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# Urge For an Independent Judiciary or Just a Game of Thrones: A Jurisprudential and Comparitive Perspective

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**Abstract**

Now, in a recent development the Hon'ble Supreme Court of India has struck down a central law aimed at forming a National Judicial Appointment Commission which was enacted vis. a vis. the Constitution (Ninety-Ninth Amendment) Act, 2014. It may seem like another quotidian judgment delivered by the Hon'ble Court but it actually is the biggest crisis in the working of Indian model of separation of powers till date. It may seem like any other judgment of the Hon'ble court declaring ultra vires a law made by the legislature but in effect it undermines the competence of the legislature and the executive and gives a severe blow to the system of checks and balances as envisaged by our constitution makers. Was the court right in doing so? What were the reasons for which the court was forced to do so? Is the continuous interference in policy making on part of the court viable? Is it hampering the power of other organs of the state or just exercising the power of judicial review? Is it correct jurisprudentially and if not then what needs to be done? These are the sort of questions the author aims to answer by the medium of this present article for which the author has analyzed the situation in hand by using doctrines, case laws and his own opinions. In the end the author will try to suggest some workable solutions so that a system of checks and balances is maintained without hampering the independence of any of the organs of state.

**Keywords:** Judiciary; Separation of powers; National judicial appointments commission (NJAC)

## Collegiums Versus National Judicial Appointment Commission: Introduction to the Uncontrollable Judiciary

Every judge of the Supreme Court and the High Court is appointed by the President by warrant under his hand and seal[1].

This is a Constitutional proposition which is unquestionable. However, the main debate is whether "consultation" with the high judiciary by President as given in Articles 124, 217 and 222 (which is specific only to appointment of judges) will have primacy over the aid and advice of the Council of Ministers (which is generally applicable to all the functions of the President) or *vice versa*. Though the question seems to be answered by the judiciary in cases like *Shamsher Singh*[2], *2nd Judges Case*[3] and the *3rd Judges case*[4] and now by the *NJAC* case in favor of the judiciary, the debate has nevertheless not ended. The collegiums simply vest the primacy in judiciary *whereas* the NJAC takes care of both the judiciary and the executive. In all the aforementioned cases though the constitutional position has been discussed at a great length, more so in the recent NJAC judgment (making the judgment a One Thousand and Thirty pages long), never has it been discussed to the utmost satisfaction of the people. It is important to see whether an arrangement which gives equal representation to all the organs of the state can simply be rejected on the argument of independence of the judiciary and keeping on a pyre the system of checks and balances and separation of powers we should continue with the collegiums system or is it necessary to bring in a workable *judicio-politico* arrangement.

This article in order to achieve its aim is divided into five main parts and a conclusion. Part I introduces the author's main argument that *justice cannot be influenced* and doesn't matter who appoints the judge if he is corrupt he will give biased judgments. Part II rebuts the Court's argument of the "independence of judiciary" being a basic feature of the Constitution on two premises that *firstly* the basic structure doctrine as understood has never existed in the Indian jurisprudence and the understanding of *Kesavananda* case itself is flawed; *secondly* even if there is any basic feature of the Constitution, one such basic feature cannot gain priority over the other. Part III deals with what jurisprudential arguments can be forwarded to confront the Hon'ble Supreme Court of India's arguments. Part IV gives a comparative study of judicial appointments in three jurisdictions *namely* the United States of America, Australia and the United Kingdom and prescribes what would be the best system for our nation and also gives three different names to the systems of appointment prevailing in these systems based upon the ratio of participation of the organs of state in these appointments. Part V concludes the arguments by giving certain solutions to the present face-off between the judiciary on one hand and the legislature and executive on the other and reminds all these organs that for the poor citizenry the only thing that matters is justice which can be seen.

## Why Ask for Truth When You Close Your Ears to It? Is the Executive Influencing Justice?

The biggest irony is that while observing that civil society in India has not been able to maneuver its leaders towards national interest and that it is not in a position to act as a directional deterrent for the political-

[1]See The Constitution of India, Articles 124 and 217

[2]Shamsher Singh v. State of Punjab, AIR 1974 SC 2192

[3]Supreme Court Advocates - on - Record Association v. Union of India, (1993) 4 SCC 441

[4]Re: Supreme Court Advocates - on - Record Association v. Union of India, (1998) 7 SCC 739

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executive establishment[5] the Hon'ble Court has based its conclusion on the views of politicians themselves[6]. The Hon'ble Court has also talked about the eminent rightist leader L.K. Advani's statement which says that "*I do not think anything has been done that gives me the assurance that civil liberties will not be suspended or destroyed again. Not at all*"[7] (emphasis supplied). This discussion of emergency must have made many of us feel nostalgic about the fact that it was the Hon'ble Court itself which by a majority judgment upheld the emergency[8] and held something which in the words of great jurist Seervai would be "*Lawlessness be thou our law*"[9]. On the contrary these politicians who deliberate as the legislatures or act under their magisterial authorities as the executive were the people who were being jailed for demanding the rights of the people from the then Indira Gandhi government and the present Finance Minister of India was one of the persons who was sent behind bars[10].

More interestingly the only brave judge who dissented in the aforementioned *Habeas Corpus* case, Justice H.R. Khanna, was the judge who contested presidential elections later in 1982 but lost to Giani Zail Singh. He was the judge who after being superseded and not made the chief justice by then Prime Minister Indira Gandhi resigned from his office *but* also refused the offer of Janata government to head the inquiry against Smt. Indira Gandhi, or even the finance commission for that matter. His judgment was called the "only light in gloom" by Anil Divan[11]. He is the kind of judge who never left alone the spirit of "constitutionalism" or "rule of law" even when he was in minority (*Habeas Corpus* judgment was delivered by an astonishing 4:1 majority), but he later joined politics, does that mean that he was rigged during the judgment? Practically speaking independence of the judiciary will remain intact and sacrosanct till the judges who hold such respectable positions of justice keep in mind the aim with which they joined the profession "the dispensation of justice", it is of very less importance whether the executive controls it or not. Another logical argument is that even if collegiums appoint a judge but the judge is not committed to the cause of justice no one can compel him to dispense justice. It is his reason that forces him to do justice. There are provisions in the Constitution which have the effect of prohibiting a retired judge of the Supreme Court to practice in any Court or tribunal of Indian Territory[12], thus another inference that can be drawn logically that even if a collegium appoints a judge of the Supreme Court it cannot give him employment after his retirement, so can it be said that even when appointments are being made by collegium judges may favor a particular political party to gain political advantages after their retirement? Honorable Mr. Justice Kurian Joseph in his opinion on the recusal of Honorable Mr. Justice J.S. Khehar has rightly pointed out (though in a different context) that "*oath of Office he has taken as a Judge to administer justice without fear or favor, affection or ill-will and his ability to carry out the oath by reason of his training and experience whereby he is in a position to disabuse his mind of any irrelevant personal belief or pre-disposition or unwarranted apprehensions of his image in public or difficulty in deciding a controversial issue particularly when the same is highly sensitive.*" (Emphasis supplied) If the Honorable the judge actually would believe as to what he has written then he should not have second thoughts about the independence of judiciary being compromised if executives exercise power in appointment of judges. There has to be concurrence with the Honorable judge's opinion as finally it is the oath of the office the judge has taken that will inspire him to do justice.

1. In the Name of the Basic Structure: Repeated Arguments and Lack of Judicial Creativity

The argument of the Court which is the sole basis for all these judgments is that of the independence of judiciary as a basic structure. Basic structure in India is a doctrine evolved by the judiciary according to which some parts of the Constitution are non-amendable and they cannot be subdued by the legislature. All the previous cases have already provided us with the same line of argument[13]. This part of the analysis will focus on how the argument given by the Hon'ble Supreme court that collegiums should be saved as being a necessary connotation of the phrase "*independence of judiciary*" which in turn is the basic structure of the Constitution[14] has become or should become redundant and dormant by the very fact that while upholding this one basic structure many others have been put on gallows such as Republican form of government, Demarcation of power between the three organs of the state etcetera[15]. Though the independence of the judiciary is undoubtedly a basic feature of the constitution as held in several celebrated cases but as pointed out by Sr. Advocate T.R. Andhyarujina no system in the world has said that the process of appointment of judges has anything to do with it. Rather than giving such a redundant argument the court could have given any other line of argument such as *generalia specialibus non derogant*. When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one [16]. In the present case the judiciary could have forwarded the argument that the "consultation" with collegiums is specific in nature with respect to the presidential powers of judicial appointment *whereas* the aid and advice of ministers is general in nature as it is in relation to all the functions of the President, thus the special provision shall prevail in case of any conflict[17]. In the present situation of an apparent face-off between judiciary and the executive, the former could have taken refuge to this particular doctrine rather than repeating the same old basic structure argument again and again which in turn is creating (and also in the recent past has created) conflict as is apparent from the Finance Minister's blog post. Furthermore, the argument of basic structure is redundant on two simple grounds *vis. a vis. firstly* that the doctrine of basic structure which was first formulated by the "*view of majority*" in *Kesavananda* judgment is itself not clarified upon as the said view of majority was never actually a view of the majority in the aforesaid case. The basic structure doctrine as used today was never formulated in the judgment. That was the conclusion of only one judge- Justice Khanna. Reference to expressions such as "basic structure" or "basic features"

[5] SCAORA v. Union of India, Writ Petition Civil No. 13 of 2015, 197

[6] Id, NJAC Judgment, 198,199,200

[7] Id, 198

[8] ADM Jabalpur v. Shiv Kant Shukla, (1976) 2 SCC 521

[9] H.M Seervai, Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism, p.3 (1978)

[10] 'Indian democracy cannot be a tyranny of the unelected': Arun Jaitley's 'alternative view' on NJAC verdict, First Post, http://www.firstpost.com/politics/indian-democracy-cannot-be-a-tyranny-of-the-unelected-arun-jaitleys-alternative-view-on-the-njac-verdict-2473218.html (Last Updated- Oct, 19, 2015)

[11] Anil Divan, A profile in judicial courage, Available at http://www.thehindu.com/todays-paper/tp-opinion/a-profile-in-judicial-courage/article1215366.ece (Last Updated- March 7, 2008)

[12] The Constitution of India, Article 124(7)

[13] See Supra at iii & iv

[14] Union of India v. Sankal Chand, Himmatlal Sheth, AIR 1977 SC 2328

[15] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (454), 582

[16] Ruth sullivan, sullivan and Driedger on the construction of statutes, 273 (4th ed) ; see doré v. verdun (city), [1997] 2 scr 862

[17] T.R. Andhyarujina, An Invented Primacy, Indian Express (October 21, 2015) Available at: http://indianexpress.com/article/opinion/columns/an-invented-primacy/

etcetera made by other six judges were made in different contexts[18]. As very excellently put forth by H.M. Seervai *"there is an unbridgeable gap between the concepts and lines of reasoning of Justice Khanna and the six judges…their judgments use very different concepts and they do not use the phrase (basic structure) in the same sense in which Justice Khanna uses it"*[19] (emphasis supplied). Thus, what we think was a 7:6 majority ratio in the Kesavananda judgment was actually a 6:6:1 ratio. It is the same "*declared limitations*" on the amending power of the Parliament argument on which the Court has based its judgment[20] but when there was no clear majority as to what is the basis of basic structure how any judicial decision can be based on it, is the main doubt that needs to be clarified. *Secondly*, let us *Arguendo* assume that there is a basic structure of the Constitution and there are inherent limitations on the amendment power of the Parliament how will we decide what basic feature should get priority over the other. In a plethora of judgments delivered by Courts relating to basic structure no such doctrine of priority has ever been developed by any court. Thus, while upholding one basic feature many others cannot be put on pyre to burn in envy. As pointed out earlier in the article[21] and also as pointed out rightly by Finance Minister Arun Jaitley "*The judgment ignores the larger constitutional structure of India. Unquestionably independence of the judiciary is a part of the basic structure of the Constitution. It needs to be preserved. But the judgment ignores the fact that there are several other features of the Constitution which comprise the basic structure. The most important basic structure of the Indian Constitution is Parliamentary democracy*"[22]. The Supreme Court of India is the *sentinel in qui vive* of the Constitution[23] thus it should endeavour to protect the constitutional values and attach due weight to legislative competence. With this basic structure argument the Supreme Court in a crusaders spirit has overlooked several important basic features of the same Constitution in the name of which it purports to be doing justice.

2. "The Road to Power is Paved with Hypocrisy and Casualties": Jurisprudentially Speaking

*First Argument*: While delivering a speech at Banaras Hindu University former judge of the Hon'ble Supreme Court of India Markandey Katju said paraphrasing Savigny that, law is not a consciously created phenomenon but was the gradual distillation of the *volksgeist* (the spirit of the people)[24]. And this is a proposition nearly all nations agree to (at least in a democracy) and is very apparent from the examples of two greatest democracies namely India and the United States which use the phrase "WE THE PEOPLE " in their preamble[25] to show that the power of all the organs of the state is derived from the people. What needs to be pinpointed here is that how will that *volkgiest* transform itself into law if the Court keeps on declaring *ultra vires* the laws made by legislatures at this rate. Either the Court should do surveys to understand the will of the people or it should leave it to the legislature to transform that *volksgeist* into law by way of legislation and that legislation should only be questionable on the ground that it violates the rights of the people itself. In India and that too in the present system of appointment of judges it has to be said that the Courts lack democratic credentials to overrule the judgment of legislature on just political questions. It could have been different in United States courts where either the judges are appointed by direct elections or where the executive appoints them and the legislature confirms the appointment. Legislatures are elected and accountable bodies. Accountable in the sense that after every five years when the Lok Sabha goes to election it has to account for all the misdeeds it has done to harm the people as finally they are the devices who judges the legislature on the touchstone of whether or not the legislature has acted in furtherance of the spirit of the people. If the legislature has not acted in accordance of the will of the people it is replaced by another legislature. *Whereas*, *vis. a vis.* Judiciary (in India) there is no such procedure and there it is all about the will of the Chief justice and his brethren in the collegiums as they are the final arbiter in matters of appointment and transfer of high judiciary as the primacy prevails in their command in case of conflict. The proposition author is trying to put forward by this argument is *whether* will of the people can be sufficed by whims and fancies of the Hon'ble collegiums?

The argument advanced by one of the petitioners in the case was that *"will of the nation, could only be decided by a plebiscite or a referendum"*. Practically speaking no one is against the idea of a referendum, as will be discussed further in the article but the point petitioners were putting forth and which the aforementioned contention discloses is that the only way to understand the will of the people is by way of referendum. This was such a sorry state of argument on part of the petitioners that they even refuse to accept the fact that parliament is the representation of the people's will on the simple ground that they are the chosen representatives and their only work is to make laws according to the needs of the people. On this concept of representation by parliamentarians is based the whole idea of a republican form of government which itself has been held to be a basic structure of the Constitution (if at all there is any basic structure)[26].

*Second Argument*: The second argument is based on the doctrine of *nemo iudex in causa sua* which means that no one should be the judge in his own cause which has been accepted by the Hon'ble Supreme Court and other courts themselves as an indispensable principle of natural justice in plenitude[27]. The law in question related to the appointment of judges themselves so it would have been better if the high judiciary would have left the matter to the better judgment of the Parliament or would have given a clause in a judgment making the judgment effective on a plebiscite.

*Third Argument*: The third and most important aspect of the present argument is that of the separation of powers between the three organs of the state which is based on the sole premise that "*he who regulates, who will regulate him*". This kind of separation of powers has been held to be a basic feature of the Constitution by the Hon'ble Supreme Court of India[28]. Is it not hypocrisy not to do what you preach? This is what the judiciary has done by going back on its own words. This appointment of judges is the only matter where the executive could have influenced the judiciary without influencing its powers to do justice. The fear which has been expressed by the Court is that if the executive is allowed to interfere in the appointment of judges it will influence the judges to owe allegiance to the ruling political party in order to gain appointment or transfer benefits. The argument, truly speaking cannot

[18]T.R. Andhyarujina, the kesavananda bharati case: the untold struggle for supremacy by supreme court and parliament, 49 (1st Ed. 2013)

[19]Seervai, Fundamental Rights At The Cross Roads, (1973) 75 Bom Lr 47 & 48

[20]NJAC judgment, Supra at v

[21]Supra at xv

[22]'Indian democracy cannot be a tyranny of the unelected': Arun Jaitley's 'alternative view' on NJAC verdict, First Post, http://www.firstpost.com/politics/indian-democracy-cannot-be-a-tyranny-of-the-unelected-arun-jaitleys-alternative-view-on-the-njac-verdict-2473218.html (Last Updated- Oct, 19, 2015)

[23] State of Madras v. V.G. Row, AIR 1952 SC 196

[24]Justice Markandey Katju, Ancient Indian Jurisprudence, Speech delivered at Banaras Hindu University on November 27, 2010.

[25]See Preamble to Indian and United States Federal Constitution

[26] Kesavananda, Supra at xv

[27] J. Mohapatra v. State of Orissa, AIR 1984 SC 1572; S. Kannan v. Member of the Local Board, (1990) 1 MLJ 516

[28] Kesavananda, Supra at xv

be totally rebutted to say that it will not influence the judiciary, the only point is that even in the collegiums system some high court judges may owe their allegiance to the ideology of the Chief Justice or to be chief justice. Thus, giving the basic argument on the same premises as that of the Court it can be said that even the collegiums system is flawed in abovementioned sense and thus it should not function anymore. The NJAC system is better in the sense that while giving executive the power to have a say in the appointment of judges it did not take away the power from judiciary. It just tried to bring in a system of checks and balances. The 99th Amendment to the Constitution which had the effect of bringing in Article 124A gave the members of NJAC as Law minister, "two eminent persons", Chief Justice of India and two other justices of the Supreme Court next to the CJI in seniority[29]. Though the 99th amendment brought in executive as a major player in the appointment and transfer of judges it did not give primacy to any one organ of the state unlike the 2nd judges' case which brought into picture the collegiums system, thereby maintaining a system of checks and balances, in the sense that if other three members of the NJAC would overstep their jurisdiction the other three would have veto power. A court in India is allowed to delve into the correctness of election of any legislator or Council of Ministers etcetera[30] but the same is not allowed for any other organ and if it happens it is circumvented with the argument of an "independent judiciary". What should it be called if not hypocrisy? According to Montesquieu those possessing power will grasp for more powers unless checked by other power holders, and thus a separation of powers could only be maintained if accompanied by the system of checks and balances[31]. This exactly is the case with Indian judiciary, since the inception of the basic structure doctrine in 1973 to the NJAC judgment in 2015 the powers of the judiciary have been on a gradual increment, which now certainly needs to be checked. Though the judiciary is not to be blamed for it rather it is the absence of concrete separation of powers in our Constitution which must suffer the blame.

*Fourth Argument*: As it is a cardinal principle of interpretation of statutes to "make construction on all the parts together and not of one part only by itself"[32]. Every clause of a statute is to "be construed with reference to the context and other clauses of the act, so as, as far as possible, to make a consistent enactment of the whole statute"[33]. Thus, in the present context if the whole Constitution is given effect to and the term "consultation" occurring in articles 124, 217 and 224 is read with article 74 the NJAC is fully constitutional and gives effect to the whole scheme of the Constitution thereby having chief justice as mentioned in the aforementioned articles and law minister as representing the Council of Ministers (in accordance with Article 74) as its members.

*Fifth Argument*: The "political question doctrine" is for maintenance of the governmental order[34]. The Supreme Court has itself said in an earlier decision that where the matters are related to the exclusive domain of the legislature it cannot interfere there[35]. There can be no doubt that amendment is the sole domain of legislature as is apparent from the name itself. Further, under the Constitution also the legislature has this exclusive power of amendment whether under Article 368 or Entry 97 of the Union List is none of our concern. Thus, following its own mandate as laid down in the above referred cases the Hon'ble Supreme Court should have left the matter or dismissed it on the ground that it is the exclusive jurisdiction of legislature and therefore going into it were to amount as venturing into an unauthorized territory.

3. If you Don't Like How the Table is Set, Turn Over the Table: Comparative Study of Different Jurisdictions

In the judgment the Court has analysed but misunderstood procedures of judicial appointments in many countries thereby holding that "*in the process of evolution of societies across the globe, the trend is to free the judiciary from executive and political control*"[36]. In the very same paragraph the Court again commits an error of judgment by holding that "*there cannot be any greater and further participation of the executive, than that which existed hitherto before*." It would be noteworthy to see here how judges are appointed in various common law jurisdictions. In ***Australia*** the Attorney General recommends judicial appointments to the Cabinet and the Governor-General. The decision whether an appointment has to be made or not depends totally upon the Attorney General along with his trusted aides and advisors. When the decision has been made to make an appointment to a federal court, the Attorney-General consults widely, writing to interested bodies inviting nominations of suitable candidates. These bodies include, but are not limited to, the Chief Justices of the Family and Federal Courts, the Chief Federal Magistrate, the Law Council of Australia, the Australian Bar Association and their State and Territory counterparts. An advisory panel appointed by the AG himself gives the report to him which he further forwards to the Prime Minister or the Cabinet seeking their approval. If approved from there the appointment is given its final effect by the Governor-General[37]. In ***United States of America*** the appointment needs to be made by the President and a further confirmation is necessary from the Senate[38]. In the ***United Kingdom*** after the amendment of the Constitutional Reform Act (CRA) 2005 by the Judicial Appointments Regulations, 2013 there are 15 members in the JAC including the Chairman[39]. Among them except 7 judges from different courts there are 5 lay members and 2 lawyers. This is the kind of commission we need to have in ***India*** and this sort of JAC cannot be ignored by us the reason being our adoption of Anglo-Saxon system[40]. This exactly is the kind of model the NJAC Act, 2014 was trying to give us. The NJAC were to constitute of 6 members out of whom 3 were to be judges of the Hon'ble Supreme Court, the Law Minister of India and two other "eminent persons"[41]. These eminent persons in the Indian Commission are very much similar to the lay persons of the UK Commission *except* that in UK the term lay persons has been defined[42]. What the Court should have done is to either define the term "eminent persons" or to ask the government to define the terms by bringing an amendment in the next parliamentary session. Just because you don't like the food on the table you cannot turn the table, as it will cause disturbance to other people sitting on the table, rather an attempt should be made to change the food kept at the table.

[29]Sec. 3, The Constitution (Ninety-Ninth) Amendment Act, 2014

[30] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299

[31] BARON DE MONTF5QUIEU, 1 THE SPIRIT OF THE LAWS bk. XI, at 157-160 (Thomas Nugent trans., J.Y. Prichard ed., Fred B. Rothman & Co. 1991)

[32]Case of Lincoln College, (1595) 3 Co, Rep. 58b, 596

[33]Canada Sugar Refining Co. Ltd. V. R. [1898] A.C. 735, per Lord Davey at p. 741

[34]Baker v. Carr, 369 U.S. 186 (1962)

[35]Maharishi Avadhesh v. Union of India, (1994) 1 Supp. SCC 713

[36]NJAC Judgment, Supra at v, 178

[37]Attorney General's Department, Judicial Appointments, Ensuring a Strong and Independent Judiciary Through a Transparent Process, available at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/FedJudicialAppointmentsPolicy_May2010.pdf

[38]United States Constitution, Article II Clause 2 Sub-Clause 2

[39]Section 3, Judicial Appointments Commission Regulations, 2013

[40]Kaleeswaram Raj, Justice in Judicial Appointments, The Hindu (Opinion Page), Available at http://www.thehindu.com/opinion/lead/justice-in-judicial-appointments/article5587974.ece (Last Updated- January 18, 2014)

[41]Sec. 3, The Constitution (Ninety-Ninth) Amendment Act, 2014

[42]Schedule 14, Constitutional Reforms Act, 2005

Anyways one fact that could not be overlooked from the present study of various jurisdictions is that in all these countries executive have some control. In *Australia* the executive exercises all the control; we may call it fully controlled appointment system, in the *United States* the control is shared by the legislature and the executive**;** we may call it *shared appointment system*, in the *United Kingdom* is very decentralized in the sense the Judicial Commission has a representative and participative character. The procedures are transparent. There is no predominance either of the judiciary or of the executive;[43]we may call it *participative appointment system.*

Whatsoever we may call it but one thing is not to be forgotten that these powers of appointment flow from the Constitution itself. That there is only one reason for which a constitution comes into play whether written or unwritten and that is to construct a common national, political and constitutional identity for the people it covers, to delineate powers and responsibilities of the various instrumentalities of state, impose limitations upon them, and regulate the relations between states and its population[44]. It must not be forgotten that all constitutions are made for the same purpose and that constitutional guarantees are cut from a universal cloth, and that all constitutional courts are engaged in the identification, interpretation, and application of the same set of principles[45].Thus, the court rather than acting as particularist should have acted like a Universalist and by going through the judicial appointment procedures of various jurisdictions should have upheld the NJAC law and the 99th amendment thereby giving due recognition to the role of executive in judicial appointment which in turn would have strengthened the system of checks and balances in Indian horizontal power sharing arrangement.

4. When Dead Men and Worse Come Hunting You Think It Matters Who Sits on the Iron Throne?: Ending the Face Off

It has been nearly half a century since when started the battle for supremacy between the Parliament and Executive on one side and the judiciary on the other with the very enunciation of the doctrine of basic structure. This part of the research paper will try to procure certain solutions to introduce a system of checks and balances on the judiciary in appointment without compromising the Independence of the judiciary.

*First* such solution would be to have judges from lower courts come to the Higher courts by relaxing their terms of services, and making it a system like that of All India Services under Article 312 or like Civil Services under Article 310 of the Indian Constitution.

*Second* such solution would be to have elections for judges from the selected few jurists in the country and judges from different lower courts as held in different courts in the United States[46]. This would help in the judiciary getting some democratic credentials, by virtue of which it could exercise more powers but under some reasonable control of the executive and the legislature.

*Third* would be to have a system like Australia where the High Court judges are appointed by the executive without any intervention by the existing judiciary[47] or to have a system like United States Supreme Court where the judges are appointed by the President with advise and consent of the Senate[48].

*Fourth* and most democratic approach would be to call for a referendum to vote on the acceptability of NJAC. Though there is no express mention of a referendum in our country but there are instances in the past when such plebiscites have happened. In December, 1948 we had a plebiscite in Junagadh to establish our claim over that place. This is how a state practice of plebiscite is established. As signatories of the ICJ statute, for us customary law (state practice) should have primacy over other forms of law[49]. Thus when there is a state practice and we are no subsequent or persistent objector to it, we can accept a plebiscite for determining the procedure of appointment of judges in India. If the plebiscite holds the NJAC not a very good creativity for appointing judges then the law shall perish or the law will come back with full force if people think that the law should stand.

A tussle between the executive/legislature is of no use to the general public rather it is of huge detriment to their aspirations of getting the rights under the social contract they made. The end of the state is to achieve a good democracy and development of the state which can be furthered only when all three organs of the state work in close collaboration with each other. It has to be kept in mind that who holds supremacy is of no value as it is the final will of "*We the people*" which is supreme in any democracy.

## Conclusion

T R Andhyarujina in his recent article titled "*An Invented Primacy*" has excellently argued that CJI cannot be given primacy in matters of appointment as the proposition of primacy of Chief Justice of India in appointment of judges was rejected by BR Ambedkar (Chairman, Drafting Committee, Constituent Assembly of India and later Law Minister)labeling it as a dangerous proposition. The prophecy by the great constitutionalist appears to be transforming itself in a truth today as we can see by total negation of the separation of powers. It would have been better for the executive to confront the judiciary then only as judiciary has already overreached its domain of both power and responsibility. Now the power cannot be taken away from the judiciary *in toto*, there has to be a buffer and the same was being done by the legislature in form of the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014, but the same was rejected by the judiciary as being prejudicial to its independence and ability to do justice. However, if the same is to be compared to other jurisdictions which have executive interference in appointment matters the Indian judiciary ranks low. For example, Australia has been ranked as the 8th best country in the world "where justice prevails" by Forbes, *whereas* India is nowhere to be found in that list. In the World Justice Project list the countries with executive influence in appointment of judges rank much higher than us *e.g.,* Australia and United States are ranked 10th and 19th in this report respectively *whereas* we score 59th position. Thus, this comparison makes it apparently clear that the absence of executive influence in appointment of judges cannot be the yardstick to measure how efficiently justice is being done; rather it is the spirit of justice which furthers justice and rule of law. By paraphrasing Amartya Sen it should be said that *rather than trying to bring about a just society* (in this case a judiciary free from executive influence in appointment) *focus should be on how to minimize the injustice* (in this case to do justice while maintaining the perfect distribution of power). By the argument of "independence of judiciary" the executive interference in judicial

[43]Supra at xl

[44]V.N Shukla, Constitution of India, A-3 (12th Ed. 2013)

[45]Sujit Choudhry, Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, ILJ, Vol. 74, No. 3, p. 819, 1999

[46]In most of the states of the United States judges for Court of Appeals are elected and not appointed directly by the executive.

[47]Attorney-General (NSW) v Queen, (1990) 170 CLR 1 at 33

[48]United States Constitution, Article II Clause 2 Sub-Clause 2

[49]ICJ Statute, Article 38 (b)

appointments cannot be negated that being a necessary requirement of the system of separation of powers, in absence of which the judicial authority will grow unfettered and unrestricted and May some day in the future hamper the very existence of the system of checks and balances and democracy. Some day in the future what Lord Acton said may come true for Indian judiciary that "*Power Corrupts, Absolute Power Corrupts absolutely*".

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