article 30 can be denuded of all content. May I now end on this note? Mr. Chairman, this is just another political gimmick. How have your judges stood in the way of your lightening the miseries of the people of this country?

As I said in my speech on the President's Address, what are the three gallopers—one is galloping inflation—what have the poor judges got to do with the galloping inflation; what have they to do with the galloping unemployment; what have they to do with galloping corruption? The only thing that stood in the way of corruption was the Court. You have now added galloping lawlessness of the Executive.

SHRI PILOO MODY : Galloning communism.

SHRI N. K. P. SALVE (Betul) : Sir, as one belonging to the accountancy profession, I am very close to the legal profession to which Mr. Frank Anthony has the privilege to belong and I do not want for a moment to run away from the fact that some of the members of the accountancy profession as well as legal profession have been quite a bit agitated and are at the moment nursing a serious grievance over the supersession order. That is a reality from which I do not want to run away. Training and tradition has deeply anguished me because of the manner in which this controversy has been carried on after the appointment of Mr. Ray as the Chief Justice of the Supreme Court. If we are really interested in maintaining the high dignity and high esteem of the Supreme Court, the minimum we could have done is not to paint a picture as though these three superseded judges were the be-all and end-all of virtue and the others are super-cut-throats and unprincipled unscrupulous stooges of the Government. I wish pettiness, acrimony, bitterness and personal rancour had not been brought into the controversy in the way in which it has been done. If it has been brought, I must submit that my party is not at all guilty of the same.

One of the superseded judges, a learned man and a great jurist that he really was, made certain extremely spiteful and rancorous personal remarks against the Prime Minister. These remarks, I submit with

[Shri N. K. P. Salve]
great humility and respect to the person concerned, do not benefit the dignity of a Supreme Court Judge, even if he has turned overnight into a politician. It is a disgrace to both the judiciary and politics.

SHRI PILLOO MODY : What did he say?

SHRI N. K. P. SALVE : I have read the report of what he has said. Whatever he stated about the Prime Minister in relation to various matters is according to me not benefiting a Supreme Court Judge. I do not know what Mr. Mody's notion is about a Supreme Court Judge and whether he has ever appeared before a judge to know the dignity of the Courts. These expressions, would never have been used by a judge who wants to maintain the dignity of the Supreme Court. Even if he has turned a politician overnight, he must realise that even in politics there is some dignity.

I want to make absolutely clear that not for a moment do we, here on this side of the house want a judiciary which should ever be subservient to the executive. Such a thing, more than the opposition we know, will shake the very foundation of the parliamentary institution and will very seriously imperil democracy. We want a fair, just, independent and incorruptible judiciary, which is not merely an absolute necessity, an absolute postulate, but an indispensable condition, for purposes of stabilising democracy. The whole question is, whether in the supersession order we have done anything to shake that foundation of democracy? I further wish to make clear to those who have been condemning the supersession order, that we on this side of the House do not want a judiciary which will work at the dictates of the executive. If this supersession order is merely a plan or device to put up a few stooges who will always abide by the orders given by the executive and two their line, we will fight, to the bitter end. But the present judges are not stooges. There is some reason, some principle and rationale behind the supersession order which I want these gentlemen to kindly understand. So far as we are concerned, democracy is not merely a cult, which gives a government of the peoples' choice, but we love it as the way of our life as an article of our faith, as the very foundation of our value and we shall cherish

it. Let there be no mistake about this fundamental truth of the matter.

With this I want to come to the real issue involved in this controversy. Rule of seniority and constitutional provisions have been referred to. I do not want to go into the polemics connected with either seniority rule or the constitutionality of the matter. Shri Stephen has dealt with it. Shri Frank Anthony, in a very ostensibly erudite speech, said that the supersession order was a nullity. We only agree to disagree with him on this issue. I do not want to go into the legality of the rule of seniority, or whether the order was constitutional and whether this particular supersession order is valid or not, because I want the rationale of the decision of the Government to be understood on the merits of the matter from our viewpoint. Unless it is understood properly, the criticism which has been levelled recklessly, I submit, is utterly untenable and uncalled for. And I assure the entire opposition that this bitter personal criticism of the Prime Minister, or Shri Mohan Kumaramangalam or Shri Gokhale, is neither going to serve the cause of an independent judiciary nor is it going to serve the cause of parliamentary democracy. Let us be serious in our business.

Coming to Shri Atal Bihari Vajpayee, with rapt attention I heard his extremely fluent Hindi speech, in the magnificent language that he uses. We may differ with him on his political philosophy or his ideas, but we all admire his command over the language. But I want to point out to him that where the verbiage becomes stronger than the argument, both become weak. The verbiage should not be stronger than the argument. Shri Atal Bihari Vajpayee said that Shri Mohan Kumaramangalam accused the three superseded Judges, of being partial and their honesty was impugned. I submit that Shri Mohan Kumaramangalam has never said anything of this sort, he could not have said anything of this sort because, so far as the integrity, honesty, learning and wisdom of these three judges are concerned we do not consider for a moment that they are wanting in anything. They are great men, able men; and let us be very clear about it.

But, Judges have their own predilections, preferences and likings. Have we not known

of two types of judges, namely, acquitting type and convicting type, even though they are not dishonest or bereft of integrity? Then there are judges of the widow-type and judges of reversioner-type. There are judges who held that the widow under the old Hindu law was merely a trustee and the whole property should belong to the reversioner and they always attempted a judgment in favour of the reversioner. Then there were other judges who were more humane who thought that the widow should be given the fullest protection. That does not mean that one judge loved the widow more than the reversioner or *vice versa*. They preferred our principle to other. It is one's own predilection. In income-tax cases also we hear of judges who are pre-assessee and pro-department. That does not mean that either of them is dishonest.

So, the basic point is that all these three judges are honest men of integrity. Not with standing that, they have been superseded for very valid reasons to which I shall come presently. Let it be understood that we do not impugn them, we do not assail them, we do not cast adverse aspersions on their integrity, honesty and learning. However, notwithstanding their seniority, they have been superseded for reasons which we think are valid. The basic issue is that the vast masses in the country have enjoined on us the supreme responsibility of drastically revolutionising the entire socio-economic set up and putting an end to the order of exploitation leading to the most disgraceful disparities. How do we achieve this without adhering to a certain socio-economic philosophy or certain socio-political philosophy? We have, therefore, adhered to a certain socio-political philosophy. Any opposition of such socio-political philosophy at the polls, at the public meetings, at the State Legislatures, at the Parliament level, at the Rajya Sabha level is not only necessary but we welcome the same and we can meet it, but if such philosophy is opposed by the judges in the Supreme Court, for reasons which may be valid or may not be valid, then however honest, however eminent, however senior the judges may be, a grave situation arises, and a solution has to be found to this grave situation. The problem has to be solved. The question is, however able we may be—to fight the political opposition to our political philosophy

at the polls, at public meetings, at the public forum, at the State Legislatures, at the Lok Sabha, at the Rajya Sabha, how is it possible for us to fight out a political battle in the Supreme Court? It is well nigh impossible to fight at the Supreme Court level so far as we are concerned. I submit that it is an uneven fight. Our country has enjoined on us certain responsibility to carry out certain programmes. That can be done if certain measures are taken. If we meet this opposition in the Supreme Court, how can we fulfil the mandate which has been given to us by our electorate and how do we, as the representatives of the people, help the people achieve their hopes, aspirations and ambitions for which we have been sent by them with great hopes pinned on us? We cannot allow the Supreme Court to be made a ground for fighting a political battle and, therefore, this supersession. This has to be understood.

Mr. Frank Anthony referred to political pollution. He was not here when I pointed out the basic difficulties we were facing. The difficulty faced by the Party was in the implementation of the mandate of the people. We are out to implement a certain socio-economic philosophy and various measures are to be taken. How is the party going to fulfil the promises if the Supreme Court Judges are going to ignore all this, not because they are dishonest, but because of their predilection because of a certain philosophy to which they subscribe and which is opposed to our philosophy. That is the difficulty which has arisen and, therefore, this supersession order has been made and this step has been taken by us purely to enable the nation by a democratic process to give to itself the socio-economic order it has been dreaming of. We have done this not to discredit the learned judges, I repeat, not to humiliate the distinguished jurists, not to make the Supreme Court a stooge of the Government, but merely because we honestly disagreed with the political philosophy of the three judges which is wholly opposed to our political philosophy and we do not want our political philosophy to be defeated by the judges in the Supreme Court, for we cannot fight a political battle with them there.

I submit in the end that our action is *bona fide*. Atalji said history will judge if we have been dishonest. I challenge this and

[Shri N. K. P. Salve]

say it is for history to judge whether or not the action taken by us is going to strengthen the democratic foundation.

I am further willing to submit that more Western democracies have taken such steps. They have had to supersede Judges and those democracies have emerged far stronger than what they were. Such a step has not, in any way, adversely affected the democratic foundation. You may disagree. But for God sake, while swearing by the dignity of the Supreme Court, don't use undignified and invective language against either the Chief Justice or other Judges. And for God's sake, don't use personal invectives either against Mr. Mohan Kumaramangalam or the Prime Minister...

(Interruptions)

SHRI N. K. P. SALVE : I heard your speech with rapt attention. I do not say that you made any personal remark. That is not my allegation. My only allegation was that you attributed to Mr. Mohan Kumaramangalam certain words, dishonesty and lack of integrity...

SHRI ATAL BIHARI VAJPAYEE : I did not say that.

SHRI N. K. P. SALVE : Then, there is no dispute. I apologise to you. If you accept that so far as integrity and honesty, wisdom and learning of the three Judges are concerned, we have absolutely no dispute between us, then there is no point of dispute.

As I said, we accept this challenge. History alone will judge whether the action of supersession which we have taken is going to really strengthen the very foundation of our democracy or not.

SHRI S. A. SHAMIM (Srinagar) : Mr. Chairman, Sir, I rise to congratulate Mr. Mohan Kumaramangalam on his theatrical performance in this House on the 2nd of May. Unlike the Law Minister, he was very frank, honest and forthright.

He is a distinguished criminal lawyer, I am told, and has many acquittals of murderers to his credit. The Government, realising the gravity of the offence it had committed, had engaged a very eminent lawyer. But I am not sure whether Mr. Mohan Kumaramangalam can get away

with an acquittal here in this court or not, because he forgot that he was not arguing before a reactionary and bourgeois court but was arguing before the people of India, and the people of India do not understand the refined English and involved legal arguments. The people of India will judge him by what he was said and what he has meant.

His delivery was indeed very good. But what he delivered was rather disappointing. The accused has confessed. Let us not waste time in arguing. Let us pronounce the judgment and that is what precisely I am going to do.

I do not challenge or dispute the Government's right to appoint the Chief Justice, to disappoint other Justices and perpetrate injustice on the people of this country. After all, the people of the country get the Government they deserve. With a massive mandate, they have brought this Government and they have to suffer until they throw it out. I do not dispute that under article 124 and article 126, the President and the Government have the authority to appoint Judges. My only contention is that this right was subservient to a limitation which came into being as a convention. Adherence to this convention was not a concession given to the people of India by their benevolent Government. This was a rule of propriety, a rule of procedure, to avoid suspicion, to avoid criticism or doubt regarding the *bona fides* of the Government. By destroying this convention, the Government has not destroyed the convention alone but an institution.

Why was this convention necessary? In the words of Mr. H.M. Serrval :

"Convention is based on the view that, on the whole, the interests of the judicial administration are better served by eliminating the discretionary powers in the appointing authorities than by a search for the best man."

It is said that, 15 years ago, the Law Commission suggested that seniority alone should not be the criterion for appointment of the Chief Justice of India. I agree. But is it not a fact that this very Law Commission had suggested that this convention, if it is to be broken, should be made public long before it is broken? But how is it that this time the appointment of the Chief

Justice of India took place with the suddenness of a Palestinian Commando operation and with the suspense of a Hitchcock thriller? How is it that the whole drama was enacted in the darkness in the same manner in which the new Congress was born?

I am not mourning the death of a convention. I am worried about the crisis of confidence it has created. Today in the name of social change, revolutionary outlook and political philosophy, three inconvenient judges have been got rid of. I am foreseeing a situation in the near future when the entire supreme Court will be packed with forward-looking, progressive judges. What will happen at that particular point of time? At that time what objective norm will be applied? I gave some thought to it. At that time, it will be only personal preference or prejudice, personal likes and dislikes of the person appointing. How is the criterion of 'progressivism' to be applied in such a situation?

I also envisage another situation. What happens if a judge who is committed to social philosophy and has a progressive outlook is thoroughly ignorant of the legal knowledge, does not have any idea what law is and how it should be interpreted? In such a situation, is it that the progressive and forward-looking judge will be appointed and the law-knowing judge, the man who is competent to interpret the law, will be superseded? In this age of supersession, anything is possible.

SHRI PILOO MODI: Mrs. Indira Gandhi is also going to be superseded.

SHRI S.A. SHAMIM: By me and not by you.

I have nothing to say against Mr. Justice A.N. Ray. And I do not particularly like Mr. Hegde, more so after I have heard his speech yesterday. He is a disgusting speaker. But I am entitled to know as to what more the objective tests applied and experiments performed on Mr. Justice A. N. Ray to find out that he was the best of the judges.

The only information that I have got about Mr. Justice A.N. Ray is through my learned friend, Mr. Hiren Mukherjee. In future when I want to know about the qualifications of the prospective Chief

Justice, I do not know whom I should approach because I am told that my learned friend Mr. Hiren Mukherjee, is not going to contest the next parliamentary elections when the appointment of new Chief Justice is due.

Therefore, what I am interested in is in knowing for certain as to what are the qualifications which go into making a Chief Justice. In short, what I am submitting is that the appointment of the Chief Justice of India should be institutionalised and not personalised.

I agree with the man of Steel, Mr. Mohan Kumaramangalam that judges are not infallible, they are ordinary human beings, they commit mistakes very often. And so does Mr. Mohan Kumaramangalam. Is that not true of Prime Minister and other Ministers and, particularly, of the Minister of Steel and Mines? How do you overcome this difficulty, by appointing men who are not fallible or prone to making errors? I am afraid, such Robots are not being manufactured on a commercial scale as yet, and we shall have to put up with the ordinary human beings for the time being. Is Mr. Chief Justice Ray super-human enough not to commit mistakes which his worthy predecessors have committed? If that is so, it is good news, but too good to be true. The Judges also face dilemmas in deciding an issue in one way or the other and it should not be held against them. Even Mr. Mohan Kumaramangalam the other day confessed that he was facing a legal dilemma as to how he should deal with Mr. Mukherjee about whom this House had taken a unanimous decision. When the Steel Minister confessed facing a dilemma it was not held against him. Then why should it be held against the Judges if they are giving dissenting or minority judgements?

In passing, may I make another submission? This ability and suitability clause in the appointment of Judges should be applied in other political and administrative spheres also. For instance, why should Mrs. Gandhi be the Prime Minister of this country when abler and more suitable persons like Mr. Mohan Kumaramangalam and Mr. A.N. Ray are available? Then, the Members of the Union Public Service Commission should be told clearly to select

[Shri S. A. Shamim]

only those people who have a progressive outlook and who are forward-looking. Even if they have merit, they should not be considered. Only those who are forward-looking, should be selected. Why stop at the Supreme Court, why not take this social philosophy into the lowest rungs of the administrative set up? Let us recruit officers direct from the AICC and abolish this bourgeois Public Service Commission. We must not allow the backward-looking people to come in the way of forward-looking Congressmen.

In his historical speech with geographical overtones, Mr. Kumaramangalam, the defence Counsel of the accused, was very sarcastic to some of the Supreme Court Judges. If I have understood him, he told us that they are a bunch of reactionaries. I cannot question it because he knows the learned Judges more than I know. But may I ask : who selected and appointed this bunch of old reactionaries to this highest court of the land? Believe me, Sir, neither myself nor my father had the opportunity to do so. It was Mrs. Gandhi and her illustrious father who made the appointments to the Supreme Court. I see a calculated move by Mrs. Gandhi in denigrating and ridiculing her own father. When she ridicules and denigrates the Judges, in fact, she is denigrating her own illustrious father. What an ungrateful daughter?!

Mr. Kumaramangalam in his 55 minutes' speech—I wish I had half this time to expose him—quoted many American jurists and precedents to justify the unjustifiable. He referred to the British and Canadian judicial systems and tried to draw support and sustenance from these countries. It is strange logic from a committed comrade! How is it that he quoted all the decadent, reactionary and imperialist countries and not the most progressive of all the countries, the Soviet Russia. This must be an omission. Since when have we decided to look up to Mr. Nixon for guidance in our judicial system? We tailor our economies, our political behaviour on the Russian model. Then why not accept the Russian model in the judicial system as well? I am told that it is more efficient, more ruthless and I must say very cheap cheap in the sense that you can do away with these advocates who are unduly interfering with the appoint-

ment of the Chief Justice. You can take care of them.

Why follow the judicial example of America alone? Why can't you follow other precedents? President Nixon has very recently accepted the responsibility of bugging the telephones of democratic party office. Will Mrs. Gandhi accept the responsibility of bugging my telephone No. 384281. Congressmen, belonging to Mrs. Gandhi's Congress, unite; you have nothing to lose but your credibility.

16hrs.

Sir, before concluding I would refer to the social philosophy theory of Mr. Kumaramangalam. I entirely agree with him and his few party men who say that social change should be brought about swiftly and speedily. I do not agree with my friend Mr. P. L. Mody who wants a slow orderly change. The people are impatient and they are not going to wait till Mr. Mody and his 7 friends replace Mrs. Gandhi. Let us make laws which are invested with that social philosophy. Let us make laws and amend the Constitution in a way which will bring about the desired change. The Supreme Court has given us the right to amend the Constitution as we demanded. I have already voted twice in the 24th and 25th amendments and I do not mind voting for another. Let us bring an amendment that from now onwards the Congress President will hold the office of Chief Justice of India simultaneously. I will vote for this amendment also.

Finally, I would ask a few questions. They are : Was the appointment of the Chief Justice agreed upon by the Nehru Forum Members of the party as well? Has it been accepted by Maharaja Karan Singh and other Maharajas of the congress party? Sir, I am tempted to quote one Urdu verse.

بنے ہیں اہل حوس مدعی بھی منصف
کسے وکیل کریں کس سے منصفی
[چاہیں]

I am tempted to quote another verse by the eminent Urdu poet, Mr. Anand Narain Mulla who has lately joined the

ranks of the faithfuls. At the time of his retirement from the High Court, he said :

यह हिम्मत मर्दाना फिर आए कि न आए,
मुझ सा कोई परवाना फिर आए कि न आए
ताकत की अऊनत के मुकाबिल यह लबे अदल
यों हरफ दीवाना फिर आए कि न आए ।

[یہ ہمت مردان پھر آئے کہ نہ آئے
مجھ سا کوئی پروانہ پھر آئے کہ نہ آئے
طاقت کی اعونت کے مقابل یہ لب عدل
یوں حرف دیوانہ پھر آئے کہ نہ آئے]

16:52 hrs.

[SHRI K.N. TEWARI in the Chair.]

And lastly, Sir, he was the judge who said that the police in this country is the most organised gang of decoits and bandits. And it is he who said yesterday that the appointment of judges and the Chief Justice of the Supreme Court, should be left to these bandits and decoits.

है कौन बेगुनाह इस शहर में इन कातिलों
के सिवा ।

[ہے کون بے گناہ اس شہر میں ان
قاتلوں کے سوا]

SHRI VASANT SETHE (AKOLA) :

From this discussion which has been going on for the last two days there are certain basic points which emerge apart from the heat and outburst or disappointment or whatever you may like to call it. I just thought whether this furore would have taken place if Mr. Justice Shelat who was to retire in July was allowed to take ever as Chief Justice. Therefore, if Mr. Shelat had been the Chief Justice, as the senior-most judge, and then if in the meantime, Government were to accept, to have a change from the convention, and declared as a policy that hereafter, they decide to accept the recommendation made by the Law Commission, and decide to enroll a person as Chief Justice even on other grounds from outside, would this furore have been there? What I have seen here is this. There are two sections in those who are critical of it. One, who feel indignant about the modality and about the timing as they say, like Mr. Dapthary, ex. Attonréy General. Therefore, the question is this. I am not going into the constitutional aspect. This has been dealt with by other speakers, al-

though my friend Mr. Frank Anthony, tried to distinguish it and said that Article 124, by convention has come to be read as meaning preference by seniority.

SHRI FRANK ANTHONY : I said consultation.

SHRI VASANT SATHE : Your only point was about consultation. Even if seniority rule is to be given a go-by, you would have no objection.

Consultation, with whom? Consultation with the other Judges of the Supreme Court. Consultation, in the matter of appointment of Chief Justice, with whom? The consultation will be with the retiring Chief Justice at the most. As far as Article 124(2) is concerned, it is clear that the President has except in the case of Chief Justice, mandatory requirement to consult other Judges. But, there is no such mandatory requirement in the case of appointment of Chief Justice.

Now, we will come to the motive part. Let us take the whole perspective into consideration—*mens rea*, as you know. What is the ground on which this social change is taking place. My friend Mr. Piloo Mody, the other day, tried to distinguish the Fundamental Rights, as enshrined in Article 19-Part III, as against those enshrined in Part IV-Article 39. He said that those enshrined in Part-III are inherent in an individual and those enshrined in Article 39 are something to be brought about by the Government. That was the distinction which he was trying to make out. Let me, therefore, try to refresh his memory and recall what these Articles are. Article 19 refers to right to freedom. It says that all citizens shall have the right to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions; to move freely throughout the territory of India; to reside and settle in any part of the territory of India; to acquire, hold and dispose of property. This is most sacrosanct for Shri Piloo Mody. Then, it says :

“(g) to practise any profession, or to carry on any occupation, trade or business”
What is this right to acquire, hold and dispose of property? When you put it on a pedestal so high, what would it mean? right more sacrosanct? Even if property,

[Shri Vasant Sathe] unlimited property, is acquired by exploitation of the people, even if property is disposed of in the most clandestine manner at the cost of the people, is this right very sacrosanct?

SHRI PILOO MODY : Unless the hon. Member is trying to make political propaganda, which he is entitled to do and to which I have no objection, I would say, if he is trying to argue the legal point, that none of what he has said has ever been mentioned by me either in this speech of mine or in any other speech. The obsession with property seems to be a matter which is in his head; it is not with me.

SHRI VASANT SATHE : He said that the right was inherent. I would like to ask him what he means when he says that it is inherent.....

Mr. CHAIRMAN : The hon. Member should try to conclude.

SHRI VASANT SATHE : I was told that we were to get 12 minutes each. I have not spoken even for 8 minutes, because I have been looking at the clock all the time. If you want me to stop, I shall do so. But this is really unfair.....

THE MINISTER OF PARLIAMENTARY AFFAIRS (SHRI K. RAGHU-RAMIAH) : I have requested the Chair to give each Member 12 minutes.

SHRI VASANT SATHE : I have spoken only five minutes.....

Mr. CHAIRMAN : He has taken 8 minutes already.

SHRI VASANT SATHE : I am trying to make a very serious point.

SHRI PILOO MODY : Very serious with cheap political jibes.

SHRI VASANT SATHE : I am submitting that there is nothing inherent in the right to property. The right to property is in a society. When you live in society with human beings, organised by law, within a definite territory, you acquire those rights. You do not acquire those rights in a vacuum, devoid of society or social content. Therefore, this right to practise a profession or to hold property is something which is very sacrosanct

as compared with what we find in the Directive Principles, for instance, in article 38. Article 37 provides :

"The provisions contained in this Part shall not be enforceable by any court....."

That is the only crime which this article has committed, and, therefore, the people do not get protection. And it further says :

"...but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

SHRI PILOO MODY : That is executive action.

SHRI VASANT SATHE : When the State tries to make laws, what does it make those laws for? In article 38 we find that :

"The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

And with what objective? We find in article 39 that :

"The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;"

Is this more fundamental or is the right to acquire property at the cost of the rest of society more fundamental? The article further says :

"(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good."

So, what is more fundamental?

When the State tries to do something and to make laws to achieve this objective, what happens? What has been happening actually? Since when has this crisis come about? It has come about since the verdict on the Golaknath case.

SHRI PILOO MODY : Before that everybody had food in his stomach.

SHRI VASANT SATHE: Till then, Government were not trying to depart or break-away from the convention. But since the Golaknath case verdict, the settled law was unsettled by a majority of one vote against six judges.

Therefore, consider this point. Consistently thereafter, after the Golak Nath decision, for all these years every progressive measure taken by Government has been neutralised and negated by the Judges of the Supreme Court. What was their attitude? What was their approach to even the provisions of the Constitution, to the principles of the Constitution, to which they had taken an oath of allegiance?

Therefore, I would like to submit that as far as this trend is concerned, all that is aimed at is that these two wheels of the chariot, the judiciary and the executive, must along with the legislature move together in the same direction. If one wheel moves in reverse, the chariot cannot move. If you are to do anything really for the people of this country, the judiciary must be in tune with and in harmony with the Parliament. That is the objective. All that has been tried to be done under the power of the President in a most constitutional manner is to keep aside those who are not in harmony with the directive principles, objectives and policy of the Constitution which have to be implemented if at all you want to pull the people of this country out of the mire of poverty with the help of laws made by us.

सभापति महोदय : मुझे आप लोगों से एक चीज निवेदन करनी है। जो भी माननीय सदस्य कांग्रेस की तरफ से बोलें वह थोड़ा थोड़ा समय लें। यह निर्णय हुआ है कि कांग्रेस के सदस्यों को दस-बारह मिनट दिये जायें। इसलिये वह लोग उतना ही समय लें। जो भी लोग ज्यादा समय लेंगे वह दूसरे सदस्यों का समय लेंगे। अपोजीशन की तरफ से अधिक नाम नहीं है। उधर एक माननीय सदस्य को ही बोलना है। तीन बार सदस्य कांग्रेस की तरफ से बोल सकते हैं। इसलिये मेरा आग्रह है कि जब भी उन को समाप्त करने को कहा जाय वह उसी समय बैठ जायें।

9-419 LSS/73

श्री मूलचन्द्र डागा (वासी) : सभापति महोदय, हमारी विरोधी पार्टियों को एक बात की खुशी होनी चाहिए कि श्री हैगड़े उनकी किसी पार्टी में आ रहे हैं। विरोधी दल वाले इस बात पर विचार कर लें। अगर उनको अपनी पार्टी को मजबूत बनाना तो वह श्री हैगड़े को अपना लें। वह आपके लिये बरदान मित्र हो गये हैं। अब तो श्री हैगड़े ने कह दिया है कि डेमोक्रेसी की हत्या हो रही है, लोकतन्त्र की हत्या हो रही है, और अब वह राजनीति में आना चाहते हैं। इसलिये हमारी विरोधी पार्टियाँ को खुश होना चाहिये।

कभी कभी यहाँ लोग कहते हैं कि इस मामले में श्रीमती इन्दिरा गांधी क्यों नहीं आती। यह एक बड़ी छोटी सी बात थी। मध्यवर्ती चुनाव के बाद हिन्दुस्तान के अन्दर विरोधी पार्टियाँ समाप्त हो गईं, उन का कोई विशेष अस्तित्व नहीं रहा, कहीं पर भी उनका शासन नहीं रहा, तो यह स्वाभाविक बात है कि उन के अन्दर फस्टेशन आये। कहीं कोई बात हो जाये लोग खड़े होकर तरह तरह की बातें कहने लगते हैं। आज बार एसोसिएशन के बोर्ड से बकील मिन कर आवाज उठा रहे हैं, जैसे हिन्दुस्तान की सारी बातों का ठेका उन्होंने ही ले रक्खा हो। उसी तरह से हैगड़े साहब की मीटिंग हुई। वह बम्बई गये और चौपाटी पर भाषण दिया। वहाँ पर काले सडों से उनका स्वागत किया गया। यहाँ पर जो कुछ हो रहा है वह बुद्धि की विलासिता है। हम केवल तर्क कर रहे हैं। हम केवल यह बतलाना चाहते हैं कि हम हर बात को लेकर पार्लियामेंट में आयेगे। लेकिन यहाँ पर कोई यह कहने के लिये तैयार नहीं है कि संविधान का खण्डन किस तरह से हुआ है या गवर्नमेंट ने जो कदम उठाया है वह संविधान के खिलाफ है। यहाँ पर न संविधान की हत्या हो रही है न किसी और की हो रही है। यहाँ जो भी

[श्री भूल चन्द शर्मा]

भाषाज उठाई गई, उस में संविधान की हत्या की बात तो लोग भूल गये, श्री मोहन कुमारमंगलम का नाम ले कर फिलासफी की बात करने लगे। हिन्दुस्तान के अन्दर प्रचार करने की दृष्टि से उनकी भाषा को लेकर कहने लगे कि उन्होंने कह दिया कि हम ऐसी फिलासफी चाहते हैं या ऐसा दृष्टिकोण चाहते हैं।

श्री मोहन कुमारमंगलम ने अपनी स्पीच में फिलासफी की बात नहीं कही। उन्होंने कहा कि संविधान जनता के लिए है, जनता संविधान के लिए नहीं है। संविधान कोई जिन्दा लाश नहीं है, बल्कि यह एक दस्तावेज है, जिसमें बदलते हुए जमाने के मुताबिक, जनता की आवश्यकताओं, इच्छाओं और आकांक्षाओं को पूरा करने के लिए, परिवर्तन किया जा सकता है। पिछले चुनाव के समय हम ने देश की जनता को कहा था कि हम नीतियों को आगे बढ़ाना चाहते हैं, जिन से हम देश में परिवर्तन ला सकें और लोगों की स्थिति में सुधार कर सकें। जनता ने हमारी बात पर विश्वास कर के हमारे दल की भारी मैकेट दिया। श्री मोहन कुमारमंगलम ने कोई नई फिलासफी हमारे सामने नहीं रखी है। वह भी कांग्रेस के चुनाव घोषणापत्र के आधार पर चुनाव लड़ कर यहाँ आये हैं। लेकिन कुछ बुद्धिजीवियों, पूँजीपतियों और राजनीतिक दलों ने, जो देश में एक नया समाज बनाने में रुकावट पैदा करना चाहते हैं, श्री मोहन कुमारमंगलम की बात को पकड़ कर वह प्रचार करना शुरू कर दिया है कि संविधान की हत्या की गई है।

अब तक हम ने हैमडे साहब को नहीं सुना था। लेकिन इस्तीफा देने के बाद उन्होंने जो भाषण दिये हैं, उन से मालूम हो गया है कि वह कितने पानी में हैं। अगर वह चुप रह जाते हैं, तो हम संयोजते कि वह बहुत गहरे आदमी होंगे। लेकिन सुप्रीम कोर्ट से बाहर आते ही वह बीछला उठे हैं। उन्होंने

कहा है कि मैं पार्लियामेंट में आ रहा हूँ। कुछ राजनीतिक दल की ऐसे व्यवहार कर रहे हैं कि मानों पहले वे बिल्कुल शक्तिहीन थे और वह हैमडे साहब के आने की वजह से बड़े शक्तिशाली हो जायेंगे।

कल एक सभा में श्री मोरारजी देसाई ने कहा कि लोगों को मीजुदा सरकार को ओवरधो कर देना चाहिए। उन्होंने यह नहीं कहा कि चीफ जस्टिस का एपॉइंटमेंट गलत हुआ है। विरोधी दलों को तो लोगों में असंतोष पैदा करने के लिए कोई बहाना मिलना चाहिए। हम ने प्रिवी पर्स खरब कर दिये। बंगलादेश के मामले में भी हमें सफलता मिली। अब हम ने फूडग्रेन्थ के व्यापार को अपने हाथ में ले लिया है। जब जनता में इस सरकार की नीतियों के बारे में विश्वास पैदा होने लगा, तो बुद्धिजीवियों और कुछ राजनीतिक दलों ने जनता में असंतोष पैदा करने के लिये चीफ जस्टिस की नियुक्ति का प्रश्न खड़ा कर दिया। वे लोग कहते हैं कि अब मोहन कुमारमंगलम को फिलासफी चलेगी।

जैसा कि मैंने कहा है, श्री मोहन कुमारमंगलम की कोई फिलासफी नहीं है। सारी फिलासफी संविधान में है। कांस्टीट्यूशन इज दि लिबिंग फ्रेम ग्रॉफ दि बवर्नमेंट। हम संविधान को जनता की इच्छाओं और आकांक्षाओं के अनुरूप बदलना चाहते हैं। और उसको बदलना होगा। आज हमारे देश में शोषण करने वाले एक घोर है और शोषित वर्ग दूसरी घोर है। बाबिर बकील श्री किस वर्ग में है? एक जमाने में गांधीजी ने बकीलों के बारे में कहा था कि जीवन में मूल्यों को बचलना चाहिए, बकीलों को भी इतनी ज्यादा कीस नहीं लेनी चाहिए? हमें जनता को शोषण और पूँजीवाद से बचाना है और उसके लिए संविधान और कानून में परिवर्तन करने हैं।

श्री मोहन कुमारमंगलम ने स्पष्ट शब्दों में यह कहा है कि जब देश आगे बढ़ता

है और जनता की इच्छाओं और आकांक्षाओं उभरती हैं, तो उन के अनुसार संविधान भी बदलता है। हम सब संविधान के प्रति बफादार हैं। आखिर फिलासफी क्या है? संविधान ही फिलासफी है। हमारा संविधान एक क्रान्तिकारी दस्तावेज है।

जैसा कि मैंने कहा है, विरोधी दलों ने इस प्रश्न पर बात का बतंगड़ बना दिया है। कल एक सभा में श्री मोरारजी देसाई ने भाषण दिया :

"He asked the audience to resolve to overthrow the Government."

वहाँ श्री वाजपेयी ने भी भाषण दिया।

"Shri Atal Bhari Vajpayee, the Jan Sangh leader, urged Chief Justice A.N. Ray to resign on his own, or else 'we will be forced to make him quit'."

मालूम नहीं कि श्री वाजपेयी जस्टिस रे के सामने सत्याग्रह करेंगे। जब इन राजनैतिक दलों ने देखा कि वे गरीब और मजदूरों के सामने नहीं जा सकते हैं, तो उन्होंने सोचा कि इस प्रश्न को लेकर जनता में असंतोष पैदा करो। आपने देखा है कि जनता ने इन लोगों का समर्थन नहीं किया है। लोगो ने जस्टिस सीलेट को काले झंडे दिखाये हैं।

अन्त में मैं यह कहना चाहता हूँ कि हमारी केवल एक फिलासफी है और वह संविधान की फिलासफी है। भारतीय संविधान ही हमारा दर्शन है, हमारा मार्गदर्शन है, उस के अनुसार हम चलना चाहते हैं और हम ने उसकी शपथ ली है। श्री मोहन कुमारमंगलम ने भी उसी संविधान की शपथ ली है। मैं समझता हूँ कि विरोधी दलों की ओर से जो भाषण हुए हैं, वे वेस्टिड इन्टेंशंस के समर्थन में किये गये हैं।

SHRI P.G. MAVALANKAR (Ahmedabad): Sir, after having heard the Minister of Steel and Mines day before yesterday, we, the members of this House have begun to wonder whether any purpose would be served by our remaining in this House, and, seeing

that the way he wants this country to go is the way towards totalitarianism, whether even the Lok Sabha would be a completely committed body with one suitable voice in conformity with the voice of the Government. All the same the happy situation is, that there are still opposing points of view being expressed on the floor of the House and outside and therefore, while fortunately time is still on our side, we should see to it that democratic institutions and values are protected, may, enhanced. Now, I freely concede that while discussing this vital matter, we cannot take extreme positions, for the truth of the matter lies somewhere in between. On which side of the extreme this particular truth lies is of course, the real question. And, this is a question which is both debatable and undoubtedly controversial.

It is not without significance that the Government's defence two days ago was constructed by the Minister of Steel and Mines, and not by my friend Mr. Gokhale who I would think as Minister of Law and Justice should have intervened in the debate on the first day itself. It is interesting and even suggestive that the first defence should have come to us from Mr. Mohan Kumaramangalam. The whole House knows what his social philosophy is and to which kind of social philosophy he is committed throughout his life. He now wants to extend that philosophy to other major organs of the Government like the judiciary. The tragedy of the situation is that the minister in his steel frame-work mentality has tried to undermine the independence of the judiciary. His speech undoubtedly was a brilliant performance. He so very easily converted all the Congress MPs to his own particular rigid philosophy. But, I ask the Congress members; Do they honestly one and all subscribe to the kind of communistic and rigid philosophy to which he was referring? If they do not, then why should they not come forward in the open and say that they do not agree with the kind of social philosophy to which the Minister was referring?

As I said a little while ago, the Minister of Steel and Mines did undoubtedly make a brilliant performance. We all admire his erudition, his debating skill and he had, of course, all the time at his disposal. He presented his case as shrewdly as an

[Shri P. G. Mavalankar]

advocate of his calibre would do. He spotlighted the facts which suited him, and he highlighted the questions which fitted his plea, without, of course, bothering whether what he was illustrating and quoting was the complete picture and whether all this was in the full context of the relevant issues and questions involved.

He quoted the precedents and pronouncements of events and persons from USA, UK, Australia and Canada. But he dare not quote from any country whose social philosophy he has been so steadfastly holding to and preaching everywhere. Even there he quoted them only partially because he wanted to quote only that which will suit his plea. So, he did not quote or tell the House that in those countries, USA, UK, Australia and Canada there is democracy and people continually resort to the various democratic processes that obtain in those countries. He never mentioned that these countries have a responsible and responsive executive, something which is totally absent in India today. He never mentioned that in those four countries, in these four democracies, there is a strong opposition. He never mentioned that those countries have a robustly independent judiciary. He never mentioned that those countries have a free press with an unending free flow of news and views. He never mentioned that those countries have independent radio and television network which are free to criticise the government. He never mentioned that those four democracies have vigorous universities where habits of critical thinking are developed. He also never mentioned that those countries have an informed, intelligent and enlightened public opinion. Over and above all this, the constitutions of these four countries have various built-in safeguards and safety valves and they have adopted the system of checks and balances. Because of all these things, even if they make a visibly or an apparently political appointment, that political appointment cannot be anything but independent because once a judge is installed in his place, he has to function as an independent judge, since he knows that all these factors and agencies to which I have made a reference will revolt against him if he gave justice in favour of the Government.

Now, I ask the Minister of Mines : Are these factors available in this country? If they were, then if the Minister had said "let us appoint some people of our liking", I would have said "all right" because the other factors were bound to prevent the persons so appointed from acting in an arbitrary way. But, in the absence of these factors in India we should not allow this.

Sir, let there be no mistake about it—this is a frontal attack by the executive on the free processes of the judiciary. The Government's action is sudden and swift both in style and substance. It is nothing else but the result of secret scheming by the small caucus who have scant respect for democracy and democratic institutions. It is a calculated and clever move to undermine the independence of the judiciary. The cavalier and dramatic fashion in which the Government have acted so suddenly has caused concern and consternation not only in this House but throughout the country.

The issues involved are fundamental and basic. They are issues of far-reaching significance. Therefore, I feel that Government's action is without wisdom and without propriety. It will certainly undermine the whole edifice of parliamentary democracy and it will bring a democratic constitution into great disrepute.

As many hon. Members, particularly on this side of the House, have said, we are not discussing individual personalities. We have nothing against the person of a Judge as such. I for one want to adopt an impersonal approach to the whole problem. We are discussing policy questions because democratic values are at issue.

The principle of seniority is not sacrosanct or sacred. But why this sudden realisation of the good in the Law Commission's recommendation after 15 long years?

I ask the Minister of Law and Justice— I hope, he will reply to it—why was the country, the Parliament and, more particularly, the highest judiciary itself not taken into confidence before taking such a step of supersession? And, Sir, to supersede not one but three Judges against whom there can be no objection except, of course, that they were terribly independent and upright Judges and men of honour. Their resignations have proved

their self-respecting nature and selfless attitude. The whole nation salutes to them for that.

Much has been said about Judges and social changes. It is known all over the world, whether they are democracies or any other type of Governments, that Judges are conservative by nature. It is their function to conserve law and order. They are bound to be conservative. But when you make a judicial appointment, what about Judges' own philosophy? How can you divorce it totally from his thinking, acting and deciding? It is true, of course, that Judges must not hamper progress in the country. The people's wishes, Parliament's resolutions and enactments, must be respected. But let us not forget that peoples and Parliaments are not perfect and not infallible and they are liable to doing unjust and undemocratic things.

So, the Judges being fiercely independent and devoid of any party and factional politics, decide on merits of the case, on the basis of the letter and the spirit of the Constitution. It is only in this sense that Judges can be "committed", that is, Judges who are "committed" to the principles of Constitution, to the letter and spirit of the Constitution. But when the Government says that they want Judges of a different type, "committed" Judges as the slogan goes, they want "committed" Judges meaning conformist Judges who conform to Government's point of view. They want "yes-men" who will be "yes-men" to whatever Government want to suggest and act. Therefore, I say, this is a concept and style and activity which is wholly out of tune with democratic theory and practice.

The fathers of our Constitution laboured hard to build up an independent judiciary. In the last 25 years, this bastion of freedom and the fundamental rights of the people remained, more or less in tact and beyond reproach. But now that glorious edifice and all the accompanying vital conventions and traditions have been allowed to crumble down and collapse. The people's faith and confidence in the independence of judiciary has been shattered by the Government action—I underline the words 'faith' and 'confidence'. The people's confidence has been shattered and they have been disturbed. Therefore, I feel, this damage has been beyond repair.

You, Mr. Chairman, will see that the reaction in the whole country is spontaneous, sharp, swift and sure, whether it be in Delhi or Bombay or Ahmedabad or elsewhere. This is some consolation that our people outside are awake to the democratic ideals and values. This political sabotaging by the ruling party has shaken the judicial institution and our Constitution to their foundations. The Government have injected and introduced politics into judiciary.

Why did the Government do this at the time they did? The timing of the Government action is important. It is so soon after the recent historic judgment on Fundamental Rights wherein three superseded Judges gave opinions against the Government. That has aggravated the people's suspicion. In matters, judicial and fundamental, not only must you be clear clean and fair, but you must also continuously appear to be so without really shattering the people's faith and confidence. That really sustains the people's confidence about the independence and impartiality of Judges and justice.

Moreover, this is a case where there has been inflicted a penalty on free opinions of the individuals. Democracy should value free opinion. A free opinion is always a different opinion. It can often be an awkward and inconvenient opinion. Therefore, I am infinitely sorry and disturbed that this Government should have done all this extra-ordinary and extra-constitutional manoeuvring. The pity of it is that they are using democratic framework and letter to destroy democratic freedoms and spirit of Constitution. This is the great tragedy. This reminds us of what Hitler did in Germany during the early thirties of this century. I hope, we do not want these things to happen in this country.

SHRI B. R. SHUKLA (Bhraich) : Much eloquence has been mis-directed, mis-spent, and has produced only more heat and little light. The real questions are, firstly, whether the appointment of the Chief Justice of India and the consequent supersession of the three judges of the Supreme Court is Constitutional and valid, and, secondly, if it is Constitutional and valid, whether it is an act of gross impropriety on the part of the Government which is responsible for such appointment

[SHRI B. R. SHUKLA]
and, thirdly, whether, even in spite of the so-called improper act of supersession, democracy has been imperilled by this appointment. These are the three issues to which we should address ourselves.

Mr. Shyamnandan Mishra and Mr. Frank Anthony have said that it is not in accordance with the Constitutional provisions. Mr. Shyamnandan Mishra says that he is not a great Constitutionalist. But so far as Mr. Frank Anthony is concerned, he is a senior advocate of Supreme Court and we wanted that his statement on this point should be accurate in law. Article 124 read with article 126 nowhere lays down any procedure of consultation for the appointment of Chief Justice of India. When this matter was brought before the Constituent Assembly, Mr. Ananthasayanam Ayyangar said:

"The important amendments that have been made relate to the necessity for the President consulting the judges of the High Courts in the States. Consultation with the Chief Justice is necessary for making appointments of puisne judges of the Supreme Court. So far as Chief Justice himself is concerned, there is no higher judicial authority who may be consulted"

SHRI SHYAMNANDAN MISHRA : Is Mr. Ayyangar an authority? My humility should not be equated with ignorance.

SHRI B. R. SHUKLA : I do not say that he is an authority. Since you respect his opinion, I quoted him.

There is another judicial decision of the Supreme Court reported in 1966, All India Reporter, Supreme Court, page 1987, in which it has been laid down that the President, when he is constitutionally obliged to consult anybody, must consult only that person and nobody else. If he is required to consult 'A', and if he consults 'A' and also 'B' and 'C', then the whole decision is vitiated. Now the position is, when under the Constitution there is no obligation to consult anybody, then as the Constitutional Head of the Union of India he has to act on the advice tendered by the Cabinet and that Cabinet is headed by the Prime Minister. The Prime Minister advised him to appoint Mr. Justice A. N. Ray as the Chief Justice of India.

Now, you can attack the appointment not on the Constitutional grounds but on the ground of political propriety. The question is, what is the political impropriety involved in this. Till the other day, Mr. Justice A. N. Ray was a suitable person because he was duly appointed as the puisne judge of the Supreme Court. All other judges who are members of the Supreme Court are also good judges. If they are good judges uptill now, do you mean to say that the moment Mr. Justice A. N. Ray has been appointed or elevated from the position of a puisne judge to the position of Chief Justice of India, he would sell his conscience, he would become a docile man and he would simply act as an instrument and tool in the hands of the present Government?

SHRI ATAL BIHARI VAJPAYEE : This is what Mr. Kumaramangalam wants.

SHRI B. R. SHUKLA : It means that all these Judges, headed by Mr. Justice A. N. Ray, have been good and honourable Judges, men of integrity and no reflection has been sought to be cast on their integrity except by an oblique reference by Mr. Vajpayee when he said that Justice Ray was responsible for deciding a case in favour of Mundhra. If all these Judges continue in future to decide cases coming before the Supreme Court, then, do you mean to say that all those cases in which Justice Ray would be sitting as the Chief Justice or he would be constituting a Bench, those decisions would be influenced by the Government? Such a short-sighted view of the calibre and character of our Judges is wholly unwarranted and you should not attack their integrity in this unwarranted fashion. Therefore, my submission is that our democracy is not in danger because of this appointment then comes the question of convention. What is the convention? Now, the mere fact that certain Senior Judges of the Supreme Court were appointed also as Chief Justices in the past was merely a coincidence. They were good, honest and able Judges and they were senior also and, therefore, the seniority was not yet a condition precedent for their appointment. It was just a coincidence and if seniority is accepted as a rigid criterion for appointment of the Chief Justice, it means that the President and the Government have absolutely no say and no discretion in the

matter and that would be introducing a new clause, a new provision in the Constitution which is not there for the time being.

Third thing—about committed Judiciary. Now, much has been said about committed judiciary. Mr. Kumaramangalam has, in his speech, nowhere said that committed judiciary means conformance according to the pattern of the communistic regime as prevalent in Russia. So, the word 'committed' means that we are not a 'Sihita Pragna' or 'Paramahansa' within the meaning of Gita. Everybody is committed. Mr. Vajpayee is committed to one concept or the other. Here, we are committed to a different concept of social philosophy. Mr. Frank Anthony is committed to a different concept of philosophy. He said—Mr. Vajpayee was not here then—that an impartial judiciary was the creation of the Britishers, and that this is for the first time we are meddling with it. I want to remind him of the history of Lord Bacon in England, who was removed for acts of corruption and nepotism. Therefore, corrupt Judges have been found everywhere in the world.

Now, what will happen if an eminent advocate of the Supreme Court like Mr. Frank Anthony is elevated to the Bench of the Supreme Court...

SHRI B. P. MAURYA : No, No .

SHRI B. R. SHUKLA :and Mr. Mohan Kumaramangalam is also elevated to the Bench of the Supreme Court. I am sure that as they have different sets of values and philosophies, they will create a deadlock.

So, commitment means commitment to the social and directive principles of the Constitution and anybody who, by his legal quibbling and constitutional hair-splitting, wants to retard the progress of the country and proves a hurdle in the implementation of the aspirations and urges of the people, he would have to be removed and only in this context, we have to understand the word 'committed judiciary'.

Mr. Piloo Mody only is only trying to reap the harvest of discontent. He is collecting in his small basket rotten and rejected eggs. But let me assure him that not only thousands and lakhs of

people but crores of people are behind the Prime Minister and her party. They want that directive principles should be implemented. A few hundred lawyers under the misguided leadership are only creating a fuss and a furor. If there had been any doubts in the mind of the uninformed people regarding the supersession of Mr. Hegde and his colleagues, those doubts stand dispelled by the statement of Mr. Hegde which he gave in his Press Conference. In his statement he has proved that the moment he has put off his judicial robe he has put on the readymade garment of a politician provided by reactionary parties like the Swatantra and others.

SHRI KARTIK ORAON (Lohardaga): Much water has flowed down the stream and all types of arguments and counter-arguments have been put forth regarding the supersession of the judges. It is not the sole case of supersession in this country, there are numerous cases of supersession which have gone on; but they have all gone unheard, unwept and unsung. Nobody has bothered about them. Not even the Opposition has brought forward any such case of supersession.* But why is there so much of mud-slinging and so much of subrerattling about the supersession of the judges? Whether it is supersession of a clerk or of a judge, it is after all supersession; it is just the same; the pain is the same. I don't personally see much sense in discussing this in Parliament. Of course, Parliament is to protect every individual, rich or poor, high or low. That is there.

The opposition brought out the plea that the Chief Justice should be appointed on the basis of seniority. If at all this is to be done, then the seniormost judge should automatically become the Chief Justice. But this is not so. We have the provision under Article 124 of the Constitution whereby the President has got to appoint the Chief Justice. The fact that the President has been authorised to make the appointment clearly shows that he has got the discretion in the matter. According to this Article, in the matter of appointment of Chief Justice, the President is not obliged to make consultations with the Supreme Court or the State Government or the Executive. Therefore, I have failed to understand why this reasoning is brought forward. My point is only this. I do

[SHRI KARTIK ORAON]

not want to go into the legality or illegality of those things. What is supreme—whether the will of the people or the Supreme Court?

SHRI DINEN BHATTACHARYYA: Shrimati Indira Gandhi.

SHRI KARTIK ORAON : Yes, everybody wanted to be Indira Gandhi but everyone has miserably failed to capture the imagination of the people or the will of the people except Shrimati Indira Gandhi. It is the will of the people which has demonstrated their faith in her. They have responded under the dynamic leadership of Shrimati Indira Gandhi. They have done it by the massive mandate they have given for our party in the 1971 elections. Will of the people guides the destiny of the nation. Will of the people is the law of the land. Whoever tries to ignore that will of the people will himself be destroyed. That has been done. Therefore, let us not argue about this. The will of the people has to guide the destiny of this country. When the majority of the people want that things have to be done in a particular way, then this will have to be done that way, and there is no question about it. Therefore, I think that were just beating about the bush and wasting the valuable time of Parliament by talking about this question of supersession of judges, this, that and the other. But we are not talking about the poor people of our country who are dying of starvation. Why are we not talking about them? Let us be realistic. Today, nobody is going to ask the Opposition parties for anything. The people of this country are not going to ask this party and this Government whether Karl Marx was right or not, but they are going to ask them to provide them with food, shelter and clothing, medical facilities and educational facilities and so on. Therefore, there is a tremendous burden cast on the Government. So, in all decisions of any kind, they have to be careful to see to what extent it is in fulfilment of the wishes and aspirations of the people of this country, and if they take any decision in the light of this, there is nothing wrong about it.

Dr. R. M. Jackson has defined an experienced judge in his book. *The Machinery of Justice in England* (1953) as follows: He was the secretary to the Royal Commission

Justices of Peace, and he has argued in his valuable book as follows:

“An experience judge means one who is well used to trying defendants, and who generally speaking, makes an excellent job of that side of his duty. But when we come to the passing of the sentence, our ‘experienced judge’ is experienced merely in following a customary measure, and his experience does not extend to knowing what happens to those the sentences. Should we describe a man as being an ‘experienced physician’ if he ordered doses of medicine and never enquired what result they had on the patient?

This Government and this party has a tremendous responsibility to meet the requirements of the people of this country and, therefore, they must have this point in their mind all the time.

I have been going through the records of all the Chief Justices of our country, and have found that in most of the cases, just before retiring, they have passed some sort of judgment or the other which is contrary to the will of the people or the aspirations of the people. Take for instance, the case in regard to the supremacy of Parliament, the privy purses case, the case of nationalisation, the case regarding compensation for property and so on. In all these, all the retiring judges have gone against the will of the people. Only one judge, namely Mr. A. N. Ray has been acting almost in consonance, though not always, because he has his own judgments also, with the will of the people. We have to take note of this, and therefore, let us not make any fuss about these things.

Suppose somebody commits the offence of reckless driving or reckless writing and talking or somebody gives a reckless judgment....

MR. CHAIRMAN : Now, the hon. Member should try to conclude.

SHRI KARTIK ORAON : Shri Hegde, Shri Grover and Shri Shelat have been saying that there has been damage to the independence of the judiciary and the cause of democracy. But I would submit that they are not the custodians of the independence of judiciary and the cause of democracy. If that were so, if there had been that force of correction, then there would have been many more judges who would have

come forward and resigned. But nobody else has resigned. What have these people who have been superseded, been saying? Mr. Hegde said that he would like to be judged by the Bar not by the Government. He says that the wrong done to the three Judges was of small significance compared to the damage done to the independence of the judiciary, to the cause of democracy. If that was so, the other Judges would also have resigned. But none has resigned.

17.00 hrs.

Then he said that because he passed an adverse judgment against the Prime Minister, he has been victimised. This only shows that he has been having a guilty conscience all the time. He knew that what he was doing was wrong and did not believe that what he was doing was correct.

These are the facts. So I feel there is no case for this discussion, there is no need to discuss the supersession of the Judges. Let us discuss supersession in general. That will be a wonderful thing for the country, otherwise not.

With these words, I think the action taken by Government, by the President, is perfectly in order and ought to be applauded by the people of this country.

SHRI SHANKERRAO SAVANT (Kolaba) : The supersession of the three Judges has touched off a storm in the privileged world, in the world of the propertied classes and the intelligentsia.

SHRI G. VISWANATHAN : What about you? You do not have property?

SHRI SHANKERRAO SAVANT : The members of the Bombay and Delhi Bar had collected yesterday. All they did was to shower some abuses at the Congress and Shrimati Indira Gandhi. Of course, they have been doing this for a pretty long time and, therefore, it need not surprise us.

What surprised me in particular was that Shri Madhu Limaye, the socialist leader should join in the chorus, because when the Golak Nath case was decided, it was Shri Nath Pai who was the first to tell Parliament that it was laying down a very pernicious principle.

SHRI P. VENKATASUBBAIAH (Nandalay) : He brought forward a non-official Bill.

SHRI SHANKERRAO SAVANT : Yes. He said it would take away the sovereignty of Parliament; therefore, we must undo what has been done by the judgment. Strangely enough, another leader of the Socialist Party, Shri Madhu Limaye, is, now hand in glove with these reactionaries who, according to Shri Nath Pai, put individual liberty above social welfare.

Shri Limaye has stated that it is not the fact of supersession which is more material, but the procedure of it. I cannot understand the distinction because once it is decided that the supersession was lawful, in accord with constitutional propriety and was needed for further advancing democracy, it is immaterial what procedure was followed. But it seems the Socialist Party has given up its socialism and is only after the hate-Congress campaign.

Both Shri Anthony and Shri Viswanathan have poo-hooed the present policy of taking into consideration the social philosophy of judges. They have said that there will now be a clamour for the loaves of office. They are shouting from house-tops about the independence of the judiciary. When this was there, did we get any type of whimsical judgments or judgments reflecting the individual independent thinking of of the judges from the munsif's court to the Supreme Court? If not, why should the need for conformity to social philosophy cause chaos or clamour for loaves of office? So it is no good saying that simply because at the top there are certain principles laid down, that there will be conformity to certain socialist philosophy, they will now be clamouring for loaves of office.

They are talking of a fight to the finish. That is nothing new. At the time of the Bank nationalisation case and at the time of the abolition of the privy purses, they talked of the same thing.

AN HON. MEMBER : Who talked?

SHRI SHANKERRAO SAVANT : All these people. They cannot put up a better performance now with the help Mr. Hegde who is less intelligent and more conceited. We are prepared to accept their challenge. After the hullabaloo about fundamental rights and directive principles, I just want to tell them one thing. There are three arms of the State, the legislature, the judiciary and the executive.

[SHRI SHANKERRAO SAVANT]

Is it not necessary that all the three should run in unison? The main question is: What would be the result if they pulled in different directions? If in order to make them pull in the same direction some principles are laid down, there is nothing wrong and the Government is perfectly right in saying that the judiciary should conform to certain principles. The confrontation with the judiciary has not started only from Golaknath case. Golaknath only highlighted the conflict which was started much earlier. Immediately after the passing of the Constitution, this very Supreme Court laid down that incitement to murder was permissible because it was covered by the fundamental right regarding freedom of expression. They quibbled with words of the Constitution to come to this strange conclusion. Therefore we had to pass the first amendment to the Constitution. After the first amendment was passed, the Supreme Court held that this amendment was proper. There after at the time of Golaknath case, they reversed their own verdict and held that the first and the fourth amendments were all *ultra vires*. But, when they saw that undoing all legislation during the previous decade would introduce chaos and would invite anarchy they introduced a totally new principle and laid down that whatever might have been done in the past was legal, but in future the Government should not take recourse to the powers under these amendments. When the judges are giving such whimsical judgments should the executive and the legislature sit silent? As a matter of fact we gave them 8 or 10 years to behave properly. When we found that in every important case the Supreme Court was going against us, we took the proper course namely to see that they conformed to the social philosophy of the constitution and that the executive, legislature and the judiciary all pulled in one direction. Therefore my contention is that there is nothing wrong in what has been done. Something has been said about articles 124 and 126 of the Constitution. The marginal note to Articles 126 is wrong. We are to go to the article itself and not by the marginal note. That is an accepted canon of interpretation of statutes. Article 126 speaks of the appointment of Chief Justice and not of the appointment of acting Chief Justice or of permanent Chief Jus-

tice. If article 126 is taken out of the Constitution there will be no provision for the appointment of Chief Justice. This will be absurd. Therefore, my contention is that this appointment is only under article 126 and there is no provision in it for any consultation with the outgoing Chief Justice. There is thus absolutely no legal impropriety or violation of any of the articles of the Constitution or any other law. Therefore, whatever has been done properly and as such should be accepted.

17.09 hrs

(MR. SPEAKER in the Chair)

MR. SPEAKER : You have all exceeded the time that was allotted. What shall we do now?

SHRI K. RAGHURAMIAH : The hon. Minister may begin his reply at 6 p.m. today.

MR. SPEAKER : Then there cannot be any other business today.

SHRI K. RAGHU RAMAIAH : Private Members' Business has been postponed; only the introduction of the Bills will be there.

MR. SPEAKER : Was it with the permission of the Chairman? Otherwise, you will kindly sit down. I shall call you.

SHRI M. SATYANARAYAN RAO (Karimnagar) : I shall not take more than three minutes.

MR. SPEAKER : All right. Then continue.

SHRI M. SATYANARAYAN RAO : Mr. Speaker, Sir, since morning I was hearing the speeches of the Congress Members. I was really astonished whether all of them were speaking from their hearts are they have been instructed by Shri Raghu Ramaiah and Shri Kumaramangalam to speak like that. The question is whether the Government is right or not to appoint as Chief Justice whomsoever it wants. Whether it is just and proper constitutionally or not I am not going into that.

I have no doubt that it is certainly constitutional for the Government to do that. But, the manner in which this appointment has been made has created some doubts in the minds of the people. I am told that this

gentleman has been appointed as Chief Justice because he happens to be not only a friend of Shri Kumaramangalam but he is also a relative of him. That is why the people are very much agitated about this particular matter. I am told that the Prime Minister had no role in the matter and Shri Gokhale had nothing to do with it. Shri Kumaramangalam has played the role, and he is responsible for the appointment of Shri Ray as Chief Justice. That is the reason why the people, and we the Members, are agitated.

Before hearing the speech of Shri Kumaramangalam I was wondering why there was so much of hullabaloo about this gentleman. But, when I heard his speech, I felt that it was a justified agitation on the part of the lawyers as well as the people outside, and also here, in their saying that he is selected because he has got certain social philosophy and so on and so forth. Particularly he mentioned about the suitability. I do not agree with what Government has done.

Shri Kumaramangalam is saying that a judge must have a social outlook or whatever philosophy the Government possesses.

THE MINISTER OF STEEL AND MINES (SHRI S. MOHAN KUMARAMANGALAM) : I never said that we must have a social outlook. I said that every judge has such an outlook. The question is : what is that ?

SHRI M. SATYANARAYAN RAO : In your speech you have said that you have selected him because of the social philosophy. You have also mentioned suitability. I have got with me the speech. This is not proper on the part of any Government, and Shri Kumaramangalam whether he is responsible for the appointment or not, to say so. It is very dangerous. We know that in democracy judiciary must be very independent. It has also got its own role to play; the executive has also got the role of implementing whatever the law that is passed by the Legislature. The judge is supposed to interpret the law that is passed by it. It is not that because of his social outlook or because of certain philosophy that he possesses, he should be appointed. He has no business to interpret according to his own philosophy. His duty is to interpret the law according to the Constitution. Whatever be the Constitution, that is up to the judge to interpret

it. If he interprets it differently, then it is for the Government to amend it. You have done it now. We are very sorry to note that only recently in a judgment of the Supreme Court—it is favourable to you—they have held that Parliament has got the authority to amend the Constitution and also to abridge the rights. Even then the three judges have been superseded. I do not know why that has been done. I am sorry for this action of the Government. It is dangerous and it is not only not in the interest of the Congress party but also it is not in the interest of the country. I appeal to the Members, particularly, the Congress Members, to beware of this decision. This is a first step and so many things will follow from that. I hope that you will also be superseded one day I am sure as to why the Prime Minister is talking all about this convention. There is no convention at all. You show me as to which article says that the President is obliged to appoint a particular person as Prime Minister. He can appoint anybody according to the Constitution.

According to the Constitution, he shall appoint the Prime Minister, and the Ministers will be appointed on the advice of the Prime Minister.

If we go according to the letter of the Constitution, the President can appoint even Mr. Vajpayee or Mr. Banerjee as Prime Minister. That way the Prime Minister can be also superseded. Think for a moment what will happen if he comes to power. He will finish all of you. You are not taking it very seriously. So, you better tell Mr. Kumaramangalam, "Stop here; don't proceed further."

SHRI SAMAR GUHA (Contai) : Sir, no issue, either political or legal, in our domestic sphere, has agitated the men of the judiciary, the legal profession, the press and the people at large, more than the appointment of the new Chief Justice of the Supreme Court. It is not merely a question of ascertaining the comparative merits of Mr. Ray and the three superseded judges. It is not even the question of mere supersession and not observing the convention of appointing the senior-most judge as Chief Justice considered as something as sacrosanct—which is agitating the people's minds. The most important point which is agitating the people is the

[SHRI SAMAR GUHA]

political motivation behind this act of supersession. In it the people see an inlet of a growth of a certain kind of ideology, totalitarian ideology, that may subvert the future of Indian democracy. In it an attempt has been made to make our judiciary subservient to the executive. By this act, an element of political subterfuge has been introduced which may scuttle the whole edifice of our democracy.

This is the apprehension of the people and this apprehension has been alarmingly justified by the principal spokesman of the Government, Mr Mohan Kumaramangalam. In a melodramatic way, like the devil quoting the scripture, he was quoting the scriptures of the so-called bourgeois democracy, which was only an artifice to camouflage his own purpose. He was propounding the theory of selection of judges on the criteria of their affiliation to a certain political and social philosophy. Not only did he propound the theory of a committed judiciary, but I will go a step further and say that he had propounded the theory of a dictated judiciary.

In his dramatic mood, he was accusing Mr. Justice Hegde of wanting to oust the press, oust the Parliament and oust the people. But Mr. Kumaramangalam very cleverly concealed what he himself wanted to oust. He wanted to oust the very foundation of our democracy by propounding the totalitarian theory of dictated judiciary.

I have said that I do not consider, my party does not consider, that the principle or convention of appointing the seniormost Judge as the Chief Justice is sacrosanct. But the question is, suppose, one judge has to be superseded by the other because of the question of merit or capability, if there is a certain conflict or contradiction, how will that conflict or contradiction be removed? Who will do it? No doubt, it will be done by the President. But, in such cases, what are the conventions? Unfortunately, we have not set up any conventions, norms, principles or procedures in case the issue of supersession of a certain judge arises. If only the Government had set up some conventions, then there would have been no occasion for making these charges. The will of the President is usually implemented through the executive, that is, through the Cabinet, the Prime Minister or the Political

Affairs Committee of the Cabinet. Therefore, you should set up some healthy democratic principles, norms and procedure. If you want to supersede a Judge, it should not be done according to the whims of the executive but according to certain institutional principles which you have to set up.

There is another dangerous theory that has been propounded, namely, "suitable social philosophy". The selection of the Judge will be according to his ideological convictions or social philosophy. Today his social philosophy may be suitable to the Congress Party. Tomorrow it may be suitable to another political party. Before 1970 the Congress was not what it is now. In future, who knows, what it will be? As a student of science I may say that neutrons cause fission in the mass of atoms. But all neutrons cannot cause fission in all mass atoms. Certain condition has to be created, certain compulsion has to be generated in a mass of atoms. Then one or two neutrons are enough to cause nuclear blast in the mass of atoms. The neutron inside the Congress, Mr. Kumaramangalam, is inducing and propagating a certain ideology and creating a compulsion inside the Congress, creating conditions for fission i.e., for another split in the Congress. I am saying this because no honest member of the Congress has tried to really challenge the theory of certain suitability of social philosophy on the basis of which the judges would be selected. Unless you are cautious about it, the future would be bleak because like a neutron would be causing a nuclear blast, this subtle political and ideological indoctrination will cause a nuclear blast inside the Congress.

The Judges will not be guided by the social philosophy of one party today and another party tomorrow. They will be guided by the Constitution. Everybody knows that in our Constitution while the Directive Principles are there, there is no directive to implement those principles enshrined in the Constitution. This has introduced certain contradiction between the Directive Principles and the Fundamental Rights including in our Constitution. That is the reason why we have supported this Government to change the Constitution. In fact, many changes have been made. I yield to none in my desire, and the Socialist Party strongly feels, that nothing should be allowed to

stand in the way of social change and if the Constitution has to be changed, it should be changed.

I want to draw your attention to what a twice-elected President of the Congress had said. He wanted India to be a Socialist Republic and he wanted India to frame its Constitution according to the principles of a Socialist Republic. He stated in his book 'The Indian Struggle' :

"In our free India the Constitution should not be framed according to mid-Victorian concept."

I am referring to Netaji Subhas Chandra Bose. At that time he was dubbed as a fascist and totalitarian for his outlook regarding Constitution of free India.

I know that judges, even though they deal with principles of jurisprudence, their subjective predilections are bound to come in. Jurisprudence is not an exact science like Physics, Chemistry or Mathematics, and, as such in interpreting laws they are quite likely to be subjective on occasion. In correctly interpreting laws, they will be guided by the constitutional provisions. If the Judges find that certain amendments we have made are not according to the fundamental structure of our Constitution, they have the right to strike them down. If the Government is really for the social change, for the Socialist reconstruction of the country, certain radical measures have to be taken, a new Constituent Assembly has to be convened.

Our Constitution is the creation of a Constituent Assembly which had a different authority, different origin, different concept, different capability. This Parliament has not tried to completely, structurally and fundamentally, change the Constitution which was framed by the Constituent Assembly. If you really want, we can do it by convening a new Constituent Assembly. If you really have the courage that you want socialist transformation of our country, you should convene a new Constituent Assembly and we will wholly support you in that effort.

Before that, if some judicial confrontation comes, if the issue of supersession of Judges comes, it is time we should adopt and formulate certain norms, certain principles

certain procedures so that the executive may not have the over-riding authority to appoint Judges according to their suitability which will mean you are trying to subverting judiciary, which will mean you are going to set up a "committed judiciary" and, ultimately, a "dictated judiciary", because it will ultimately mean scuttling the very edifice of the Indian democracy.

SHRI AMARNATH VIDYALANKAR (Chandigarh) : Mr. Speaker, Sir, the reactionary elements in the Opposition parties are in the habit of raising false alarm and creating a sense of insecurity in the minds of people in order to exploit their sense of panic. Formerly, they used to raise a slogan that religion and culture was in danger; then, they raised a slogan that language was in danger and, now, having failed to utilise those slogans, they have raised a slogan that judiciary and democracy is in danger.

In fact, we should look at this problem in a proper perspective. This conflict between the judiciary and the legislature the conflict between the Parliament and the judiciary, is an old story. I will not go into that because my time is very short. But really it was the Opposition that dragged judiciary into the political arena. When the Opposition thought that the two institutions under the Constitution stood for stability and continuity—the judiciary is for stability and continuity and the Presidential office is also meant for stability and continuity—the Opposition tried to drag the ex-Chief Justice, Shri Subba Rao, into the Presidential election. He was the Chief Justice when the Golaknath case was decided. His political philosophy and social philosophy was known to them. So, they persuaded him to resign from the office of the Chief Justice and drew him into the political arena by putting him up, on their behalf, for the Presidential election. They thought they will utilise the Presidential office for their political purposes, that is, to keep the *status quo* and oppose the social change.

Then again, they thought that the Presidential office could be utilised at the time of the last Presidential election and they raised a slogan that they wanted the Presidential office to stand for stability and, by stability, they meant *status quo*. At that time, the controversy with regard to bank nationalisa-

[Shri Amarnath Vidyalankar]

tion was going on and the controversy regarding abolition of privy purses as also going on. They thought that the President's power could be utilised for opposing that social change and for keeping the *status quo*.

Now having failed in that, they want that judiciary should be used for their purpose and they expect that judiciary should protect the vested interests. Mr. Anthony was saying that judiciary in our country was to protect the citizens. Which citizens? Do they want that it should protect the vested interests and landlords? Whom have the judiciary protected in Golaknath case and subsequent cases? Did the judiciary protect the tenant against the landlord? Did the judiciary protect the rights of the workers against the monopolists? Did Mr. Anthony and other friends raise their voice that judiciary should protect the people who are being crushed under the present system? They did not talk about that. Never did they stand for that. Mr. Frank Anthony did not stand even for those detenus whose liberty was at stake. Now they think that, according to their conception, protection should be given to the *status quo*, the present system. That is what they think by stability'.

This is not a question of this judge or that judge. The question is which political philosophy, which social philosophy, is going to be adopted. I do not say that whatever this party says or that party says should be done. The conflict was between Fundamental Rights and Directive Principles. In all the discussions, the question was what kind of importance, how much of weight, should be given to the Directive Principles. Those judges thought that Fundamental Rights were much more important than the Directive Principles. The Directive Principles enjoin on the Government to run the administration in a way so as to protect the rights and interests of those who are crushed, those who are downtrodden. But the judges, for instance in the Golaknath case and other cases, tried to ignore the Directive Principles, and the Opposition did not raise their voice against it, saying that the Directive Principles were as important and as part and parcel of the Constitution as the Fundamental Rights were. This is the real question I say that we want the judges to be committed, not to this party's philosophy or that party's philosophy, but they should be committed

to the Directive Principles as much as to the Fundamental Rights. And I can say that the philosophy and thinking of most of the judges were not in conformity with this.

Much has been said about the Principle of seniority. I do not want to quote all the decisions. But there are decisions of the Supreme Court itself; in all cases where the question of appointment by selection was raised, the Supreme Court has given decisions—and Mr. Hegde was also there—that it is for the Government to decide and that seniority is not the sole principle. I want to quote only one ruling, the ruling given by Mr. Justice Wanchoo, the then Chief Justice and Mr. Justice R. S. Bachawat, Mr. Justice V. Ramaswamy, Mr. Justice G. K. Mitter and Mr. Justice Hegde :

"Within limits seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof, and experience is certainly a factor in the making of a successful employee. Seniority is given most weight to promotion from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is the best suited for promotion to a higher grade; the very opposite may be true."

In this and many other judgments, the Supreme Court has taken the view that seniority should not be the sole criterion; in the case of selection posts, it is for the Government to decide who is the suitable candidate.

There is a lot of talk about convention. I can cite many instances where this convention has not been followed. It is not a convention really. In the Rajasthan High Court Mr. Wanchoo superseded other Judges. There are other cases also, in Madhya Pradesh, and I can cite many instances, but for want of time, I will not go into them. But this is not the convention that is always followed, and I can say that in all these matters, the Government has been the real judge and in this matter, if they have ignored the seniority, it is only a right case and it is in order to promote a social philosophy that is acceptable to the people and that is

the philosophy that is enjoined and accepted in our Directive Principles.

Now, there is a lot of talk about politics. They say that we have been persuaded by our political considerations. Who is not swayed by political considerations? They want that the Judges of the Supreme Court should decide cases in a particular way to protect their vested interests. They wanted the President also to protect their interests. What is politics now? What is the politics in India at present? The politics is whether we can give relief and succour to the people who are down-trodden, who are suffering, and whether we can through legislation give them protection. If the law stands in the way and if the judiciary stands in the way, I can say that those Judges who stand in the way and those Judges who are wedded to the philosophy of *status quo* should be superseded, and I think they are not fit and not suitable for occupying that high post.

श्री परिपूर्णानन्द वैन्सली (देहरी-गढ़वाल) : अध्यक्ष महोदय, अभी माननीय सदस्य श्री माबलकर तथा कुछ अन्य साधियों ने यह आरोप लगाया कि तीन जजों ने चूकि संविधान संशोधन के विरोध में अपने निर्णय दिये इसलिए सरकार ने उनको सुपरसीड किया। शायद वे इस तथ्य को भूल जाते हैं कि यह एक संयोग की बात थी कि जस्टिस सीकरी मुख्य न्यायाधीश के पद से कार्य-मुक्त हुए, इसलिए यह स्थिति पैदा हुई। यदि वे एक साल, दो साल और रहते तो कदापि यह स्थिति सामने नहीं आती। इसलिये यह आरोप लगाना कि सरकार ने कोई पहल की है सर्वथा मिथ्या है। बाजपेयी जी ने कहा कि हमारे देश की जनता सर्वश्रेष्ठ है, मैं उनके सारे भाषण में सारगर्भित बात केवल यही समझता हूँ। इसीलिए जनता में भारी बहुमत से कांग्रेस को लोक सभा में भेजा है। संविधान में हमने जो संशोधन किया वह जनता की भावनाओं के अनुरूप किया है क्योंकि गोलकनाथ केस तथा प्रीवीपर्स और बैंक राष्ट्रीयकरण के मामले में रोड़े सामने घटकाये जा रहे थे। इसलिये मैं समझता हूँ बाजपेयी जी व समये

जी इस तथ्य को भूल जाते हैं कि एग्जीक्यूटिव को किन परिस्थितियों का सामना करना पड़ता है जोकि जुडिशियरी सामने लाती है। उदाहरण के रूप में मुल्की क्लेम की बात मैं करना चाहता हूँ। सुप्रीम कोर्ट के जजमेन्ट के बाद हैदराबाद व समूचा आंध्र प्रदेश में जो स्थिति पैदा हुई वह भली भाँति मालूम है जहाँ एक प्रकार से अराजकता की स्थिति पैदा हो गई थी। यदि हम प्रकार का कोई निर्णय जुडिशियरी करती है और उसने देश भर में अराजकता पैदा होती है तो क्या हाल हमारे देश का होगा? कहा जुडिशियरी रहेगी, और कहा हम रहेंगे? इसलिये बहुत आवश्यक है कि कार्यपालिका को अपने दायित्व का पालन करना होना है।

सुप्रीम कोर्ट जजब की मीनियरिटी के बारे में कई उदाहरण पेश किये गये हैं, सब को मालूम है कि जॉन्टम हैगड़े, जस्टिस प्रोवर की पदोन्नति हुई, जॉ दुमरा को सुपरसीड कर के आये। और कई न्यायाधीश हुए जैसे जस्टिस इमाम को सुपरसीड करके श्री गजेन्द्रगडकर आये। इसी प्रकार से राजस्थान हाईकोर्ट के जस्टिस वाचू औरों को सुपरसीड कर के मुख्य न्यायाधीश बने और जस्टिस मरजू प्रसाद भी राजस्थान हाईकोर्ट के चीफ जस्टिस दूसरो को सुपरसीड कर के आये। लेकिन इस बारे में विरोधी दल के माननीय सदस्यों ने कुछ नहीं कहा। कितने ही व्यक्तियों के उदाहरण यहां प्रस्तुत किये गये, और हमारे विरोधी दल के लोगों को भी मालूम है किन्तु उन का किसी ने कभी प्रतिकार नहीं किया। आज ही वह नौबत क्यों आयी?

जस्टिस राय के ऊपर यह आरोप लगाया गया कि वह अब शायद मत्तारुद दल की नीतियों का समर्थन करे इसलिये उनको चीफ जस्टिस बनाया गया। किन्तु आपको मालूम होगा कि उन्होंने मेन्टेनेंस आफ इंटर्नल सेक्योरिटी ऐक्ट में और न्यूब्रिज्रिट कंट्रोल आर्डर में सरकार के खिलाफ निर्णय

[परिपूर्णानन्द पेंव्यूली]

दिया था। अगर ऐसी बात होती, जैसा कि विरोधी दलों का कहना है, तो उनको चीफ जस्टिस नहीं बनाया जाता।

हमारे जो एडवेंचरिस्ट मार्क्सिस्ट भाई हैं और दूसरे जो तथाकथित समाजवादी लोग हैं एक तरफ तो क्लास कैरेक्टर और क्लास बायस की बात करते हैं कि जुडिशियरी उस वर्ग की है जो एक विशेष वर्ग को समर्थन देती है, किन्तु उस के साथ ही वे उस न्याय प्रणाली की व्यवस्था में जिनकी राय में वे वेस्टेड इटरेस्ट को रिप्रेजेंट करते हैं, उन को बदलने का प्रयास होता है तो वे उस का विरोध करते हैं।

राष्ट्रपति द्वारा मुख्य न्यायाधीश की नियुक्ति के बारे में कुछ लोगो ने कहा कि इसमें राजनीति की बू आती है। वे त्यागपत्र देने वालों की दशा पर धड़ियाली आसू तो बहाते हैं, लेकिन त्यागपत्र देने के बाद श्री हेगड़े ने जो प्रेस वक्तव्य दिये उसमें लगता है कि अगर राष्ट्रपति ने उनको मुख्य न्यायाधीश बना दिया होता तो न्यायपालिका की क्या हालत होती। एक बात तो उन्होंने यह भी वही कि प्राइम मिनिस्टर के आदमी मेरे टेलीफोन को टेप करते थे और मेरी गतिविधियों पर नजर रखते थे। लेकिन मैं पूछना चाहता हू कि जब वह न्यायाधीश थे तब क्यों नहीं सरकार की नोटिस में यह बात लाये? क्या वह उस दिन का इतजार कर रहे थे कि जब मुख्य न्यायाधीश बने तब सरकार की नोटिस में इन बातों को लाये? मैं समझता हू कि तथ्यों को तोड़ मरोड़ कर सब लोगो ने जो एक सी बात कही है उसका कोई अर्थ नहीं है।

मैं आप के सामने ए० आई० आर० 1967 सुप्रीम कोर्ट के एक जजमेंट को कोट करना चाहता हू। केवल एक पक्ति Leonard D White की पुस्तक "Introduction to the Study of Public Administration"

से उद्धरित करना चाहूंगा जिसे सुप्रीम कोर्ट ने अपने फैसले के समर्थन में कोट किया था। सुप्रीम कोर्ट ने जिस में चीफ जस्टिस के० एन० बाम्बू थे, दूसरे लोग थे और श्री हेगड़े भी थे, 'Introduction to the Study of Public Administration', से निम्न पक्ति कोट की - I quote :

"When seniority is made the sole determining factor at any level it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade. The very opposite may be true."

इसलिये मैं समझता हू कि राष्ट्रपति के निर्णय पर इस प्रकार के आरोप लगाना सर्वथा निन्दनीय है और देश की प्रगति के मार्ग में बहुत भारी रुकावट पैदा करने वाली बात है।

SHRI S MOHAN KUMARAMAN-GALAM In the course of his speech Shri Satyanarayan Rao made a false and scurrilous statement that I was related to Chief Justice A N Ray. This is totally false. I am in no way related to Justice Ray. I can only express my regret that Shri Satyanarayan Rao should have made such an irresponsible statement and descended to a low level of slander. If he had any doubts he could have discussed with me, he could have cleared the matter with me.

SHRI SOMNATH CHATTERJEE (Burdwan) Sir, it is no doubt that this matter has been agitating the public mind. It is utterly wrong on their part to say that all the lawyers in the country except the Steel Minister and the Law Minister and their supporters on that bench, are reactionaries, and they go on abusing lawyers as a class without going into the merits of the case. So far as the political aspect of the matter is concerned, our leader Mr. Gopalan has dealt with it. I want to make some observations because of, if I may say so, the arrogant intervention made by the Steel Minister while dealing with this matter which really does not pertain to his Ministry. This policy statement which was sought

to be made on the floor of the House by the Government with regard to the appointment of Chief Justice came from the Steel Minister and neither the Prime Minister nor the Law Minister came out with a policy statement.

This is an amazing attitude on the part of the Government. When the matter first came up on 26th April, 1973, the Law Minister tried to give an explanation on the basis of some sort of reasonableness, trying to resurrect an old Law Commission's recommendation which had never seen the light of day; at least, Government never thought of opening its pages to find out what the recommendations were and whether they should be followed or not in the past. Now, after the intervention of the Steel Minister, that facade of reasonableness has been ripped open. No longer any reliance is being placed on the Law Commission's recommendation.

The Law Minister gave an additional justification that we must have certainty and stability in the law of this country and we must know what the law of the land is, as interpreted by the Supreme Court of India. Now, the Steel Minister, his colleague has gone much further ahead. In the summary which he gave to us, this was just a minor and fifth point; in the order of priorities, certainty and stability of the law of the land was given the last preference. He has said that a particular judge must have a particular social philosophy which would be a suitable social philosophy, he must have a political outlook and he must be able to understand or appreciate the wind of change that is supposedly blowing in this country under the dynamic leadership of the Prime Minister of India.

This is the reason that he has put forward. I am not going into the question of the constitutionality or otherwise of this appointment just now, because the time at my disposal is short. Suppose that, or let us concede that the President of India, who is advised by the Cabinet has got absolute power in selecting the incumbent to the office of the Chief Justice of India. Does it mean that he can use that absolute power arbitrarily and absolutely without any consideration of anything else? Speaking for myself, I have got the highest regard for Mr. Justice A. N. Ray. I have seen him from 10-41983373

my childhood, and I have appeared before him in a number of cases at the Calcutta High Court as well as in the Supreme Court of India. He has adorned the office of judge with distinction and ability, and I have no manner of doubt, and I hope, that he will be able to discharge his duties of the great and high office that he is now occupying, in a manner which will be in keeping with the best tradition. But, Sir, it is not a question of personality.

I am not holding any brief for any of the superseded judges. We are not enamoured of the judiciary. Shri A. K. Gopalan has already spoken about this, and so, I would not repeat all that. The question is on what basis you would select a particular person and appoint him as the Chief Justice of this country or the Chief Justice of a High Court or the judge of a particular High Court, for that matter.

So far as the convention is concerned, the Law Commission's recommendations with regard to the convention has not been followed. Mr. Seervai, who is now one of their principal exponents, in his book has referred to this convention and has said that this healthy convention should be followed in future to avoid executive interference in the appointment of the Chief Justice of this country. But Government has not followed that. This convention has been given a go-by. Very well, let them give a go-by to this convention. But how are they going to appoint the Chief Justice of this country in the future? How are they going to appoint Chief Justices of the High Courts in this country in future? What are the standards? Are these appointments going to be made on the basis of the subjective satisfaction of a particular Minister, or of the Prime Minister or of the Steel Minister or of any busy-body Minister dealing with this matter? These cannot be matters of subjective decisions. How does one assess specifically the qualifications of a person to be the Chief Justice of India?

Now, this has to be done objectively. What are the objective standards? How does one find out a Judge's political outlook? A Judge is not supposed to hold any political views, at least not to air them in public. He is not supposed to proclaim his social philosophy openly and publicly. Then how does one ascertain it? Will there be a *viva*

[Shri Somnath Chatterjee]

took test in the presence of the Prime Minister and the Law Minister of India to know his political views and social philosophy to judge his qualification for appointment as Chief Justice of India? How do you find out what is his social philosophy? How do you ascertain his political outlook?

SHRI S. A. SHAMIM : The CBI will find out.

SHRI SOMNATH CHATTERJEE : That is why we say that this is not done to strengthen the judiciary, not to achieve what they conceive to be the real directive principles, for which the executive has never bothered. Through the judiciary, you cannot achieve the directive principles in this manner. The object is to have a docile judiciary and a pliant judiciary. The theory now being propagated is that a judge, if he wants to continue in office, must give judgments which receive the executive's approbation. This is a theory we cannot accept, but this is being sought to be implemented in the manner it has been done.

Three of the Judges were not acceptable to Government. If that is so, there is a provision in the Constitution of India which says how you could get rid of the Judges. Why did you not follow that procedure? What you could not do directly, you have taken recourse to this circuitous and indirect method, by appointing a junior Judge over the head of the three Judges so that the three Judges would resign. If you did not like them, you could have taken recourse to impeachment. That was possible.

We are being told of this social philosophy and political outlook. Out of the Judges who constituted the majority in the Golak Nath Case, three were subsequently made Chief Justices, namely Justice Hidayatullah, Justice Shah and Justice Sikri. Justice Shah and Justice Sikri were also in the majority in the Bank Nationalisation case and the Privy Purse case. All these three Judges were part of the majority in the Golak Nath case, in the Privy Purse case and in the Bank Nationalisation case. How were they appointed Chief Justices? Mr. Justice Hegde was not a party to the Golak Nath judgment at all. I was hearing some hon. Members saying that he was a

party to it. He was not even a member of the Bench then.

SHRI S. A. SHAMIM : He was a party in the Indira Gandhi case.

SHRI SOMNATH CHATTERJEE : He was not a party to the Golak Nath case judgment at all.

Mr. Justice Bhargava and Mr. Justice Mitter who were in the minority—I want the hon. Minister to deal with this—in the Golak Nath case, were in the majority in the Bank Nationalisation case. In one case, Mr. Justice Bhargava and Mr. Justice Mitter were progressive and the same learned Judges were reactionary in the other judgment. Is this the way you find out a reactionary Judge or a progressive Judge? Mr. Justice Bhargava was also in the majority in the Privy Purse case, but he was in the minority in the Golak Nath case. They are supposed to be reactionary Judges? Mr. Justice Ray was a reactionary Judge because he was in the majority in the MISA case? Mr. Justice Shelat was a reactionary Judge Mr. Justice Hegde was a reactionary Judge and Mr. Justice Grover was a reactionary Judge because they struck down this infamous law, 17A of MISA, which is a Draconian law?

You talk about social philosophy and directive principles. But you have enacted a law for detention of people without trial for three years, indefinitely. And you are talking of the social philosophy and social outlook of these Judges who have struck down a Draconian piece of legislation; they are being characterised as reactionaries.

This is the attitude of this Government. Mr. Justice Ray delivered the leading judgment in the Newspaper Control case. The learned Judge criticised very strongly the Government's decision in the matter and struck it down, describing it as an arbitrary decision and executive high-handedness. The same judge suddenly becomes a reactionary in the Newspaper Control case?

This is not the way we decide as to what is reactionary, who is a reactionary judge and who is a progressive judge. On the basis of one or two judgments, the executive here will want to exercise absolute power of deciding who will be the Chief

Justice of India and which Judge will be given the order of the boot because you do not like one particular judgement of his.

Therefore you should analyse the composition of these three benches. These three judgements have been opposed, rightly so, and, I am not going into that question that is a much broader question. But we want to know how in future you are going to appoint the Chief Justice? On the basis of the principle which has been laid down by the Steel Minister? This will be applied in future? I would like to know from the hon. Minister. I request the hon. Minister to give us a reply, if he can, when a decision in this case was taken to appoint the Chief Justice of India? It was well-known that Chief Justice Sikri was retiring in the last week of April. The matter of appointment of Chief Justice cannot be left till the last day. It is a matter of high policy and one of the highest offices in the country is involved. Government should have been applying its mind to this matter well before the date of retirement of Chief Justice Sikri. I should like to know when it was first decided as to who would be the next Chief Justice or who would not be. Was it kept hanging till the judgement in the fundamental rights case was delivered? Was it that only after the 25th of April, the Government started thinking on the basis of the social outlook or the social philosophy disclosed in that judgement on Tuesday, who would be the Chief Justice of India and who would not be? Was that the way this was done? It could not have been so. Therefore the decision must have been taken much earlier and this is being sought to be given effect to on the basis of the decision that has been given in some cases and some of the observations made by some of the judges. We are entitled to say that some judgement is wrong but we should not necessarily impute motives to a particular judge and then say he was a reactionary on the basis of some observations here or that he was progressive on the basis of some observations in another judgement. You then pick and choose on the basis of your own predilections. There will be now competition among these judges to curry favour with the executive Government. For instance, I have been raising this question: why do you offer job and assignments to

retired judges? That is one of the obvious principles that has crept in the judicial set-up of this country to lure those judges: if you keep yourself in the good books of the Government your future even after retirement will be looked after. They will be parading before you with their certificates of social philosophy and political outlook to get appointments. Therefore, I submit that the reasons which have been put forward are not only contradictory; they are sterile.

The real reason was to single out one judge for a very inconvenient and annoying judgement which was given. I need not elaborate. I am only sorry for Mr. Justice Grover and Justice Shelat because in order not to give the impression that a particular judge has been singled out these two judges have also been clubbed with him. Otherwise it would have been too obvious even to the votaries of Indira socialism and that is the real object of this supersession.

MR. SPEAKER : Shri Parashar ...
(Interruptions).

SHRI S. M. BANERJEE : We only got one speaker even after extension .

MR. SPEAKER : The time taken by them was not more than the allotted time. You can count it.

SHRI S. M. BANERJEE . In our case Shri Mukherjee did not take more than 25 minutes.

MR. SPEAKER : You do not know. I know it.

SHRI S. M. BANERJEE : Why should we be superseded in the House. My party should not be superseded like this.

18 Hrs.

MR. SPEAKER : There is no question of supersession here. Shri Parashar.

PROF. NARAIN CHAND PARASHAR (Hamirpur) : Mr. Speaker, Sir, it is rather paradoxical that on the one hand the spokesmen of the Opposition should say that they agree with Shri Gopalan that they do not believe in the judiciary and on the other hand, they should find out a point to criticise the Government for the supersession of three judges. This is a convenient

[Prof. Narain Chand Parashar] stick in their hands to whip the Government for what they think was not correct. In fact this is a historical turn in the history of Constitutional march of the country. I would congratulate the Government for the bold decision that is taken and a clear line that is given.

I would refer to one of the editorials of a newspaper published from Delhi which is not a Congress paper—*The Times of India* editorial dated 28th April—says that 'the Supreme Court is not a third chamber'.

SHRI PILOO MODY : That is not a Congress paper. Then whose paper is it? Government of India is the custodian of this paper. Perhaps this he does not know.

PROF. NARAIN CHAND PARASHAR : This is an important warning that the Supreme Court cannot be the third chamber of legislature. What is at issue is not the supersession of three judges or the appointment of the Chief Justice. What is at issue is the character of the Supreme Court. In all democratic countries, in their march towards the constitutional democracy, there have been times when there has been a conflict—a confrontation—between the judiciary as such and Parliament. On the other hand, even in the U.S. . . This has happened and I would just refer to two sentences from a book by Mr Samuel Krislov entitled 'The Supreme Court in the Political Process'.

"In the twentieth century all this has been reversed. The modern Supreme Court reflects a Presidency sensitive to the Electoral College votes of large, liberal states with urban predominance and a Senate increasingly responsive to much the same pattern. Presidential appointments take into account senatorial attitudes but reflect more nearly the President's own and tend to make the Court more liberal than either branch of Congress, and certainly more so than the House of Representatives."

In the past even the slavery was being defended by the Supreme Court off the U. S. We are very happy that the time has come when the Fifth Lok Sabha is witnessing that the reactionary forces have got a big blow and the frustration in the ranks of these people is a symbol of deep-seated

suspicion. On the one hand Shri Som Nath Chatterjee hopes that the tenure of the Justice A. N. Ray would be good for the country and on the other hand, he is casting serious doubts. May I ask the Opposition Members that by their acts or by their criticism, are they enhancing the prestige of the Supreme Court which they are so avowedly and protestingly trying to protect? By their speeches and by their protests, they are bringing down the dignity and the respect in which the Supreme Court should be held in this country. I would say that there is another sentence about the members of the bar, in the editorial by the paper referred to above. What they are doing is this. They are very much championing the democracy. But leading members of the bar are making a sad mistake in talking and putting across the view that the court can by itself be a custodian of democracy.

In a democracy, Parliament is supreme and the will of the people as reflected in Parliament must make its mark and must shape the destiny of this country. Secondly, I shall tell you that those people who are criticising the supersession of the three judges would have done the same thing at the time of Justice Patanjali. When Pandit Jawaharlal Nehru tried to put forward this view that there should be continuity in the tenure of the Chief Justice and that Justice Mukerjee should take over, the combined body of judges had said that they wanted Justice Patanjali to be the Chief Justice and not Shri Mukerjee. May I ask a question as to why they are singling out three judges saying that these are the judges who have been victimised by the Congress Government for giving views against the Minister or Prime Minister? May I ask them whether in their view all the other judges of the Supreme Court, except these three, are acceptable to them? If all the other judges who constitute a majority of the Supreme Court are acceptable to them, then it is *ipso facto* true that one Chief Justice cannot do grave harm to democracy, as they are now saying.

Mr. Mishra has very feelingly referred to the autobiography of Mr. Justice Mahajan. "Looking Back" who fortunately belonged to my State. May I remind him that the son of Mr. Justice M. C. Mahajan has been elected from a parliamentary

constituency of Himachal Pradesh and he is sitting on these benches today. He subscribes to the philosophy to which we are all now a party. May I remind the opposition that one of the sons of Mr. Mahajan is there as judge of the Punjab High Court. Mr. Vajpayee referred to this confrontation between a yogi and commissar, between this and that. I would remind him that Mr. Madhok would tell Mr. Vajpayee the same thing about the Jan Sangh. We say, yes; this is confrontation. The age of confrontation has come, when there should be a confrontation between those who champion the cause of the masses and those who champion the cause of a few money-bags, between missionary and the mercenary. Till three months ago, suits involving property worth Rs. 20,000 or more alone could be heard in the Supreme Court. May I know how many people in this country have property worth Rs. 20,000 or more? For filing a suit in the Supreme Court, one requires Rs. 10,000 for paying the fees of the advocate and other expenses. So, in this poor country, how many people can go to the Supreme Court? All this noise is just a humbug and show to let the country feel that a grave harm is being done to democracy. I maintain that the march of constitutional democracy is safe in the hands of the Government and the Supreme Court cannot be given the right to arrogate to itself the powers and programmes of a third chamber. It is just a body to see that the law is correctly interpreted and correct decisions are taken.

I welcome this challenge thrown by Mr. Vajpayee and I hail this confrontation because it will show clearly as to who is with the haves and who is with the have-nots. Let it be decided once and for all. Those people who are having vested interests in the seats of power would not allow any kind of progress in this direction. Mr. Palkhivala was given 39 days to argue his case but the Government advocate was given just 21 days. Since he had to defeat all the arguments which were put forward, the Government advocate ought to have been given larger number of days but he was not given. I do not criticise the personality of the judge or the other. I think all the judges are equally honourable. But ultimately it is not the appointment of the Chief Jus-

tice or the selection of a few judges but the supremacy of the will of the millions of the people of India that is going to determine the destiny of India. The vested interests will get a staggering blow at the hands of this Parliament, which is supreme.

THE MINISTER OF LAW, JUSTICE AND COMPANY AFFAIRS (SHRI H. R. GOKHALE) : Sir, the issue is a serious matter and does not admit of any fun. It does not admit of acrimony, high temper or imbalance. Let us, therefore, approach the issue in the spirit in which it deserves to be approached. Some of you on the other side may not see eye to eye with what I am going to say. But you will agree that the issue is fundamental and of crucial importance and it will be better for all of us if we do not deal with it in a light-hearted manner.

It is unfortunate that some of those persons who had recently been the Judges of the Supreme Court have themselves been responsible for making statements which will denigrate the prestige of the judiciary. I do not have the capacity to match Mr. Justice Hegde's power of vituperation or abuse. But all that I can say is by what he has said he has only given further justification for the action which the Government have taken.

The major issue is, as has been stated by hon. Members on both sides of the House, what are the circumstances, what are the considerations which should weigh with the appointing authority in making the selection of a Judge, much more so in making the selection of the Chief Justice of the highest court of the land. But, before I deal with that question, there are a few collateral matters, incidental matters, to which reference was made in the course of the long and arduous debate of six hours today, which I would with your permission like to dispose of first.

I thought the constitutionality of the action taken was not seriously challenged, although it was seriously challenged today by the hon. Member on the other side, Shri Shyamnandan Mishra. Some reference to it was made by Shri Frank Anthony also. You will remember that when the other day I had the occasion to speak for a short while and intervene in this discussion, it was at the zero hour when there was no full-fledged debate. It was unfortunate

[Shri H. R. Gokhale]

that even at that time many interruptions were there in the little and short statement that I wanted to make. After that it was only yesterday in the Rajya Sabha, and today in this House, that I am really getting this full-fledged opportunity of mentioning Government's position regarding the issue which is under discussion today. Therefore, it is not as if somebody else was put up, Shri Mohan Kumaramangalam was put up, to make an exposition of the Government's policy. An attempt was made to suggest, as it were, that what he said was something different from what government would have otherwise said. Sir, I disagree with that suggestion. And I would like to point out that while every one would have his own way of putting a on the basic understanding of the question there is no difference of opinion between me and Mr. Mohan Kumaramangalam nor between my other colleagues and myself and Mr. Mohan Kumaramangalam...

(Interruptions). During the long debate, in spite of the greatest provocation, I did not interrupt the hon. Members on the other side and I do expect they will extend to me the same courtesy now. I began by saying that all of you may not agree with me.

SHRI SHYAMNANDAN MISHRA : We are only trying to seek clarification.

SHRI H. R. GOKHALE : It is for the purpose of giving clarification that I am here. That is why I am replying to the debate at the end of the debate, the purpose being that I deal with most of the major points that have been raised in this debate.

With regard to the constitutionality, I may mention that on the first occasion I had applied my mind carefully to this question and I had no doubt in my mind that the order of the President was fully in conformity with the constitutional provisions. It appears from what the hon. Member, Shri Viswanathan, said today that there has been some misunderstanding on his part as to what I said. I did not say that the power did not flow from the Constitution, or article 124, to make the appointment of the Chief Justice.

SHRI SHYAMNANDAN MISHRA : Your words are there.

SHRI H. R. GOKHALE : I do not say that article 126 itself is enough to derive

this power. I did refer to article 125 no doubt. I said, for the interpretation which I was putting before the House on article 124, I am entitled to gain support from article 126. I did also say that the marginal note of article 126 refers to acting appointments although in the body of the article there is no such indication that it should be confined only to acting appointments. But it has reference to a case where a vacancy in the office of the Chief Justice occurs and, when the President is entitled to ask any one or the other of the puisne Judges of the Supreme Court to take up the position the acting Chief Justice, then I said what the constitutional position was that even in the case of acting appointments of short duration, it was very clear, under article 126, that the President was entitled to ask a Judge, whether junior or senior, to take up the position of the acting Chief Justice. I gained support from this on the understanding of the plain language of article 124. There is no doubt in my mind that the power to appoint the Chief Justice rests with the President. (Interruptions). You may not agree. You have put your point of view and I am entitled to put my point of view.

Looking at the first part of article 124, it refers to the appointment of Judges. I will come to Dr. Ambedkar's speech because a reference was made to Dr. Ambedkar's speech in two or three speeches during the course of the debate. There is no doubt that so far as the appointment of Judges of the Supreme Court is concerned, there is an obligation on the President to consult such Judges of the Supreme Court or of the High Courts as he may deem necessary. It is also quite clear, looking at part two, that if you have to appoint a Chief Justice, the consultation with the Chief Justice is not obligatory. But if you want to appoint a Judge, the consultation with the Chief Justice is obligatory. It is on this basis that I said, all that the article required was, you appoint a Judge after consulting the Chief Justice and other Judges as he may deem fit and that is where the obligation to consult comes to an end.

It has been said that it is true also in the case of the appointment of the Chief Justice of India. With respect to that point of view, I do not agree. There is no scope for any doubt on this question. The power

flows from that article to appoint a Judge or a person who is not a Judge also as the Chief Justice of India. (*Interruptions*). Let us not argue between ourselves because there will be no end to it. On most of the points, you will not agree with me. But when I speak here, I am not speaking only to convince you. I am not that much optimistic. I am speaking through this House to the entire nation. The entire nation has been listening to the debate and it is my duty to put the Government's point of view before the House.

SHRI SHYAMNANDAN MISHRA : It is our duty also.

SHRI H. R. GOKHALE : You have done it.

SHRI SHYAMNANDAN MISHRA : I will have to rise on a personal explanation. He has been referring to me. Here are the words uttered by him. I have a right to reply to him. I rise on a personal explanation.

MR. SPEAKER : Afterwards. Don't interrupt him in between.

SHRI H. R. GOKHALE : Therefore, my submission is, there is no doubt with regard to the constitutional validity of the appointment made in the present case.

A reference was made to Dr. Ambedkar's speech in the Constituent Assembly. I have read Dr. Ambedkar's speech.

Dr. Ambedkar was considering three propositions in order to find out as to what is the best method to be adopted in India. It was present to his mind as to what was the system in America. It was present to his mind as to what was the system in the United Kingdom. He has said that in America there is the necessity of confirmation by the Senate; the circumstances prevailing in that particular type of political system might have made it reasonable for them to have adopted it, but in the circumstances obtaining here, he did not think that that was the proper system to adopt. He has given that view. About Britain, he says that 'appointments are made by the Crown'. It is not quite clear to me—Dr. Ambedkar was the greatest of our Constitutional lawyers; therefore, when I say this I am saying with great deference and respect to him—; I do not know what kind of distinction he was trying to make; it is not clear because he did not elaborate

12-419LSS/73

it—"appointments are made in England by the Crown". The Crown in England does not make the appointments in the sense that the King or the Queen makes the appointments. In England they are made on the advice of the Council of Ministers. The same position, for all purposes, obtains here. We do not have the Crown, we do not have monarchy, we have the President, and more or less the same principle is contemplated in India also—the appointment is made by the President on the advice of the Council of Ministers.

With regard to consultation, I have read that part of Dr. Ambedkar's speech very carefully. What he says that "we have found a middle course which is suitable to India". As I pointed out, he has referred to Britain and said that appointments are made by the Crown. With all respect and deference to him, I do not see the difference, but something must have been present in his mind, I am quite sure. He says, "We have evolved a middle course." It is not only that Government advises the President of India but there is something else, "namely, consultation before the appointment is made". That is what is meant by his saying "we have evolved a middle course". That is quite true. Therefore, to the extent to which consultation is obligatory, as Dr. Ambedkar said, a middle course has been evolved in India. That middle course, in my respectful submission, applies to the situation where—I am not referring to the High Court appointments; for the sake of the present appointment, let us take the Supreme Court only—you have to consult the other judges, such of the other judges as the President may deem necessary, and consult the Chief Justice of India necessarily when you make the appointment of a judge. I have not been able to see how from the speech of Dr. Ambedkar it could be inferred that he also meant that you must consult while making the appointment of Chief Justice of India also. On the contrary, the article itself excludes consultation with the Chief Justice of India when appointment of Chief Justice of India is to be made. So, that takes care of the first objection that has been raised...

SHRI SHYAMNANDAN MISHRA : No, that is wrong. (*Interruption*). I have quoted the Prime Minister's reply in the Rajya Sabha.

SHRI H. R. GOKHALE : I have not yet finished. I cannot really hope to satisfy everybody. But I have to put my point of view before the House and that is what I am endeavouring to do. The Prime Minister's reply also, which was referred to by the hon. Member in the course of his speech, does not alter the position at all. It is a fact, which he stated, that consultation has been done in appropriate cases. *(Interruptions).*

SHRI SHYAMNANDAN MISHRA : No, no.

SHRI H R GOKHALE : Appropriate consultation has been done.

SHRI SHYAMNANDAN MISHRA : You are not representing the position correctly.

MR SPEAKER : Please do not interrupt him every time in between

SHRI SHYAMNANDAN MISHRA : He is referring to my point, to what I said, and am entitled to tell him that he is not representing my point of view correctly. I have referred to the Prime Minister's reply. He is misquoting that reply. Now, this is the position. After all this is Parliament of India. It is our Parliament and the Chair has to be of help to us.

SHRI SAMAR GUHA : If the hon. Minister avoids mentioning names, then personal explanations can also be avoided.

श्री सच्चु लिये (बांका) : मैं टोकना बिल्कुल नहीं चाहता हूँ लेकिन चूँकि जवाब दे रहे थे और मैंने जो मुद्दा रखा था एवरी जज, यह जो शब्दावली है उसमें मुख्य न्यायाधीश भी आता है।

A Judge—does it not include the Chief Justice?

ग्राफ जस्टिस को भी एम्पाइन्ट नहीं कर सकते हैं सीधे चीफ जस्टिस नियुक्त नहीं कर सकते हैं।

SHRI H R GOKHALE : It does not. I have said it that it does not. I have also dealt with this

I have already said that when you appoint a person who is not already a Judge, you have to undergo the procedure of consultation. I have started with that, that jurist who is not already a Judge is to be appointed or a Member of the Bar is to

be appointed, a judge, before he can be appointed the Chief Justice, consultation with the Chief Justice is obligatory. That is what I said in the beginning....

SHRI SHYAMNANDAN MISHRA : Now, he has referred to the reply of the Prime Minister which she made to a question of Shri A.P. Chatterjee in the Rajya Sabha and she said that in appropriate cases consultations could be made. That was the Prime Minister's reply. I had quoted this ..

श्री सतपाल कपूर (पटियाला) : एम्पाइन्ट ग्राफ आर्डर रुल्स ग्राफ प्रोसीजर के लिए होता है न कि डिफेन्स ग्राफ प्रोपीनियन के लिए।

SHRI SHYAMNANDAN MISHRA : I am reading the wording of the reply which the Prime Minister made in the Rajya Sabha. That is what I have quoted. The point of order is that he is misrepresenting what I have said. Is that not a point of order?

SHRI C M STEPHEN : It cannot be a point of order. Point of order relates to the enforcement and interpretation of the Rules of Procedure. He can rise on a point of explanation not a point of order.

SHRI SHYAMNANDAN MISHRA : He is misquoting. The Prime Minister said "In any case, all appointments of Judges in the High Courts and the Supreme Court as well as the Chief Justice are made by the President in accordance with the provisions of the Constitution and after appropriate consultation"—not consultations in appropriate cases. He is misquoting me.

SHRI H R. GOKHALE : It does not make any difference.

Then, it is unfortunate that in the course of the debate, certain references were made to the present incumbent of the high office of the Chief Justice of India. It is not necessary for me to refer to all those innuendos, but to one in particular, it is my duty to refer because according to me, it is a blatant attempt not only to impute motivations to the Government but also to the Chief Justice of India. It was said in the course of the speech of one hon. Member that there were prior consultations with the Chief Justice of India to take an

assurance from him that he will decide cases favourably to the Government. Nothing can be a greater falsehood than this. I had occasion to say this in the other House but I had to repeat it to-day that no Minister is worth his salt if he asks for such an assurance and no Judge is worth his salt if he gives such an assurance. I did it for the sake of the record because it was a very wrong thing to say and make an allegation of that type. Sir, there is a lot of misunderstanding as to what is the attitude of the Government, what is the basic policy of the Government which it adopts in the matter of selection of Chief Justice of the Supreme Court of India. The word *Committed judges* has been freely and frequently referred to. I have no hesitation in saying that the Government is not interested in having committed judges in the sense in which that word has come to be used and understood now. More than any one else the Government is very keen and will see to it that India will have a strong and independent judiciary, and that judges will function according to their oath without fear, illwill, affection or favour. Therefore, the idea in making the appointment is not at all that the independence of the judiciary should be affected. I want to make a brief reference to this aspect of the matter because much has been said and many of the arguments also overlapped.

It has been said that if you do not appoint the seniormost person, according to convention, then, the democracy is in danger, independence of the judiciary is in danger, and so on. Does the independence of the judiciary depend on the temptation to get this high office? Are our judges made of that poor stuff? That is, that if this is denied to them, they will forget the oath which they have taken? Has this happened in India for the last 25 years? In the High Courts numbers of appointments have been made like this and even in this period number of judgements have been made striking down legislative actions, striking down legislations, executive action of the Government, holding cases against the Government. It has not affected the independence of the High Court. How can you say that it is going to affect the independence of the Supreme Court, although it is done constitutionally, although it is constitutionally permissible?

I regret to say that certain accusations have been made of Government bringing in politics. It would have been better understood if it had been said that for political reasons of their own they are introducing a political controversy in this matter. Politics is not there in what the Government has done. Politics is there only in the manner in which, in the concerted way by which some members of the opposition have been utilising this opportunity for the purpose of attacking Government and attributing motives to Government. Let us face the issue straightway because that is the issue on which I have to be frank with the House. The impression which was given was that judges, as it were, were like supermen or demi-Gods, that they have no opinion, have no predilections, have no prejudices, have no bias etc. Every judge, whether of the Supreme Court or of the High Court, or for that matter of any other Court, like any other man is subject to all these prejudices, all these opinions, the bias and the predilections. I don't want to take the time of the House giving so many quotations. There are plenty of them giving the experience of very eminent and learned judges at a time when this issue was not any part of a controversy. But I would only quote a two-line and a very telling quotation from an American judge who says thus :

"The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."

Judges are subject to all influences of these tides and currents, and you cannot blame them for this. I am not blaming them for this. In fact, I would be sorry if the judges were so immune to what is happening all around that like stones they do not react to anything that is happening around. Judges do react one way or the other.

The impression given that by saying that judges have to have an awareness or a special social philosophy, we are saying something new, ignores the fact that even in the courts as they are constituted today, much before the present appointment of the Chief Justice was made, there have been judges with social philosophies, and there have been judges with positive views

[Shri H. R. Gokhale]

on social, economic and political matters, and these views and philosophies are reflected in their judgments.

Mr. Justice Hegde said that we were going to have committed judges. I have already said what I wanted to say, namely that we do not have committed judges in the sense in which that expression is used. But probably Mr. Justice Hegde's definition of committed judges is that if a judge is committed to the *status quo* and if a judge is committed to the philosophy of the bygone centuries then he is independent and he is all right, but if a judge is wedded to social change and ideas and the currents of modern life then he is not independent.

I am saying this with a sense of responsibility, and I am not saying this because of any want of respect for the learned judge Mr. Hegde. I have always held him as a person in high regard, and I do not dispute his right to have his own opinion and views. It is natural that people react differently on different occasions and on different issues. But Mr. Justice Hegde has a philosophy and a social outlook of his own, not only after he got out of the seat on the dais of the Supreme Court Bench, but even when he was a sitting judge of the Supreme Court; not to talk of his observations and his views which can be gathered from judicial pronouncements which have been made from time to time by the learned judge, I am talking of his known views which he has uttered on the public platform in the course of the last several years. I think that it was asked by some Member, perhaps Shri Frank Anthony, I am saying this subject to correction, with reference to a veiled attack on my hon. friend and colleague Shri S. Mohan Kumaramangalam, that if you do not have faith in parliamentary democracy, then how democracy could be protected. I agree that if a man does not have faith in parliamentary democracy, then democracy in the hands of such a man is in danger; and two or three years back, when Mr. Justice Hegde spoke on a public platform, at a lawyers' conference at Bangalore--and this is not on hearsay, because I was present at the conference myself, and the speech is also available--and said that he thought that the parliamentary system of government was not suitable to the genius

of India, and he advocated that India should have the Presidential system of government. It was an expression of a view on political matter, when he was still a judge of the Supreme Court.

SHRI SHYAMNANDAN MISHRA : It is not negation of democracy.

SHRI H. R. GOKHALE : It is not negation of the democracy; that is what my hon. friend says. That was why I began by saying that it is felt that if a judge has views which are in conformity with the ideas of *status quo*, then, of course, it is not against democracy; that is a different matter. But, here, Mr. Justice Hegde was challenging the very fabric of the structure of our Constitution where we accepted parliamentary democracy as the most suitable to the genius of our country. I am not disputing his right to hold that view. On the contrary I am saying that it is his right to hold that view. Someone else may even say, after all, we had a certain system, it is now time that we have a second look, and the country should have another system. I am not objecting to any person, much less Mr. Justice Hegde, holding a view of that kind.

To say that a Judge has no views, no outlook, no prejudices and biases and no political opinion is, I think, to ignore realities.

He delivered a speech in the Bharatiya Vidya Bhavan some months back on a subject called 'Perspectives of the Constitution'. It will be too much if I refer to the whole speech.

SHRI SHYAMNANDAN MISHRA : Please read out some portions.

SHRI H. R. GOKHALE : I am coming to the major portion. He made a quotation. It is usual that when you quote something, you want to rely on that quotation and express your view in support of it. He quoted from the remarkable book *Asian Drama* by Myrdal. It contained a quotation which expressed the views of the eminent author on political matters. After quoting that these were the observations of Mr. Justice Hegde :

"The place of wise and independent advisers was taken by courtiers and

self-seekers. There appears to be a keen search for yes-men".

What was he doing if not talking politics. If my hon. friends say, as they are entitled to say, that this is the position in the country and this is bad for the country, I can understand it. But it does not lie in the mouth of a sitting Judge of the Supreme Court to reflect on the composition of the Government and say that it is composed of people who are courtiers and yes-men.

SHRI SHYAMNANDAN MISHRA : He was quoting Myrdal.

SHRI H. R. GOKHALE : Therefore, it is wrong to say that Judges have no opinions. I do not dispute their right to have these opinions.

SHRI SAMAR GUHA : From your arguments, the inference is that for his political opinion, he has been bypassed.

SHRI H. R. GOKHALE : I am coming to it. Do not be impatient. I will answer it squarely, whether you agree with me or not.

SHRI SAMAR GUHA : This is not a dictated democracy.

SHRI SHYAMNANDAN MISHRA : What does Myrdal mean? You have got flatterers and psychopants.

SHRI H. R. GOKHALE : Not just quoting him. After quoting him with approval, these were his observations. What I quoted was not Myrdal's observation. This was Mr. Justice Hegde's observation. If I was not clear before, let me make that clear, that what I was quoting was not the learned author of *Asian Drama* but Mr. Justice Hegde.

Again, I say I have no objection to Mr. Justice Hegde having his views. In fact, this is in support of what I am saying that Judges do have views. They do have political philosophies. Like all human beings if they have views, you cannot blame Mr. Justice Hegde for having them. I am not blaming him for having those views. What I am saying is that to proceed on the basis like a person who is amoral and also apolitical, that he does not think this way or that way, is a line of thinking which is based on an illusion, which is not based on realities.

SHRI SHYAMNANDAN MISHRA : Who said that ?

SHRI H. R. GOKHALE : You have not said that; but you were not the only member to speak in this debate.

SHRI SHYAMNANDAN MISHRA : Nobody has said that.

SHRI S. A. SHAMIM : There were only two main speeches (*Interruptions*).

SHRI H. R. GOKHALE : I want to make it clear that we have not taken into account political considerations, as are taken into account in many other countries for the purpose of this appointment. The reference to the other countries was only for this limited purpose of showing that even in countries where it is almost unanimously accepted that a democracy of the type which we have envisaged exists and a judicial system which is the same or similar to ours exists, not only are the known views of a person taken into account, but the fact that he had a political past is regarded as a plus point in the matter of selection of a judge or to a high position in the judicial hierarchy. We have not done anything like that. I believe Justice Ray has no political past. We have not taken any political considerations into account. Why should this be a matter of consternation and shock in India? I was very sorry to hear Shri Frank Anthony—unfortunately he is not here—express the view that the difference between other countries and this country is that in our country democracy had not taken deep roots. In spite of the fact that this country has been facing difficulties of a very big magnitude, democracy has established itself in this country and the people of our country have gained a reputation of being the largest democracy in the world. I think it is wrong to denigrate the political genius of our people by saying that here are our people who are not able to understand things, about what is democracy, as the people in America or in England or in Australia or in Canada do.

The real trouble is that it was so embarrassing for some to find a situation in America, England, Australia and Canada where they have that provision there, political past as a plus point, and then to make out a distinction by saying that you do not look at that.

[**Shri H. R. Gokhale**]

Here I have made it absolutely clear that the political past experience served as the necessary pre-requisite for the purpose of the plus point in the matter of appointment of judges. There is nothing to be shocked about it as if something has happened and heavens have fallen and it has not happened anywhere in the world and it has happened only here.

What is the purpose? In the appointment to the high office you take the background and the social outlook of the person into consideration. It is only in the Supreme Court or High Court that matters of high constitutional importance affecting the public affairs come up for discussion. It is there that an understanding of men matters, as the Law Commission has put. A person is appointed to the high office. How do you find out? Some body asked in the course of the debate. It is not on the ground that a man holds reactionary views or progressive views as Mr. Chatterjee had practically at the end of the debate wanted to suggest. Reactionary and progressive are relative terms. I do not wish to use them. What I said was that there was something like what the country regards as socio-economic philosophy. It is not a political party, it is not a question of the ruling party. It is defined, for example it is indisputable that we have adopted socialist pattern of society as the basis of our future evolution of social and economic policy.

SHRI SAMAR GUHA : That has to be enshrined in the Constitution. Only then the judges will interpret it according to the Constitution.

SHRI H. R. GOKHALE : For example we regard secularism as our basic tenet. There can be hardly any dispute that we cannot have untouchability in this country and we regard communalism as an evil so far as this country is concerned. We know that we in India want progress in certain social directions. It is to give effect to the will of the nation, to the will of the people that all the functionaries of the agencies which make up this federation have to function so that progress has to be made.

As the time when we thought of these matters the Supreme Court judgement in the recent constitutional amendment was not available, but the House remembers

with what overwhelming majority the two Houses of Parliament passed the 24th amendment to article 368. It was to give effect to the principle that Parliament in this country is sovereign and that no Court or no authority however high can stand in judgement over the will of Parliament. We proceed on the basis that Parliament reflects the will of the nation through its elected representatives, and yet how the philosophy and outlook of a judge can work in decisions can be found in the recent observations it made by Mr. Justice Hegde, dealing with the questions how much sovereignty and how much representative character can really be attributed to Parliament. The Judge said that a thing might be passed by two thirds majority, but it might not reflect the will of the people.

SHRI SHYAMNANDAN MISHRA : 57 per cent of the people are against you.

SHRI H. R. GOKHALE : It might embarrass you, but this is the quotation taken from the judgement of the learned judge in the recent decisions in the Supreme Court.

"The assertion that either the majority of members of Parliament or even 2/3rd members of Parliament speak on behalf of the nation has no basis in fact. Indeed it may be possible for the ruling party to carry through important constitutional amendments even after it has lost the confidence of the electorate. Therefore it will not be correct to say that whenever Parliament amends the Constitution, it must be held to have done it as desired by the people."

This is based on the philosophy. I do not dispute his integrity; I am not saying that he is not entitled to have this view. But, here is a social philosophy reflected in a judicial pronouncement.

As against that, the present Chief Justice of India—I am going to trace the history which is a very important matter because this is a matter in which a lot of misunderstanding has been created and it has got to be cleared—on this very important issue says :

"The amending body to amend the Constitution represents the will of the people."

But this is not only with regard to Article 368 because that was a major issue. In

fact, we had our quarrels over Golaknath's case on the right of Parliament to amend any provision of the Constitution. That was the issue at stake. This momentous case went on for months and months together where elaborate arguments were heard. Out of 13, 11 judges have delivered their judgements. In this case, we are told that Parliament cannot be said to really represent the wishes of the people. Even though it may have two-thirds majority, it may have lost the confidence of the people. That is all decided by Justice Hegde although others do not believe in this. Is it not importing into the judicial pronouncement the political philosophy in the understanding of the matter? I am not quarrelling with him. Don't be under the impression that the judges do not import the political philosophy in their judicial pronouncements.

This is not all. The House is aware of the bitterness and the feeling of frustration created by the judgments of the Supreme Court in the past on Article 31(2). We know that there had been pronouncements repeatedly made in the past when the Article had been upheld. The Fourth Amendment had held that the adequacy of compensation cannot be gone into. It had been held that compensation need not be market value. Only a little time before the bank nationalisation case, the Supreme Court had elaborated this in the Shantilal Mangaldas Case. And yet what happened in the bank nationalisation case? In the bank nationalisation case you go back where you were. You must pay the market value. Article 31(2) was really the result of the Fourth Amendment. The amendment was rendered completely nugatory to allow it to remain so. But, I must say that on that we went again to the Supreme Court. Now this issue was there. What is the meaning of the word 'amount'? Why did we introduce the upward amount? To say that this is the will of the Parliament that if property is acquired for a public purpose in furtherance of the public policy, it is not obligatory to pay the compensation, that is, at the market value, as interpreted by the Supreme Court. This is what the Parliament, in its wisdom, desires to do in a particular case, is a matter which is not justiciable. That was the object.

Now, look at the differing approaches of the learned judges. Mr. Justice Hegde says:—

"The Court cannot go into the question whether what is paid it is payable is compensation. It can only go into the question whether the 'amount' in question was arbitrarily fixed or illusory or whether the principles laid down for the purpose of determining the 'amount' payable have reasonable relationship with the value of the property acquired or requisitioned".

Therefore, you may put in the word 'amount'. That is not compensation. We shall determine what is the reasonable relationship between the value of the amount, that is, market value and what you have paid. The view taken by the learned judge in this whole matter has again put us in a nebulous state; we were put back to the position prior to the passing of the 25th Amendment. I am determining the philosophy, opinions and views of the judges on the basis of their judicial pronouncements. I can use Mr. Hegde's speeches because he was making speeches. In the case of others, we do not have public speeches. Fortunately others do not very often go and make speeches in public.

As against this, Mr Justice Ray said : In fixing the amount, the Legislature will act on the general nature of legislative power. The principle may be specified. The principle which may be acted upon by the legislature in fixing the amount may include considerations of social justice as against the equivalent in value of the property acquired. Considerations of social justice will include the relevant Directive Principles, particularly in Article 39(b) and (c). These principles are to subserve the common good and to prevent common detriment. The question of adequacy has been excluded from Article 31(2) by the Constitution Fourth Amendment Act. It cannot be said that the legislature would be under the necessity of providing a standard to measure an adequacy with reference to fixing the amount. The Constitution does not allow judicial review of a law on the ground of adequacy of the amount and the manner as to how such amount is to be given otherwise than in cash.

The difference in approach to social matters and to the interpretation of the will of Parliament and what Parliament regards as paramount is very obvious, not because of

[Shri H. R. Gokhale]

dishonesty or want of integrity I would never say that—but because, it is born out of a social philosophy and conviction which is embedded in the mind and thinking of a judge, as in the case of all other men

SHRI SHYAMNANDAN MISHRA : Then why did you give Rs 55 lakhs to the Birlas for acquiring the Birla house?

SHRI H. R. GOKHALE : Let us not go into extraneous matters now. Let us look at article 31C. The House is aware under what circumstances it became necessary for Parliament to introduce this new article. It made in a sense a very novel and far-reaching approach to constitutional problems inasmuch as for the first time it gave supremacy to the Directive Principles over the Fundamental Rights. Parliament had learnt from experience over the course of years what had been the result of the political philosophies of judges having been brought in honestly by men of integrity in interpreting the legislations, whether constitutional amendments or otherwise, passed by Parliament. Here is it relevant to refer very briefly to one thing. Somebody said, why did you not appoint so and so when he was in the minority in Golaknath's case? I think it is running away from the main point. Golaknath's case was certainly not the first although it was the one which gave the hardest blow on the will of the people. There have been cases before

श्री मधु लिमये अध्यक्ष महोदय, मेरा व्यवस्था का प्रश्न है। मंत्री महोदय जिन जजमेंट्स से उद्धरण दे रहे हैं वे फैसले हमको नहीं मिले हैं। तो हमको कैसे पता चले कि उनके उद्धरण सदर्भ-रहित हैं या नहीं? इसलिए सरकार को हमें वे जजमेंट्स देने चाहिए।

MR. SPEAKER : That is an accessible document. Why should they give it?

SHRI H. R. GOKHALE : I will not quote any more because I think I have quoted enough to indicate what is my point of view. Why I am quoting is not to say that X judge is bad or is not having integrity or ability or capacity or honesty. It is a question of an outlook of a Judge. Whether he likes it or not, he imports and brings it into his judicial pronouncements.

श्री मधु लिमये : आप केवल सम्पत्ति के अधिकार के बारे में कहते हैं। ज़रा व्यक्तिगत स्वतन्त्रता के बारे में भी सब लोगों का जरिया बता दीजिए।

SHRI H. R. GOKHALE : व्यक्तिगत स्वातन्त्रता for Hindus not the be-all and end all of the matter. That is what I am saying.

श्री मधु लिमये सम्पत्ति और व्यक्तिगत स्वतन्त्रता दोनों का महत्व है।

SHRI H. R. GOKHALE : I had not finished. Before that he interrupted me. In justice Ray you have the combination of a person who upholds the right of society in respect of property and in him you have a person who upholds personal liberties. Why should we forget it so soon? I will not quote any more, because it is unnecessary to quote more.

The impression given is that when the Government is saying "we have to take into account the social outlook" it has said something revolutionary, out of the way, and something which has not happened before is happening now. That is not so. It has happened all the time in the history of the Supreme Court and High Courts for no fault of anybody. It is in the nature of things, whether a human being is a Judge or not, to have a philosophy. If he has to function as a human being, consciously or unconsciously he has to import his philosophy into the judicial pronouncements.

The Golak Nath case was in 1967. We said that if we are wrong, we will correct the Constitution, amend the Constitution. We amended the Constitution. We saw the same thing in the Bank Nationalisation case. The Golak Nath case came after two previous decisions where the complete amending power of Parliament has been upheld by the Supreme Court. The Bank Nationalisation case comes after article 31(2) had been interpreted to mean that compensation payable was not justifiable and not the market value. In the Princes Case the Supreme Court had given a judicial pronouncement that whether you recognise the Ruler or not, or whom you derecognise,

is a political act. Here they thought that it was not a political act, they can go into the question because it was a constitutional question. Where do we go? The Court may decide against us, but we are entitled to know what is the mind of the Court. Has it a mind when it changes its pronouncements from time to time? when public policy and public legislation has to depend on the law laid down by the Supreme Court, if the Supreme Court goes on changing from time to time, how are these people who are concerned with the implementation of public policy to function?

The reason why I mentioned or quoted these cases was not to throw out anybody because he was against us in the Golak Nath case or with us or because he was against us in the Bank Nationalisation case or with us. That was hardly relevant. The idea is, if you look back over a reasonable period of years and take the judicial pronouncements of various eminent individuals, you will be able to arrive at an objective basis, a rational conclusion, as to what outlook or what view a person has with regard to matters with which this Parliament, and through this Parliament the people of this country, are fundamentally concerned. If this is what we have done, I have no apology and I need not be apologetic in supporting the appointment of Mr. Justice Ray. Mr. Justice Ray has a long and outstanding career as a judge. He has no political bias. In one case a man may give a judgment in favour and in another case he may give a judgment against a particular party. That does not really give an indication of his outlook. We have to give a chance to all of them to find out how they react on basic national issues.

I am quite sure that even after all this hue and cry the Supreme Court of India will remain as a firm foundation of democracy in this country.

It is regrettable that this has been exploited for political purposes. It is more regrettable that the Judges themselves should have gone on and participated in seminars organised by political parties. It is much more regrettable that one of them is yet a sitting Judge of the Supreme Court and I have no words to criticise him. The point is, how it is that suddenly in a day after the resignation, one wakes up to find his views are in tune with

political parties. One does not form his views overnight.

Therefore, when we say or for that matter when it is said that the philosophy or the awareness which a Judge must have as a human being irrespective of important matters, it is not a demand that a Judge should be "committed". It is, on the contrary, a demand that a Judge will be committed to nothing else but to the Constitution itself which includes the Directive Principles. The Directive Principles in a nutshell contain a philosophy of the Constitution. When you see that what the Judge says is against the philosophy of the Constitution itself, then I do not think any Government which has any sense of responsibility or any Parliament which seeks to represent the people can take the view that we will put people there who will not implement the philosophy as enshrined in the Constitution itself.

It is not recently that these questions have arisen. These questions have arisen from time to time. Some hon. Members said that I referred to America. We must refer to all the countries because situations similar to this have arisen everywhere. I think, it is very important that I put before the House a statement made by President Roosevelt. I want to read a small extract from the broadcast address of President Roosevelt delivered on March 9, 1937. It is very telling because it deals with a situation, more or less, similar to ours. I quote :

"When the Congress has sought to stabilise national agriculture, to improve the conditions of labour, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws. That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court ... In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people. The Court in addition to the proper use of

[Shri H. R. Gokhale]

its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there and which were never intended to be there. We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men. I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution “as written that will refuse to amend the Constitution by an arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean the judiciary so independent that it can deny the existence of facts universally recognised. Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to ‘pack’ the Supreme Court and that a beneficial precedent will be established. What do they mean by the words ‘packing the Court?’ Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

“If by that phrase it is charged that I wish to place on the Bench spineless puppets who would disregard the law and would decide specific cases as I wish them to decide, I make this answer : that no President fit for his office would appoint, and no Senate of honourable men fit for their office would confirm, that kind of appointees to the Supreme Court.”

This was what President Roosevelt said in 1937 when the New Deal legislation was under challenge.

It is not as if we in India are saying this for the first time because as far back as 1949 our great, Prime Minister, pandit Jawaharlal Nehru, uttered these historic words in the Constituent Assembly :

“No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament ... it is obvious that no court, no system of judiciary can function in the nature of a third House as a kind of Third House of correction. So, it is important that, with this limitation, the judiciary should function ... ultimately the fact remains that the legislature must be supreme and must not be interfered with by the courts of law in such measures of social reform.”

Our great architect, Pandit Jawaharlal Nehru, said it a far back as 1949. When I am saying today is this. We do not want the Supreme Court's independence to be fettered at all. In fact, we want a strong and independent Supreme Court, but a Supreme Court which will decide under the Constitution and not over it. It is for us now to say that we want to take the appeal from the Supreme Court to the Constitution; because otherwise in some of the judgments where do you get this idea that the power of Parliament, as read in the Constitution, is absolutely clear and without any limitation. They say that there are some basic features; this is a limitation not written in the Constitution but introduced in the Constitution by judicial say-so. That is exactly what we will not allow to happen. We do not want that to happen in this country. We will be failing in our duty if we do not take steps in this vital matter to see that we appoint independent and strong judges who will uphold the Constitution and not sit over it, who will decide matters not in accordance with their political outlook but in accordance with the outlook and the philosophy as envisaged in the Constitution itself, in accordance with the views accepted by the community at large, by the country at large, and in the direction in which this country is seeking to go. I do not think any further elaboration is necessary.

In the end I would add this that it is unfortunate that judges have been brought in and references have been made to individual judges. When I referred to Judges

I never meant any disrespect to the individual judges. I thought I was entitled, and I am entitled to look at the judicial pronouncement of a judge. Once they are rendered, they become public property. Therefore, without making any allegation, without attempting to refer to the learned judge who went out of his way to make all kinds of remarks, I would only say that I do not think they deserve any reply. All that I want to say is that we have no animus against these individuals. As the Law Commission itself has said, when certain persons are superseded, it does not mean any disrespect to them, because the considerations are different. It is interesting to note that the present Chief Justice himself has struck down laws made by Parliament. Only in the very recent past he was a party to the decision striking down the Maintenance of Internal Security Act as well as the Government's order regarding newsprint control. I wish to make this abundantly clear and then I will conclude. We are in no way interested in having a pliable or weak court.

On the contrary, it is the cardinal principle of ours that the court must be independent and strong. But independence and strength in a court by itself will be of no value without an understanding of the deeper forces of to-day which motivate the millions and millions of our countrymen who want a new and better life and our justification for doing what we have done is that we believe that the gentleman who to-day adorns that high position of Chief Justice of India has shown that not only in terms of his knowledge and understanding of law, of independence of thought and action he ranks among the leaders of judicial profession in our country but also that he possesses an understanding of where our country is going and where all of us want to go, to transform a great country to the India of our dreams.

Thank you, Sir.

19.17 hrs.

CONSTITUTION (AMENDMENT) BILL*
(Amendment of articles 248, 250, etc.)

*Published in Gazette of India Extraordinary Part II, Section 2, dated 4-5-73.

SHRI SAMAR MUKHERJEE (Howrah): I beg to move for leave to introduce a Bill further to amend the Constitution of India.

MR. SPEAKER : The question is:

"That leave be granted to introduce a Bill further to amend the Constitution of India.

The motion was adopted.

SHRI SAMAR MUKHERJEE : I introduce the Bill.

**WILD LIFE (PROTECTION)
AMENDMENT BILL***

SHRI RANABAHADUR SINGH (Sidhi) : I beg to move for leave to introduce a Bill to amend the Wild Life (Protection) Act, 1972

MR. SPEAKER : The question is

"That leave be granted to introduce a Bill to amend the Wild Life (Protection) Act, 1972 "

The motion was adopted.

SHRI RANABAHADUR SINGH : I introduce the Bill

MR. SPEAKER : Next Bill is withdrawn.

NETAJI NATIONAL ACADEMY BILL*

SHRI SAMAR GUHA (Contai) : I request for leave to introduce a Bill to provide for the establishment of the Netaji National Academy to disseminate knowledge on various important subjects, such as

- (a) Economics of Planning;
- (b) Comparative political philosophies;
- (c) Advance military science; and
- (d) Problems of Indian National integration and matters connected therewith and incidental thereto.

I beg to move for leave to introduce a Bill to provide for the establishment of the Netaji National Academy to disseminate knowledge on various important subjects and matters connected therewith and incidental thereto.

†Introduced with the recommendation of the President.