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TRACING THE DEVELOPMENT OF JUDICIAL APPOINTMENT IN INDIA[1]

ABSTRACT

What is the primary role of judiciary, to adjudge or to administrate? One will simply say to adjudge, then why the Indian judiciary has taken the job of judicial appointment? which is clearly an administrative function.

It can be said there is no simple answer to this question, clearly one basic reason is to safeguard the independence of judiciary. But can mere appointment, be said to be 'judicial independence'. In order to determine how judicial independence can be achieved, it is imperative to first understand what an 'independent judiciary' is, and what are its objective, scope, nature etc.

Also, we need to understand how judicial appointments are made today. And for it we need to look how was it done during early days of our democracy, and how we reached at the stage at which we are today.

Also, we need to understand the drawbacks of our present system (collegium). And how they can be resolved. What measures are taken by the government to resolve it (NJAC).

In this Article I have tried to answer all these questions by quoting all relevant case laws (*The Three Judges Case*), laws and Articles of constitution and opinions of jurists.

Keywords: judicial appointment, independence of judiciary, collegium, NJAC.

INTRODUCTION

For the proper functioning and survival of a democratic society it is imperative to have a free, unbiased and independent judicial machinery. Independence of judiciary is important for the purpose of fair justice. It is necessary to ensures that there is no external influence on the courts and on judges during a judicial proceeding, and the judgment given are of free volition and are unbiased.

The first step towards an independent judiciary is taken in the form of constitution, the constitution of a country should provide for a free and independent judiciary the other important

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steps are legislations, conventions and popular norms and practices. While the constitution or national supreme law is however only the starting point, in the process of securing a free and independent judiciary, ultimately the independence of judicial machinery depends upon several factors which are created and backed by state and its organs including the parliament, the bureaucracy and public opinion.

The once established independent judiciary should always be guarded against political influence, changing social, political, economic conditions, as it is too fragile to be left unguarded and unchecked.

1. MEANING AND OBJECTIVE OF "INDEPENDENCE OF JUDICIARY"

1.1 MEANING

Despite being an old concept, its meaning is still imprecise and somewhat ambiguous. We can say the basic interpretation of independence of judiciary is separation of powers of judiciary and executive. But this only secures the independence of judiciary as an institution, and not of a judge in exercising its judicial functions. This is not what we say as an independent judiciary and nothing much is achieved just from separation of powers between different organs of a state.

The scope of judicial independence is not just limited to the creation of an autonomous judicial body free from the control and influence of legislature or executive, but it extends to creation of an environment where the judges are able to decide the case on its merit, according to the due process of law and according to principles of natural justice, uninfluenced by other political and social factors.

The term "Independence of Judiciary" is very wide and consists of the judge's substantive and personal independence and autonomy, the judges should not be subjugated to any authority other than the law of the land in making of judicial decisions and in exercise of other judicial duties. Independent judiciary also consists of a free and fair method of appointment or transfer and security of judicial tenure.

1.2 OBJECTIVE

The judiciary have the role to carry out the constitutional message and is responsible to secure the working of the democracy in accordance with the supreme law of the land. The judiciary perform this function by checking excessive authority of other constitutional organs if they transgress beyond the scope of their jurisdiction.

The Indian judiciary (SC &HCs) are provided with the duty to safeguard the constitution and

the fundamental rights of the people of this nation, so while enforcing these rights the judiciary sometime must encroach into the operational grounds of legislature and executive. Therefore, it is *sine qua non* that the judge be free from external pressures to give a free and fair decision.

The courts are sometimes flag bearer of socio-cultural, economic and political revolutions thus for the betterment of the society and independent judiciary becomes imperative.

Hence could be concluded that 'The judiciary has to sometimes strike down executive, administrative and legislative acts of the state if it goes unrestrained or is wanton, thus it is imperative to allow constitutional courts to work in a free, impartial and independent environment.'

2. APPOINTMENT OF SUPREME COURT JUDGES: - ARTICLE 124 (2)

Clause (2) of Ar. 124 provides for the procedure of appointment of judges at the Supreme Court. According to it every judge of the SC is appointed by the President by warrant under his hand and seal. However, the power of president to appoint judges is not unrestrained or unlimited, the constitution expressly requires him to consult it with the judges of SC or HCs as he may deem necessary.

The constitution also makes the president bound to consult the Chief Justice of India in matter of appointment of judges other than Chief justice of India. The process of appointment of judge is initiated by the Chief justice through a collegium consisting of himself and four senior-most judges of the court. Then collegium puts its recommendation in front of president. The president is bound by this recommendation and must appoint new judge as per the recommendation of collegium.

The president, however, may not appoint a person whom for specific reasons he feels may not be a suitable appointment. The collegium must reconsider its recommendation in such a case and can either drop or reiterate the recommendation. In any case the president is bound to observe and accept the recommendation of the collegium.[2]

3. A BITTER STRUGGLE FOR POWER BETWEEN THE JUDICIARY AND THE EXECUTIVE

During the early period of Indian democracy, the appointment of judges was made with a proper plan, the opinion of chief justice of the appropriate court (HCs or SC) was given primacy, and his opinion was considered most valuable in deciding a new appointment in a court. However, this practice was severely undermined and drastic and dramatic changes took

[2] *Supreme Court Advocates-On-Record Assn.* v. *UOI,* (1993) 4 SCC 441: AIR 1994 SC 26.

place in during the Indira Gandhi led government in 1970s.In an unprecedented act which left India stunned, Justice A.N. Ray suddenly became the CJI, bypassing the three senior-most judges of the Supreme Court, (Justices J.M. Shelat, K.S. Hegde and A.N. Grover) all these judges had previously pronounced judgements[3] that had not found favour with the Congress government.

And thus began a bitter power controlling game, during the National Emergency (1975-1977) as many as fifty-six High Court judges were transferred from their home court to a new court as a punishment for not deciding cases in favour of the government of India.[4] One such judge, Justice Sankalchand Sheth was transferred from Gujrat to Andhra Pradesh High Court.

Justice Sankalchand Sheth challenged the constitutional validity of this transfer in the Gujrat HC. The HC accepted the writ petition on the ground that the president had not consulted with the CJ of Gujrat HC before such transfer. In 1976 the Union government appealed to the Supreme Court, the court decided to dispose it, on the assurance by the union govt. that it would transfer Justice Sankalchand Sheth back to the Gujrat HC.[5]

At the same time another derogatory practice developed; even when there were vacancies for permanent judges every High Court judge was first appointed as an additional judge, before making him/her permanent. This was done in order to ensure that if a judge did not work as wished by the executive, he/she could be punished by not confirming his/her position as a permanent judge. This was clearly against the spirit of the Indian Constitution, because as per it additional judges were to be appointed not as a matter of course, but only to meet temporary needs of business or to clear the arrears of a High Court.[6]

The powers of appointing and transferring judges were used to punish and coerce independent judges who were unwilling to toe the government's line on policy matters. This consequently altered the course of Indian constitutional development forever.

The then law minister of India P. Shivshankar on 18th March 1981 issued a circular to governor of Punjab and to chief ministers of all other states except the North-Eastern states. The circular asked the CMs to get: i) the acceptance of all additional judges to be appointed as permanent judges in any other High Court in India, and ii) to get consent of people who are to be appointed judgeship in future to be appointed initially other than their state High Courts.

The government faced a lot of retaliation against this circular, a great number of PILs were

[3] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[4] Arvind Datar, Commentary on the Constitution of India (New Delhi: LexisNexis Butterworths Wadhwa Nagpur, 2007), p. 1164.
[5] Union of India v. Sankalchand Himatlal Sheth (AIR 1977 SC 2328).
[6] Article 224 of the Constitution of India.

filled challenging the constitutional validity of the circular. The Supreme Court of India in December 1981 clubbed eight such PILs[7] in the seminal case of *S.P Gupta* v. *President of India (First Judges Case)*[8]., the case got its name from the PIL filled by S.P Gupta in the Allahabad High Court challenging the appointment of additional judges in High Courts.

4. THE FIRST JUDGES CASE: POOR DESTINATION OF A PROMISING JOURNEY

The Supreme Court's decision in this case was quite equivocal; the court recognized an important doctrine in favour of one party, and then ultimately passed the judgement in favour of other party.

The judgement expanded the scope of PIL forever, by acknowledging the right of members of the bar to file writ petition in public favour, but it also made the government the final authority in the matters of appointment of judges of constitutional courts, thus upsetting the balance of power between judiciary and the executive.

The biggest irony was that the case did not focus into the realm of judicial appointment. The court expanded the scope of PILs and opened the floodgates to social action litigations. The *First Judges Case* changes and redefined the role of constitutional courts in India, as it developed Supreme Court as the last bastion of hope for poor, and it is still seen that way.

The final verdict of the court, however, ran contrary to the constitutional convention. The court gave advisory opinion to the CJI and handed the real power of judicial appointment to the executive. The court knowingly compromised its own judicial independence. Although it established a proper mechanism for judicial appointment, still the process was not suitable as per the Indian political environment.

Given that this judgement followed the period of emergency, in which the executive abused its power of judicial appointment as a method to punish those who did not toe with the government's line. It is shocking and intriguing to imagine under what political pressure the judiciary chose to compromise its judicial independence, even when it had already faced such misadventure during the emergency.

5. THE SECOND JUDGES CASE

[7]Under Article 139A of the Constitution, where cases involving substantially the same questions of law are pending before two or more high courts or before the Supreme Court and high courts, the Supreme Court is empowered to dispose of all the cases itself if it believes that they involve substantial questions of general importance.

[8]*S.P. Gupta* v. *UOI*, 1982(2) SCR 365; AIR (1982) SC 149.

The process established by the *First Judges Case*, continued to be followed for almost one decade, but public opinion was galvanizing against it. Experts and academicians were demanding a process of selection through a collegial body consisting of members from both the judiciary and the executives. Subhash Sharma, the honorary Secretary of the Bombay Bar Association,[9] in late 1980s filled a petition in the Supreme Court asking for the vacancies of judges in Supreme Court and various High Courts to be filled.

While hearing the petition the Supreme Court felt the need to reconsider the merits of the judgement of the *First Judges Case* by a larger constitutional bench.[10] Therefore a larger constitutional bench consisting of nine judges was formed by the Supreme Court and it was given the task to decide the process of judicial appointment and transfer of High Court judges. In *Supreme Court Advocates-on-Record Association v. Union of India* (Second Judges Case). The majority overruled the previous judgement of the *First Judges Case*[11], and a total of five different opinion was delivered by the bench[12].

The bench in its judgement said that in an ideal situation there should be no 'primacy' either of judiciary or the executive, and both the branches of the state shall work collectively in matters of appointment as instructed and contemplated in the Constitution of India. The bench observed that under the constitutional convention the process of appointment should be "integrated, participatory and consultative".

What the court basically did, was to take the driving seat from the executive and handing it over to the judiciary. Now in case of any conflict of opinion between the President and CJI or a Chief Justice of a High Court, latter's opinion was given "primacy".

The Supreme Court also moderated its power of judicial appointment through a collegiate system. The CJI or the chief justice of a High Court must ascertain the opinion of at least two senior-most judges of such court, before making any such appointment.

It can be concluded that the *Second Judges Case* achieved two major achievements first it overruled the *First Judges Case* and transferred the power of appointment from executive to the

[9] Established in 1862, an association of lawyers practicing on the 'original side' of the Bombay High Court

[10] *Subhash Sharma* v. *Union of India* (AIR 1991 SC 631).

[11] While the decision in the First Judges Case was pronounced by a bench of seven Supreme Court judges, the decision in the Second Judges Case was pronounced by a bench of nine Supreme Court judges.

[12] The nine judges on the bench in the Second Judges Case were Justices S. Ratnavel Pandian, A.M. Ahmadi, Kuldip Singh, J.S. Verma, M.M. Punchhi, Yogeshwar Dayal, G.N. Ray, Dr A.S. Anand and S.P. Bharucha. Justice Verma spoke for himself and four other judges—this constituted the view of the majority on the bench. Justice Pandian and Justice Kuldip Singh wrote individual judgements agreeing with the majority view. Justice Punchhi took the view that in making judicial appointments, the CJI had primacy and that he was entitled to consult (or not to consult) any number of judges on the proposal. Justice Ahmadi dissented with the majority view, broadly adopting the reasoning used in the *First Judges Case*.

judiciary. Secondly it decentralized the power of the Chief Justice of India/chief justice of a High Court by the formation of a collegium for appointment of judges including the CJ of the Court and at least two senior-most judges of that court.

On the issue of transfer of a High Court judge from one High Court to another, the court observed that the opinion of the CJI would be decisive. But it also said that the CJI must work in consultation with other judges whose opinion may be relevant before deciding the transfer of such High Court judge. Interestingly the court stuck to its position in the *First Judges* Case and observed that the consent of a judge is not an important precondition for his transfer.

6. CRITICISM OF COLLEGIUM SYSTEM

The whole reasoning of the *Second Judges Case* was to minimize political influence in judicial appointment, and to decentralize the power of CJI and Chief Justice of High Courts, through the formation of a Collegium system. This resulted in Turing of tide in favour of judiciary. It could be said that the judiciary overcompensated itself (an exaggerated remedy) from a self-inflicted wound[13] (*First Judges Case).*

The collegium system is widely considered as undemocratic in sense that, in case of appointment and transfer of High Court judges it gave all the power to the Chief justice and two senior-most judges of that court. Most of these judges have no public accountability, thus they can't be considered rational and competent for making such appointments or transfers.

Also, this process concentrates the power of judicial appointment to a few select hands. Another concerning issue about this system is that the system has failed to fulfill the vacancies. According to the Ministry of Law and Justice in 2004 there were 143 vacancies of judges in 21 High Courts of India, it is a surprisingly huge number almost 20% of total strength of judges.

Many jurists and academicians have pointed it out that such a machinery of judicial appointment, is highly susceptible to favoritism, and nepotism. Experts argue that such a process resulted in creation of 'judicial aristocracy', where a select few minds decide the fate of whole judiciary.

In the *First Judges Case* Justice P.N had observed that:

"Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how judges are selected and appointed or transferred and whether any, and if so, what principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests

[13] Datar, Commentary on the Constitution of India, p. 1153.

. . . The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in the making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off."[14]

Despite judicial intervention in the *Second Judges Case,* the process of appointment and transfer of judges remains clandestine and enigmatic as it was in 1981. In every aspect it has remained an inexpiable ritual – with only the name of priest altered.

7. THIRD JUDGES CASE: PRESIDENTIAL REFERENCE

The next round of confrontation between the executive and the judiciary, over the issue of judicial appointment started soon after the decision of the *Second Judges Case,* 1997 to 1998. The executive refused to nominate five judges to the Supreme Court of the India as per the recommendation of the then CJI, Justice M.M Punchhi. The executive raised doubts about the competence of these five people to be appointed as the judges of the Supreme Court of India.

As a result of this dead lock between judiciary and executive, the then president of India K.R Naryanan invoked power granted to him under Article 143[15] of the Indian Constitution. In order to seek Supreme Court's advice on nine questions of law, covering three broad categories:

i. Consultation between CJI and senior most judges on issue of appointment of new judges.
ii. Judicial review of transfer of High Court judges, and.
iii. The importance of seniority in deciding the competence and merit of a judge.

A constitutional bench of nine judges in a unanimous opinion answered the questions.[16] The Supreme Court in its judgement pointed that the judicial appointment would take place according to the judgement of the *Second Judges Case.* The only new addition to the *Second Judges Case* was that the collegium would now consist of chief justice and four senior-most judges of that court (as against two). Rest of the judgement was basically a reiteration of the *Second Judges Case.*

Although the Supreme Court gave a fantastic constitutional interpretation, but in doing so the Supreme Court entered unchartered constitutional territory, acquiring the unprecedented power of judicial appointment. The judgement, though well intentioned and well executed have

[14] First Judges Case at para. 84.
[15] Under Article 143 of the Constitution, the President is empowered to seek the opinion of the Supreme Court on important questions of law or fact that have arisen or are likely to arise.
[16] In Re: Under Article 143(1) of the Constitution of India (AIR 1999 SC 1).

disturbed by equilibrium of power, envisaged by our constitution.

8. THE AILING AND FAILING COLLEGIUM

The collegium system of judicial system practiced in India is suffering from several defects. Initially it developed as a process to secure judicial independence, as s measure to reduce political interference in judicial process and to decentralize the powers of chief justice. But with passage of time many jurists, experts and academicians have recorded their worries about this process as it is prone to favoritism and nepotism. The main objections raised by these experts can be summarised as follows: -

i. The process of appointment of judges by collegium is totally opaque and there is no process to determine the reasonableness of any appointment.[17]

ii. According to Mr. Verappa Moily, chairman of Second Administrative reform Commission there is no accountability on part of judiciary. The members of the Collegium have almost zero to none, public accountability and thus appointment have no public scrutiny.

iii. The Collegium system suffers from lack of implementation. This have resulted in judicial vacancies and in turn pendency of cases.[18]

iv. The collegium system is also seen as against the democratic morals and Constitution of India. As per the Constitution the judicial appointment should be made by the president in consultation with the Judiciary and not *vice versa*. Also, the collegium system gives all the substantive power to Chief justice and four senior-most judges of the court, leaving only nominal power of appointment to the president as he cannot go against the opinion of the Collegium.

9. NJAC: THE EVOLUTION

As we know that the primary function of judges is to adjudicate, while appointment is purely administrative function. Thus, the judges in the Collegium must perform double duty, a part of which is out of their expertise. Hence, the development of a proper functional structure for judicial appointment becomes pertinent and reasonable.

[17] 21.10.2008, "The Hindustan Times" quoting the then Law Minister, Mr. H.R. Bhardwaj, had reported "Collegium system has failed. Its decisions on appointments and transfers lack transparency and we feel courts are not getting judges on merit".

[18] 26.09.2014, "The Times of India", quoting the then Union Law Minister, Mr. Sadananda Gowda.

The attempts to put an end to the collegium system can be tracked back to 1990s. The first attempt was done in the form of 67th Constitutional Amendment Bill, but it failed to give any dent to the robust bastion of collegium system. Thereafter three such attempts were made but all these attempts turned out to be infructuous.[19] Several recommendations were given by different Committees to change the collegium system.

After a very story journey the Union government on 13th April 2014, notified The National Judicial Appointment Commission Act, 2014 (NJAC Act) in The National Gazette. The Act sought to amend various provisions of the Indian constitution including Ar. 124, Ar. 217, and Ar. 222. The amendment added Ar. 124A, 124B and 124C in the Indian constitution, in order to facilitate for the National Judicial Appointment Commission. Finally on 31st December 2014, the NJAC Act and 121st Constitutional Amendment Bill received President's assent. The NJAC is now a constitutional charter.

The notification started a new controversy, and the debate of judicial appointment and judicial independence reignited in the nation. The NJAC is to consists of Chief Justice (*ex officio* chairman) of India, two senior-most judges of the Supreme Court (*ex officio),* the Union Minister of Law and Justice (*ex officio*). And two eminent persons selected by a committee consisting of Prime Minister, Chief Justice of India and leader of opposition in Lok Sabha, or in his absence the leader of single largest opposition party in the Lok Sabha.

The most important credential to be recommended as a judge under NJAC Act is seniority, ability, merit and any other criteria as under the NJAC Act.[20] The president must make new appointments or transfer according to the recommendation of the NJAC.

9.1 Reference to the Commission

The central government must make a reference to the NJAC, whenever there is a vacancy in the Supreme Court or a High Court. All the preexisting vacancies of judges in Supreme Court or High Courts must be notified to the NJAC, within 30 days of the Act coming into force (31st December 2014). Whenever a judge of Supreme Court or High Court is only six months near to completion of his tenure, a reference is to be made to the NJAC. For vacancies arising because

[19]82nd Constitutional Amendment Bill in 1997, 98th Constitutional Amendment Bill in 2003 and the 120th Constitutional Amendment Bill in 2013

[20]Section 5 of the NJAC Act provides for the procedure for selection of Judge of Supreme Court and Section 6 of the NJAC Act provides for the procedure for selection of Judge of the High Court.

of death or resignation of the judge a reference is to be made to the NJAC within 30 days of such an event.

9.2 Procedure for appointment of Supreme Court judges.

For the appointment of the next CJI, the NJAC shall recommended the senior most judge of the Supreme Court. Provided he is fit to be appointed as the CJI as per the constitution of India. For appointment of other judges in the Supreme Court the NJAC shall recommend names of judges based on the merit, ability and other criterions notified in the NJAC Act. The members of NJAC also have veto powers, if two or more members veto an appointment, such a person cannot be appointed in the Supreme Court of India.

9.3 Procedure for appointment of High court judges

For the purpose of appointment of a chief justice of a High Court, the NJAC recommends a High Court judge based on seniority across that High Court judges. The ability, merit and other abilities of such a judge also plays an important role in selection process.

For the appointment of judges other than the Chief Justice, a nomination shall be quested by the Chief Justice of that High Court. The NJAC nominates names of judges for appointment of HC judges and such names are forwarded to the Chief Justice of respected HC for his consideration. The views of Chief Minister and Governor of such state should be taken by NJAC, before any recommendation. Finally, the Chief Justice in consultation with two senior-must judges of the HC, shall appoint a HC judge.

10. IS NJAC A PANACEA?

The question before the hon'ble Supreme Court was whether the NJAC can solve the problem which was created by collegium system.

NJAC surely solves the earlier allegation of unconstitutionality, raised because of no say of the executive in the matter of judicial appointments as compared to with that of the judiciary. The NJAC constitutes of three judicial and officers along with the Union Law minister and other legislative bodies.

The final authority in the matters of appointment is given to the president, thus it also solves the

issue of judicial accountability, as now the judiciary would be answerable to the executive in the matter of appointment of a judge.

Other than these two merits the NJAC has no other significant gains over the previously followed collegium system. The system of appointment as per the NJAC still faces the issue of transparency. The clause "any other suitable criteria" in the NJAC Act for appointment of judges is certainly not limpid and is susceptible to nepotism and favoritism.

For a recommendation to be made, the Act provides that a minimum of five members to consent out of the six members, this number is way bigger than the simple majority (50%) or special majority of (67%). Thus, even a small amount of dissent would be enough for a recommendation to be dropped. It gives the executive extraordinary power to not let a person be recommended whom it think not worthy or eligible because of political reasons, even if he is a suitable candidate.

The 121st constitutional amendment which formed the NJAC has already been struck down by the Supreme Court of India,in the *Supreme Court Advocates on Record Association* v. *Union of India* (4th Judges case)[21]. The NJAC Act transfers the power of judicial appointment almost *in toto* to the executive. Judicial appointment is the *bulwark* of judicial independence, it has also been acknowledged from time to time as a basic structure of the Indian Constitution.

Also, there is inclusion of an 'eminent person' in the NJAC, the Act nowhere defines who is an eminent person or what are the prerequisites to be considered as an eminent person on the panel of judicial appointment. There is no way to judge the accountability, credibility and merit of such a person. Further the NJAC need not disclose the reasons for recommendation of a candidate, such a lacuna can give rise to corruption and misadventures.

11. CONCLUSION AND SUGGESTIONS

India has one of the most detailed and illustrated Constitution in the world, still there are instances where the higher judiciary must come forward to give a proper interpretation of the provisions enshrined in the mighty constitution of India. The matter of judicial appointment is a prime example of such a situation.

[21] *Supreme Court Advocates on Record Association* v. *Union of India*, (2015) 11 Scale 1.

In just a period of a decade we have moved from one pole to the other, from an executive controlled judicial appointment to a judiciary dominated process of judicial appointment. In present time there is no proper institutionalized process of judicial appointment, which could be said to be properly unbiased or independent.[22]

The Indian judiciary at this period is suffering from lack of transparency and accountability, which has impacted the legitimacy of the Supreme Court. A legitimacy which must be preserved at the altar of anything, in order to secure a free and independent judiciary which is considered as *bulwark* of Indian democracy.

People closely attached to the *Second Judges Case* have noted that there is a threat to Indian judiciary from within itself. Although most of us would accept a judiciary-controlled appointment process to an executive controlled one, as the judiciary is considered to be less corrupt and biased then the political or executive bodies. It is high time now to strike a balance between these two bodies of Indian democracy.

An important question is whether a nominated person (judge), has the power to review and to strike down the laws made by a democratically elected government, without any accountability to the general masses. In India the Higher judiciary enjoys the power of reviewing and striking a law and even constitutional amendments (if necessary) made by the parliament. While in other nations the judges are appointed by independent bodies, or by popularly elected government, the Indian Supreme Court's Self appointment coupled with such extensive powers is unmatched and unparalleled.

The newly introduced NJAC also fails to satisfy the essentials of a free and independent judiciary. While it addresses the issue of judicial monopoly and accountability of judiciary, it fails to address the issues of transparency, composition of the appointment commission and it also somewhat inconsistent with the basic structure doctrine.

The *fourth judges case* raised the question on the growing power of SC in matters of judicial review. Indian higher judiciary had evolved into one of the most powerful judiciary in the world, as it is the sole interpreter of the constitution, and it is the only body that can decide what is basic structure is and what is not. But to make the judiciary work on the whims and fantasies of the government is also a poison to the Indian democracy, because then there would be no

[22] Nariman, Before Memory Fades, p. 398.

check and balance on the authority of the State.

Therefore, it is imperative for all the organs of the government to observe the true spirit of the great constitution of India as was the intention of Dr. Ambedkar. Absolutism of any kind would result in stunned growth of our democracy. A harmonious and participative understanding between all the functionaries is the need of the hour to secure an independent judiciary. If all the organs give up their collective egos and move forward with the thought of the greater good in mind, such a move would benefit the democratic structure of the country.