JUDGEMENT IN NJAC CASE-A CRITIQUE

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Constitution of India and Judiciary

The Constitution of India is hailed as one of the best federal constitution in the world. The constitution was drafted and approved by the Constituent Assembly after a great deal of debate, deliberation and research and after study of various other constitutions in the world. Those responsible for drafting of the constitution were stalwarts and eminent jurists. The constitution not only delineate the distribution of powers between the Union and the States, but also defines the powers and functions of the three different organs of the State viz., legislature, executive and the judiciary. The Constitution does not confer any superior status on anyone of the organs and all the three wings of the State are treated as equal, each one being independent in its own jurisdiction. However, the judiciary has been conferred with the additional power of overseeing the other two organs and their acts within their own sphere. The power of the judicial review conferred on the judiciary places the judiciary in a more advantageous and superior position than the other two organs. Thus, the judiciary has the ultimate power to nullify any unauthorized legislative measures or executive excesses. However, if the judiciary itself exceeds its authority and trenches upon the area earmarked for the legislature or the executive, there is hardly any effective remedy for the aggrieved. Therefore, it is stated that so far as judiciary is concerned, self-restraint is the only check on its power. Echoing the same sentiment, Justice Stone of the American Supreme court says, "While unconstitutional exercise of power by the executive and the legislative branches of the Government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self restrain".

While inaugurating the Golden Jubilee Celebrations of the Delhi High Court Hon'ble Sri Pranab Mukarjee, President of India made the following observations:

"In the exercise of powers by the judiciary, the only check possible is self imposed discipline and self-restraint by the judiciary. The balance of between the three organs of the State is enshrined in our constitution. The constitution is supreme. The equilibrium in the exercise of authority must be maintained at all times.

He further added that:

"The judiciary should re-invent itself through introspection and self-correction as autonomous judiciary is a vital feature of democracy".

The facts that these remarks are made few days after the judgment was pronounced by the Supreme Court, in the case of Supreme Court Advocates-on-Record Association and another Vs. union of India (decided on 16th October, 2015) known as NJAC case or Fourth Judges case is significant.

To appreciate the implications of the judgment in the NJAC case, it is necessary to refer to the constitutional provisions as also the history of case laws on the subject.

Constitutional Provisions pertaining to appointment of Judges

Article 124(2) providing for appointment of judge of the Supreme Court, reads as follows;

"Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court, and of the High Court in the state as President may deem necessary for the purpose and shall hold office until he attains age of 65 years,"

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

Article 217(1) providing for appointment of the judges of the High Court, reads as follows;

"Every judge of a High Court shall be appointed by the President by warrant under his hand and seal after the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office until he attains age of 62 years," In the above Articles, reference to the 'President' has to be construed as the 'Central Government', as the President acts on the aid and advice of the Council of Ministers. Thus, in effect, the power of the appointment of the judges, vests with the Central Government, with only limitation that the said power shall be exercised in consultation with the Chief Justice of India (CJI). The language employed in these articles are clear and unambiguous and do not admit of any conflicting interpretations.

While consultation with the CJI is mandatory, consultation with any other judge is optional. When these provisions came up for discussion before the Constituent Assembly, there were certain amendments moved, to substitute the word 'concurrence' with the word 'consultation' with the CJI.

Dr. B.R Ambedkar, the then Law Minister, did not accept the suggestion and stated as follows;

"I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges in really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that is also a dangerous proposition."

Thus, the Law Minister made it clear that the Constituent Assembly does not want to vest the power in any one organ of the State, either the executive or the judiciary. The, claim that primacy must rest with the CJI in matter of appointment of judges was clearly negative. In view of the unambiguous language used in the articles and also the discussion in the Constituent Assembly, it is impossible to escape the conclusion that the founding fathers of the constitution indeed intended to vest the power of appointment of

judge in the executive circumscribed by the limitation that the executive will act only after consultation with the CJI. The demand for substitution of the expression 'Concurrence' for 'Consultation' was specifically rejected. The Courts in India have repeatedly considered the connotation of the expression 'Consultation' and have held that the 'consultation' is not 'concurrence'. However, it was held that the consultation must be effective, purposeful and complete and should not be a mere formality.

Above interpretation was throughout accepted by all concerned till the Second Judge Case was decided in 1993. In practice also, all along between 1950 and 1993 the executive made the appointments in consultation with the CJI. It is a matter of record that in almost all cases the opinion of the CJI was accepted and there was hardly nay appointment (barring a few) without this concurrence.

No doubt during the 1970s, the period of emergency, there appeared to be some friction between the executive and the judiciary and the same reached such a stage that three senior most judges of the Supreme Court were superseded and Justice A N Ray, who was fourth in rank was appointed the Chief Justice of India, ignoring the convention of appointing the senior most judge as the CJI. The entire legal fraternity in India revolted against this action of the executive and there was severe criticism about the objectionable interference by the executive in the matter of appointment of the judges and that many appointments were made on political considerations. There was also talk of the appointment of 'committed judges'. There were also transfer of many independent High Court judges by way of punishment and some of the additional judges were also not confirmed. The then Union Law Minister also wrote a letter to all the Chief Justices of the High Courts and Chief Ministers with regards to the recommendation for appointment of judges, etc.

S.P. Gupta's case (First) Judge Case)

These issues became the subject matter of several Public Interest Litigations (PIL) which resulted in consideration of the question before a bench of seven judges of the Supreme Court. In

said case, SP Gupta V Union of India {AIR 1982 SC 149} a contention was urged that in the matter of appointment of judges of the higher judiciary, the Chief Justice of India had the primacy and the President of India was bound by his pinion. This contention was specifically rejected by the bench by a majority of 4:3 and it was held that the power of appointment of judges to the Supreme Court of India and the High Courts is within the absolute power of appointment of judges to the Supreme Court of India and the High Courts is with in the absolute powers of the President (executive)}. It was further held that the said power is circumscribed by the restriction as to the manner of exercising such power which provided for consultation with the CJI. It was clarified that the consultation should be meaningful and purposeful and not a mere 'make-believe' one .

This decision in SP Gupta's case held the filed for nearly a decade. The Supreme Court specifically negatived the theory of the primacy of the CJI in the matter of appointment of judges.

Second and Third Judges Case

The correctness of this decision was doubted by a three judge bench of the Supreme Court in the year 1990. Therefore the question was referred to a larger bench of 9 judges of the Supreme Court in the case of **Supreme Court Advocates on Record v Union of India** (AIR 1994 SC 268)also known as Second Judges case. The nine judge bench by majority of 7:2 overruled the ratio in SP Gupta's case and held that SP Gupta's case has not been correctly decided. The Supreme Court in this case by adopting the tool of interpretation held that in the matter of appointment of judges, in case of difference of opinion, it is only the ultimate decision of the Chief Justice of India which should prevail. Regarding appointment of judges to the superior court it is the CJI and his brother judges who have the requisite material to find out the merit and suitability of the candidates and therefore the opinion of the judiciary must prevail over that of the executive.

I had the privilege of addressing the Constitution Bench in this case as Advocate-General of the State. I had pleaded in favour of primacy of CJI, to a limited extent in the sense that there

should be no appointment without the concurrence of the CJI, but a candidate nominated by the CJI need not appointed by the executive for good reasons to be recorded.

The Total effect of this judgment was that the Supreme Court interpreted the aforesaid tow articles to mean exactly the opposite of what the Articles in their plain text say. While the Constitution stated that it is the President (Executive) who appoints the judges in consultation with the CJI, the judgment says that it is the CJI who appoints the judges though the warrant is issued in the judgment is that while according to the text of the Constitution, the power of appointment of judges of the superior judiciary vested with the executive, the same has been transferred to the CJI with the further clarification that it is not the CJI alone who takes the final decision but he does so along with two other senior most judges. (know as collegiums). This in reality is the origin of the collegium system. It was further held that the decision of the collegiums is binding on the President. This system lacks legitimacy and it rests on weak legal foundation.

Justice A.M. Ahmedi, dissented from the views of the majority and on an elaborate consideration of the various provisions of the constitution in which the expressions such as 'consultation' 'previous consent', 'recommend' 'approval', etc aare used, held that if the intention of the CJI, nothing would have been easier than to use the said expression. He further opined that the primacy of the CJI is that of the **'Pater familias'** of the Indian judiciary and not in the sense that his views should prevail over that of the executive and that his views are binding on the President of India.

Justice M.M. Punchhi, in his separate judgment felt that the role of CJI in the matter of appointment is unique, singular and primal but participatory vis-a vis the executive in a level of togetherness and mutuality and neither he nor the Executive can push through an appointment in derogation of the wishes of the other. He came down strongly on the majority's attempt to create plurality in the appointment process and termed the plurality in the appointment process and termed the proposed structure (collegiums system) as an oligarchy unknown to the constitution.

Justice Kudeep Singh, In an attempt to justify an interpretation which is virtually contradictory to the text and ordinary meaning says, as follows.

> ‘Interpretation of the Constitution is a continual process. It is not enough merely to interpret the constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions. A purposeful meaning, which may have become necessary by passage of time and process of experience, has to be given. The courts must face the facts and meet the needs and aspirations of the times.’

He further adds,

> *‘So the SP Gupta’s case must be considered in the light of our entire experience and not merely in that of what was said by the framers of the constitution. While deciding the questions posed before us we must consider what the judiciary is today and not what it was fifty years back. The constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in the light of contemporary circumstances and values, it has to be read in such a way what the circumstances and values of the present generation are given expression in its provisions’*

Above observations clearly imply that the Supreme Court having realised that it was erroneously interpreting the constitution so as to meet the present day needs as it perceives, has tried to justify it. According to me, if the requirement of the contemporary situation demands amendment to the constitution it is for the legislature to do so and no authority is vested with the Courts, **to rewrite the Constitution.** Above majority judgment of the Supreme Court has been the subject matter of severe criticism by eminent judges and jurists. There was near unanimous opinion that judges in the guise of interpretation have **re-written the constitution** so far as appointment of judges to judiciary is concerned. One cannot help concluding that the interpretation adopted by the Court is not based on Constitutional language or context but on the basis of the role of the CJI as perceived by the bench and to cure the alleged ailment by which the judiciary was suffering. Justice Punchhi has also observed in the course of his dissenting judgment that it is a case of **“ virtually re-writing the Constitution”** to assign a role to the CJI in the whole conspectus of the Constitution, as symbolic in character and to his being a mere spokesman representing the supposed views of entire judiciary”

Subsequent to this judgment came the third judges case, Special Reference No.1 of 1998, reported in (1998) 7SCC 739]. The said decision while reaffirming the views in the Second Judges Case, in effect made only one modification with regard to the composition of the collegiums. It provided that in the case of appointment of the judges to the Supreme Court, the collegium will consist of CJI and four senior most judges while in the case of appointment to the High Court, it is only CJI and two senior most judges. It is interesting to know the origin of the Third judges case. Justice M.M. Punchhi who had delivered a dissenting judgment in the Second Judges case became the Chief Justice of India in January 1998. He appears to have recommended the names of five judges to be appointed to the Supreme Court. The Government had genuine reasons to doubt the suitability of one or two of them and had intended to drop those two names. However, it appears Justice Punchhi was adamant and there was serious avoidable friction. It was at that stage to avoid an ugly situation developing, the Government sought reference to the Supreme Court under Article 143 of the Constitution seeking certain clarifications with regard to the ratio in the Second Judges Case.

The decision of the Supreme Court in Second and Thirds judges' case has been the subject matter of widespread criticism not only in this country but also abroad.

Shri Fali S Nariman who has appeared for the petitioners in the Second Judges case, has made the following comments;

> "if there is one important case decided by the Supreme Court of India in which I appeared and won, and which I have lived to regret, it is the decision goes by the title **Supreme Court Advocates on Record v. Union of India** [AIR 1994 SC 268]. It is a decision of the year 1993 and is better known as Second Judges 'case',

Commenting upon the interpretation placed by the Supreme Court, he observes;

> "There was nothing in the language of the constitutional provision or the debates in the constituent assembly that indicated the founders ever contemplated that the judges were to be entrusted with the power to select judges."

Sri T.R. Andhyarujina, former Solicitor General of India, observes as follows;

> "The Judgments in the Second and Third Judges' case are an extraordinary tour de force in the name of securing the independence of the Judiciary. The Court has re-written the provisions of the Constitution for appointment of judges. The executive's function in the appointment process has for all practical purposes been eliminated and reduced to a formal approving of the authority of a recommendation made by the Chief Justice of India and his collegiums. "Consultation" with the Chief Justice of India has been transmuted into his originating power to appoint. The Constituent Assembly's view at the time of enacting the Constitutional provisions that the Chief Justice of India should not be the final appointing authority was disregarded by the Court".

Lord Cook of Thordun Commenting on the Second Judges case expressed his amazement at the interpretation in the following words:,

> "The majority of the Court may have gone too far, if their conclusion be viewed as an interpretation of the constitution intended to be binding in law…. However, vulnerable in detail if will surely always be seen as a dramatic event in the international history of jurisprudence."

More or less similar observations are found in his article titled. 'Where Angels Fear to Tread" and it reads as follows;

> "It sounds more like promulgations of policy than an exercise in juridical reasoning is noticeably limited…. All in all the opinion of the Supreme Court in the Third judges case must be the most remarkable ruling ever issued by the supreme national appellate court in the common law world."

I do not think I should burden the speech with more quotations criticizing the judgment.

Collegium system and its working

Though the judgment of the Supreme Court, in second and third judges' case was subject matter of criticism from various quarters including eminent judges and jurists as indicated above, none questioned the motive with which those decisions were rendered. Being thoroughly dissatisfied with the action of executive in bringing political pressure on the appointment of

some candidates as judges, and in an attempt to eliminate such attempt to eliminate such attempt, the Supreme Court took over to itself the exclusive power of selection. The people would not have minded such a course even if it is based on wrong interpretation of the Constitution, if in reality the object of the decision had been achieved. Without doubt the whole purpose was to select candidates purely based on merit uninfluenced by any other extraneous consideration. But unfortunately, this object was not achieved. While political interference was considerably reduced (if not totally eliminated), there was no improvements in the process of selection. The hope that candidates will be selected purely on merit was belied by subsequent events. The only change brought about was political favoritism was replaced by judicial nepotism. In the process, merit was the casualty. The selection process by the collegiums was plagued with serious allegations of favoritism and nepotism. It also led to a culture of a 'system of reciprocity'. The entire procedure of selection was opaque and these were allegations of secret understanding.

Some of the glaring instances of infirmities and short comings noticed by many are as follows. Many judges of the High Court, barring a few, develop a mentality to be subservient to the members of the collegiums of the Supreme Court, which acts as a superior and unquestioned oligarchy of either three or five judges as the case maybe. A tendency has also developed to appease the members of collegiums which in fact affected the independence of the judiciary. Knowledgeable people talk about an unholy nexus between the collegium of the Supreme Court and of the High Court, resulting in agreement of reciprocity, leading to selection of undeserving candidates with doubtful credentials. The assumption that CJI will always act in the best interest of the judiciary and that though he is a human being, he will be above all weaknesses, sentiments and prejudices is belied by facts. A senior counsel, who was himself a Law Minister of India, had filed an affidavit before the Supreme Court, alleging that in the recent past, atleast 8 CJIs, have not maintained integrity and rectitude expected of them. These events afforded sufficient material to negative the claim of primacy for CJI in the matter appointment. None can say that CJI must have primacy even if his integrity is doubtful.

I may now, usefully refer to some of the observations and comments made by eminent jurists and judges regarding the functioning of the collegiums system.

Justice V.R. Krishna Iyer, noticing the opaque and secretive manner in which the collegiums function observed as follows,

> "The collegiums experiment is not working satisfactorily. What is wrong with our courts that they have lost their credibility and prestige? Corruption has crept in…… Another great deficiency is that a collegiums that is untrained in the task selects judges in secret and bizarre fashion. There could be room for nepotism, coomunalism and favouritism in the absence of guidelines…… The collegiums are a disaster. A new code by a constitutional chapter has become imperative."

Shri Fali S Nariman, in this autobiography, Before Memory Fades, makes following significant observations regarding working of the collegium;

> " I don't see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment – not necessarily in superiority of wisdom or competence. I see no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of High Court judge (or an eminent advocate) to be judge of the Supreme Court. I would suggest that the closed door of network of five judges should be disbanded. They invariably hold their 'cards' close to their chest. They consultant no one but themselves….. There is too much adhocism, and no consistent and transparent process of selection. As a result, the image of the court has gravely suffered."

One of the strongest critics of the collegiums system is none other than the former judge of the Supreme Court of India, Mrs. Justice Ruma Pal who herself was a member of th4e Collegium. In a Speech delivered on November 10, 2011, she made the following scathing criticism;

> "As I have said elsewhere the process by which a judge is appointed to a superior court is one the best kept secrets in the country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third –hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system.

Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."

Justice Krian Joseph has in his concurring Judgment in the present case castigated the collegium system in the following terms:

"deserving persons have been ignored whooly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the Less patronized, selection of patronized or favoured persons were made in blatant violations of the guidelines resulting in unmerited, if not, bad appointments."

Justice Chelameswar in his dissenting judgment, in the present case had the following comments to make with regard to the short comings in the collegium system and the remedial measure-

"The representatives of the civil society would hopefully act as a check on the unwholesome trade-offs within the collegiums and incestuous accommodations between the judiciary and executive branches. To believe that members of the judiciary alone could bring valuable inputs to the appointment process requires great conceit and disrespect for the civil society.

Referring to the instances where the collegiums has very quickly retraced it step for no justifiable reason he says that,

"It is a matter of public record that in the last 20 years, after the advent of the collegiums system, number of recommendations made by the collegia of the High Court came to be rejected by the collegiums of the Supreme Court. There are also cases where the collegiums of this Court quickly retraced its steps having rejected the recommendations of a particular name made by the High Court collegium giving scope for a great deal of speculation as to the factors which must have weighed with the collegiums to make such a quick volteface. Such decisions may be justified in some case and may not in other cases. There is no accountability in this regard. The records are absolutely beyond the reach of any person including the judges of this court who are not

lucky enough to become Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country."

Commenting on the absence of any guidelines for selection by the collegium, it is stated that the only criteria for selection is 'you show me the man, I will show you the rule.'

Demand for constitution of National Judicial Appointment Commission

As explained above between 1950 and 1993 the exclusive power of appointment of judges vested with the executive subject only to the consultation with the Chief Justice of India. After 1993, judges were appointed on the basis of the decision taken by the collegium in accordance with t4 the guidelines referred in the Second and Third Judges case. After noticing the functions of these two systems for a considerable length of time, it was found that both the systems did not work satisfactorily. However, by and large, thee was unanimous opinion that selections prior to 1993 were far better than the selections by the collegium. Sri Fali S. Nariman himself, as many others commented that both the systems have not worked well posed the question "but then is the National Judicial Commission the right answer? Sri Nariman answers "I sincerely hope so". He added that "idea of National Judicial Commission is an excellent one and it is some how not based muster with the Parliament on three separate occasions. He refers to Constitution Amendment Bill of 1990, Constitution Amendment Bill again of the year 1990 and 98th Constitution Amendment Bill of 2003 all of which lapsed.

The Constitution Review Committee headed by Justice M.N. Venkatachalaiah as also the Second Administrative Reforms Commission headed by Sri M. Veerappa Moily and also some of the reports of the Law Commission of India also recommended establishment of National Judicial Appointment Commission for the purpose, though all were not unanimous, in their proposal with regard to the composition of the members of the Commission. There were also suggestions from many other quarters including from judges, jurists and academicians proposing the idea of having such a commission for selection and appointment of judges. The present Government introduced the present 99th Constitution Amendment Bill and the NJAC Act, as a result of these suggestions. These bills were not introduced all of a sudden, but the same was

done after due deliberations and debate for a very long time. They were ultimately passed almost unanimously by both houses of parliament and ratified by more than 20 state legislatures.

Salient features of the Constitution amendment and the NJAC Act.

i. Both the Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014[‘Acts] were made with the intention to substitute the prevalent collegium system of appointment of judges.

ii. The Act seek to establish a permanent commission called the National Judicial Appointments Commission with the Chief Justice of India as the Chairperson and members comprising of two other senior judges of the Supreme Court, the Union Law Minister, and two eminent persons. The Commission is thus composed of the Judiciary, the Executive and the civil society.

iii. The two eminent persons shall be nominated by another committee comprising of the Chief Justice of India, the Prime Minister and the Leader of Opposition. The eminent persons will hold the office for a period of three years and shall not be eligible for re-nomination.

iv. One of the nominated members constituting the eminent persons shall belong to one among the following groups; the Schedule Caste, Scheduled Tribe, OBC, Minorities or be a women.

v. Also, the Secretary to the Government of India in the Department of Justice shall be the convener of the Commission.

vi. The Commission shall after considering the ability, merit and any other criteria of suitability as specified by regulations, recommend the candidate for appointment to the post of a judge in the higher judiciary. However, a veto power is vested with the commission in so far as the candidate’s recommendation shall not be considered if any two members do not agree for such recommendation.

vii. The Acts allow for the President, to ask the commission to reconsider the recommendation if he considers it necessary. However, if the Commission makes a recommendation if he considers it necessary. However, if the

commission makes a recommendation after reconsideration, the president is bound to make the appointment.

viii. In case of appointment of Judge of a High Court, the views of the Governor and the Chief Minister of the concerned State as also the Chief Minister of the concerned State as also the Chief Justice of High Court shall be elicited in writing by the Commission.

ix. The Commission shall have the power to specify rules, procedure and regulations for discharging the functions under the act.

x. However, no act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy in, or defect in the constitution of, the Commission.

xi. The rules made by the Central Government and the regulations made by the Commission shall be laid as soon as may be after they are made before each House of Parliament.

Judgment in the NJAC case – Decision and Analysis

Before dealing with the merits of the judgment I wish to point out three aspects.

1. All the five judges constituting the Bench have written separate judgment running into more than 1000 pages. It is stated that brevity is sine qua non of a mature mind. The present judgment of the Supreme Court as in the case of many other similar judgments is sadly lacking in brevity. Unfortunately, lengthy judgments have become order of the day making it difficult even for legal experts to find out the ratio. I was always wondering why our courts in India have not inherited the tradition of Privy Council in writing judgments which are brief and precise.

2. In important cases heard by the Larger bench, the judges have developed a practice to deliver separate opinions. It will be a healthy practice to deliver separate opinions. It will be a healthy practice if there is only on judgment where the opinion is unanimous and in case of difference –on expressing majority view and other expressing dissenting view. The process of consultation among judges should lead to a majority judgment and a dissenting judgment. In the case of

number of lengthy judgments it become difficult to discern the ratio of the case. It should not look as though there was a competition in essay writing among the judges.

3. Since Justice Khehar who was presiding over the Bench, was a member of the collegium, he could have recused himself from hearing this case. The reasons advanced fro not doing so do not appear to be convincing.

Before I begin the discussion, I wish to refer to the comment made by Shri KK Venugopal, eminent Jurist, who after quoting Judge Harlan of the United States Supreme Court who said-

> "I want to say to you, that if we do not like an Act of Congress, we do not have much trouble to find out grounds for declaring it unconstitutional."
> According to Shri KK Venugopal, this is exactly what has happened in the present case. If the Supreme Court decides to strike down a constitutional amendment it is not difficult for it to find reasons for the same.

The Constitution bench of the Supreme Court by a majority of 4.1 struck down constitution amendment as also the NJAC Act as unconstitutional. The Majority judgment has taken the view that the constitution amendment impairs on the independence of the judiciary, which is a basic feature of the Constitution and hence the amendment is beyond the competence of parliament. That independence of judiciary is one of the basic structure / feature of the constitution is beyond doubt and no one has questioned that proposition. According to the majority judgment, in the matter of appointment of judges to the higher judiciary, the CJI (or judiciary) has primacy in the matter. The Constitution bench proceeds on the footing that this is beyond controversy in view of the judgment of the 9 judge bench in Second Judges' case. The Court proceeds to hold that this primacy of the CJI is also a basic feature of the Constitution as according to it, without such primacy, the judiciary cannot maintain and protect it independence. Therefore, any action which impairs the primacy of the CJI, will amount to altering or destroying basic structure of the constitution. The present amendment introducing article 124(A) of the Constitution deprives the CJI and the judiciary of such primacy, and members of the commission

other than the three representing the judiciary having been conferred with the power of veto, the primacy of the judiciary is taken away. The result is that even if all the three judges, in the commission unanimously recommend a name for appointment, any of the two other members can nullify such proposal by exercising the power of veto. This is the combined effect of the Constitution amendment and the Act. Even taking the constitution amendment independently as it virtually takes away the primacy of the CJI which is an essential feature of the Constitution, the amendment is bad in law. Further, the Court holds that as the executive is a major litigant before the Courts, any participation by the executive in the process of selection of judges amounts to interference with the independence of the judiciary. Therefore, inclusion of the Union Law Minister, in the commission as a member vitiates the entire selection process and jeopardizes the independence of judiciary. The presence of two eminent persons allegedly representing the civil society is also not lawful particularly as no qualifications as such for eminent men are defined. The only qualification prescribed such as ability, merit and integrity are too vague to satisfy the requirements of law. Admittedly, these two eminent persons need not necessarily be from the field of law and men from any other section of the society such as science, art, etc., cannot be qualified to judge suitability of the candidates to the post of a judge. The majority judgment reaches its conclusions on the basis of above reasoning.

However, in the dissenting judgment Justice, Chelameswar, holds that the Constitution amendment, does not alter or destroy the basic structure of the Constitution and therefore the same is within the powers of parliament under Article 368 of the Constitution. According to him, though independence of Judiciary is a basic feature of the Constitution the present amendment does not affect such independence and therefore the same is valid. He has elaborately discussed the merits and demerits of the process of appointment prior to Second Judges case. He finds that the assumption that primacy of the opinion of the judiciary in the matter of judicial appointments is essential for maintaining the independence of judiciary is proved to be of doubtful accuracy. He agrees with the contention of the Attorney General that basic feature of Constitution is not primacy of the opinion of the CJI (collegiums) but he basic feature lies in non investiture of absolute power in the President (executive) to choose and appoint judges. This feature is not abrogated by the amendment. He has quoted instances where active politicians appointed as judges have outstanding achievements to their credit. He also rebuts the assumption that judiciary alone is concerned with preservation of liberties of the citizens. He doesn’t favour total

elimination of the executive in the selection process. According to him, such exclusion is destructive of the basic feature of checks and balances- a fundamental principle in constitutional theory. In the result, he upholds the validity of the Constitution Amendment.

In my opinion, the majority judgment is erroneous for the following among other reasons.

1) It is based on a totally erroneous and unacceptable finding that the Constitution Amendment or the Constitution Amendment or the Act abrogates or alters the basic structure of the Constitution. It can be emphatically said that it does not.
2) An important aspect that requires consideration is which Constitution the court is referring to in the context of its basic structure and its features. So far as judiciary is concerned, the structures and features before the second judges' case were entirely different. The Constitution as framed by the founding fathers and as interpreted by everyone till 1993, gave the executive power to appoint judges subject only to the limitation of consultation with the CJI. This was the fundamental feature in the constitution. However, the same is altered by the Supreme Court in the **Second Judges'** case by holding that opinion of the CJI has primacy in the matter and the role of the executive was virtually reduced to anon entity. The Supreme Court cannot say that the present amendment destroys o alters the basic feature to a limited extent. The Supreme Court has considered the question of alteration of basic structure with reference to the Constitution as interpreted in **Second and Third Judges'** case and has held that as the primacy of the CJI is taken away by the amendment; the same is bad in law. The Supreme Court has heavily relied on Article 141 of the Constitution, for taking the stand that it can only refer to constitution as interpreted by the Supreme Court and not on the basis of the simple text of the Constitution. I am reminded of the Statement by Justice Charles Evans Hughes of the United States Supreme Court-'We are under a Constitution, but the Constitution is what the judges say it is 'It is in that connection that its order declining to refer the question of correctness of the judgment in **second judges'** case assumes great importance. Many jurists agree that the Supreme Court ought to have referred the question to al larger bench for

an authoritative pronouncement. This appears to be the best option under the circumstances and the same is available even now.

3) In 1994, in the case of Privy Purses Abolition, the Supreme Court ruled as follows;

   "In judging constitutional validity of a constitutional amendment, the court may not make surmises on ifs and buts in reaching the conclusion of unconstitutionality."

   The Supreme Court failed to adhere to this dictum in the present case. On the other hand it has chosen to strike down the amendment on the basis of unwarranted apprehensions regarding future events, ignoring actual post experience regarding working of the collegiums system.

4) The Judgment is based on following unwarranted assumptions:
   a. Independence of the judiciary can be protected only if the judiciary is given exclusive power to appoint judges and not otherwise.
   b. Participation of any agency other judiciary in the process of selection and appointment of judges will impair the independence of judiciary.
   c. Participation of two eminent persons representing civil society (nominated by CJI, PM and Leader of Opposition) in the selection process will vitiate the selection destroying the basic structure of the constitution.
   d. The participation of Union Law Minister in the process will also vitiate the selection process as he is part of the Central Government which is a major litigant.

5) The decision is a result of total distrust of the other Constitutional functionaries such as the Prime Minister and the Leader of the Opposition who are to select the two eminent persons along with the CJI. The assumption that through Prime Minster and Leader of Opposition are political opponents, they might join hands to gain unfair advantages is far-fetched.

   If one were to evaluate the performance of each of the three organs of the State ever since independence, undoubtedly the performance of judiciary has been far better than the other two organs. But, that cannot justify the judiciary usurping the legitimate power of the Executive or Legislature.

6) The Judgment ignores the fact that in the method of selection prior to 1993, the executive had the final say in the matter while in the present dispensation as provided in the amendment, executive has only a minor role as Law Minister is the only representative of the executive in the commission.
7) It is erroneous to assume that the Law Minister and two eminent persons are likely to enter into compromises or trade off and reciprocity to recommend undeserving candidates of doubtful integrity. It is also unreasonable to assume that Law Minister and the two eminent persons will veto a nomination of a competent and meritorious candidate chosen by the judicial members. Assuming it happens, the result is denial of entry of a deserving candidate and not appointment of an undeserving candidate which can happen if judiciary is given absolute power to appoint without any check.
8) The majority view ignores the crucial fact that no candidate even if sponsored by the executive (including two eminent persons) can be appointed unless the same is consented to by atleast one of the judicial members. Is this not a sufficient check on the executive if it chooses to push through an undeserving nomination?
9) The right of veto is available to all the three members of the judiciary including the CJI who can always prevent undeserving appointment. By this, in a way primacy of the judiciary has also been retained. In the collegium system, there is absolutely no check on its decision.
10) It is stated that in case difference between the judicial members of the commission and others, there will be statement. This is better than a situation where an Undeserving candidate sponsored by the judiciary goes through without any check.

11) The judgment expresses surprise at the statement of Dr.B.R. Ambedkar, who stated that even CJI is a human being subject to all failings, sentiments and prejudices of a common man. Though this could have surprised anyone when the statement was made, as on today, there is no reason for such surprise as atleast a few of the CJIs by their conduct have proved Ambedkar.

12) While there is elaborate discussion regarding reciprocity, in the context of likely bias of a judge in favour of political executive, who had a hand in the appointment, the fact that such a feeling of reciprocity can also be there among the members of the collegiums is ignored.

13) Supreme Court should have held that the composition of the commission is inclusive giving representations to all sections of the society. The dominant position is given to the judiciary with three members including the CJI, two eminent persons representing civil socity and executive being represented by a lone members being the Union Law Minister. The composition undoubtedly provides for proper check and balances vital for selection of the best.

14) The Supreme Court failed to note that it is not advisable to weaken one basic structure for the purpose of strengthening other basic structures. One should not weaken one feature at the cost of another. To maintain independence of Judiciary the concept of sovereignty of Parliament need not be weakened.

I have pointed out some of the flaws in the reasoning of the majority judgment. I am happy that the dissenting judgment of Justice Chelameswar deals with these aspects and lucidly explains the reasons in support of conclusion that Constitution Amendment is not unconstitutional or invalid for any reason. Justice Chelameswar deserves high tribute for his dissenting judgment which is comparatively brief and precise. It is analytical and pregnant with sound reasoning and robust common sense. It is a matter of satisfaction that his judgment has been commended by none other than Shri Fali S Nariman who had appeared for the petitioners in the following words- " I will give the last word to the dissenting judgment because it has got more acceptability."

This dissenting judgment, though it is not the law of the land as on today, is one of great significance. History has recorded that many dissenting judgments have become the law of the land on a future date. A shining example of this is the dissenting judgment of Justice of H.R Khanna in the case of ADM Jabalpur (this was due to legislative intervention). I hope and trust that on a future date the Supreme Court itself will recognize the dissenting view of justice Chelameswar was right and that the majority judgment was flawed.

Factors which have weakened the independence of the judiciary

In my opinion neither the provisions of 99th Constitution Amendment nor the NJAC Act have in any way affected the independence of the judiciary. However, ever since constitution came into force in 1950 there have been developments which have in effect slowly but continuously been weakening the independence of judiciary.

When the constitution came into force in the year 1950 the same did not envisage any power to the executive to offer any employment to the judges, after their retirement. However, this is not the position today. Now, there is ample scope for the executive to offer many posts to the retired judges, after their retirement. Creation of several new posts as also tribunals to be headed by the retired judges with the executive playing a leading role in their appointments has provided sufficient scope for the executive to influence the judiciary indirectly. Creation of the posts of Lokayukta and Upa-Lokayukta and the establishment of tribunals such as Central Administrative Tribunal, State Administrative Tribunals and Consumer Protection Commission etc, are such posts. Even though the appointments to those posts may not be exclusively vested with the executive and the judiciary has some control over such appointments undoubtedly, the executive plays a vital role in the selection of judges to these posts as provided in various legislations constituting such tribunals and commissions.

Apart from the appointment to those Commissions and Tribunals the recent instances of former Chief Justice of India being appointed as Governor of a State is very serious matter of concern as according to me it affects independence of the Judiciary. It is surprising that atleast there are few jurists who have found nothing improper in such appointment of an Ex-Chief Justice of India as a Governor of a State. Some have even commended such action stating that the Ex-Chief Justice of India has vast knowledge about constitutional provisions and is therefore more suitable to occupy the post of a Governor. If this argument is extended to its logical conclusion then it means that almost all the retired judge of High Courts and the Supreme Court are more suitable to be appointed as Governor and that could be the order of the day. According to me if this position is accepted, independence of judiciary will definitely be affected to a great extent and rule of law will be the casualty. I am reminded of a statement of former Chief Justice

of India, M.Hidayatullah, that 'We want forward looking judges and not the judges looking forward.' If the present trend continues Judges of the Supreme Court or High Courts may be looking forwards to the prospect of their appointment as Governors soon after their retirement. It is relevant to note that the power of appointment of governors is exclusively vested with the Executive without any clutch.

It is unfortunate that the Supreme Court or any other authority has not taken any steps o check this malady which has impaired the independence of the judiciary.

Suggestions for Reforms in Collegium System

The Supreme court after striking down the Constitutional Amendment and the NJAC Act as unconstitutional, and ordering restoration of the system of collegiums, realizing that the functioning of the collegiums was not satisfactory and the same it has invited widespread criticism, posted the case to November 3, 2015 to enable all the parties to give their suggestions to improve the system and make it more transparent and efficient. Taking advantage of that, Union of India once again tried to involve the executive in the selection process by suggesting a role for the Prime Minister and the President. The Supreme Court while declining the said request made it clear that it will not change the composition of the collegium and the suggestions will be confined to the following four topics only- namely Transparency, Collegium Secretariat, Eligibility Criteria and Complaints.

It appears by November 5, 2015 itself a large number of representation containing numerous suggestions were received and thereafter the Court has extended the time for further suggestions from all concerned including the members of the public till November 13, 2015 and has adjourned the case to November 18 and 19 for final arguments on those suggestions. We are yet to see what all suggestions will be accepted by the Court and will be in incorporated in the judgments. Whether the suggestions for improvement of the system to be accepted by the Court and implemented will result in achieving the object, time alone will tell.

In a significant development, the learned Attorney General in a written note submitted to Court maintained that the Government reserves the right to resort to remedies available under law contending that ‘Parliament shall have the power to make any law, within the Parameters of the Constitutional, to govern the criteria and process for appointment of judges to the higher judiciary.’

This gives an indication that the government is contemplating new legislation in the light of the judgment of the Supreme Court. Having regards to the findings recorded in this judgment, it may be difficult to enact new legislation within the parameters so as to provide proper checks and balances. Hence the best option available is to insist on reference regarding all the questions before a larger bench of eleven judges.