

## NJAC: Triggering a Great Constitutional Question

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I

### The context that triggered the question

AS

a citizen of this great Republic I am proud to know that our Chief Justice of India Mr H.L. Dattu refused to participate in the National Judicial Appointments Commission till the Supreme Court decides its validity. His decision has led Mukul Rohatgi, the Attorney General, to consider this as causing an "avoidable constitutional stalemate", and has made many politicians invoke the doctrine of parliamentary 'sovereignty', and the well-worn doctrine of Separation of Powers often invoked these days to give dominance to the executive on the pretext of parliamentary sovereignty forgetting that under our Constitution 'sovereignty' is conceived, conditioned and distributed only in terms of the provisions of our Constitution.

II

### (a) Exploring our Constitution for Right Response to the Constitutional Question

My readers can themselves discover the unique features of our Constitution, and differentiate them from those of the British and American Constitutions. My reflections on the Constitution of India have led me to discover the following as its core assumptions:

The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.

The Executive does not possess any "hip-pocket" of unaccountable powers, and has no *carte blanche* even at the international plane.

The executive act, whether within the domestic jurisdiction, or at the international plane, must conform to the constitutional provisions governing its *competence*.

The direct sequel to the above propositions is that the Central Government cannot enter into a treaty which, directly or indirectly, violates the Fundamental Rights or the Basic Structure of the Constitution; and if it does so, that treaty must be held *domestically inoperative* to the extent it violates the restraints.

In India all the organs of the State have only *conferred* powers and *prescribed* roles, and all these, without an exception, are subject to our Constitution's limitations.

**This is the effect of the text and the context of the Articles 53, 73, 245, 246, 253, 265, 363, 368, 372, and 375 of our Constitution.** Our Constitution contains no provisions for limitations on national sovereign powers, in the interests of international co-operation. The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with *powers* granted under express constitutional limitations. An insight into our Constitution can be got better by trying to reflect on situations which, I wish, never takes place. Think of the morbid situations: if by an act of God, or of Man, the Parliament of the U.K., or its supreme judiciary vanishes in thin air, what would happen? Nothing, as all legislative and executive powers would go the Crown wherefrom, in the course of a long constitutional history, those powers travelled to the legislature, or judiciary triggering another round of the constitutional struggle that, judging from the trends of the market-driven globalisation, 'democracy' as we understand is going to break and bend to the global *imperium* of the corporate powers. This conspiracy against democracy is already a foot by subjugating the constitutions through treaty terms under a

new international regime under which our domestic space is being continuously narrowed, under which all the organs of the State are structured to function on orders, direct or oblique. I had an occasion to examine the unique features of our Constitution in the Postscript VI (pp.571-592) of my book, ***On the Loom of Time: Portrait of My Life and Time*** (2nd ed).

The framers of the Constitution of India knew that unless the constitutional objectives are concretely articulated, and strong dyke is established to withstand the passions of moments, the Constitution of the nascent Republic would not survive the guiles and chicanery, pressures (direct and cryptic), persuasion by the compradors, and those intellectuals who have no compunction in putting their talents in the service of the fraudsters of all sorts and of all lands who are conspiring to wreck democracy, and establish corporatocracy. You can notice how through stealth and shady craft things have been so arranged over the stages of the modern economic history to subjugate the institutions of the political realm. Erection of the new Theatres for Operations (viz. the WTO, the IMF, and the World Bank, etc.) was done with great skill to trap the nation states, and trump their constitutions. The MNCs, and all those who work for them, have worked aggressively to achieve their objectives. We have seen several instances of the MNCs and their benefactors coming together to ensure the success of their agenda and strategy. These points have been dealt with in Chapter 21 ('India's Constitution at work'), and the Postscript VI of my book, ***On the LOOM OF TIME: Portrait of My Life and Time***.

[see "[Our Constitution at Work](http://www.shivakantjha.org/pdffdocs/constitution/contitution_at_work.pdf)" (URL: [http://www.shivakantjha.org/pdffdocs/constitution/contitution\\_at\\_work.pdf](http://www.shivakantjha.org/pdffdocs/constitution/contitution_at_work.pdf)) & "[Reflections on the Constitution of India: Ambit of the Constitutional Restraints on the Treaty-Making Power](http://www.shivakantjha.org/pdffdocs/constitution/reflections_on_the_constitution.pdf)" on [www.shivakantjha.org](http://www.shivakantjha.org/pdffdocs/constitution/reflections_on_the_constitution.pdf) (URL:[http://www.shivakantjha.org/pdffdocs/constitution/reflections\\_on\\_the\\_constitution.pdf](http://www.shivakantjha.org/pdffdocs/constitution/reflections_on_the_constitution.pdf))]

### **(b) The impact of this market-driven Globalisation : *Pax Mercatus***

It can be seen that the global conspirators want the Executive organ of the State to become most assertive and powerful. Under the realities of our market-driven globalised world, we are, in effect, ruled by newly erected structures of 'corporate power' as established by institutions like the IMF, World Bank, the WTO, and many other institutions promoting the global corporate agenda. The operational realities brought to mind a story that was often narrated in the days when Charles II (1630 – 1685) ruled England. The country's parliament had been dissolved for many years, and the king ruled the realm with the cabal of advisors one of them was the most deceitful and crafty, the Duke of Buckingham. Someone who saw that government at work, observed:

***"Who rules the kingdom?" "The king." "But who rules the king?" "The duke." "Who rules the duke?" "The devil."***

Parliament is already a decadent institution dominated by the cabinet which, in its turn, is subservient to the Prime Minister. It is most often the Prime Ministerial Form of Government rather than the Parliamentary Form of Government! Once I was absorbed thinking about the ways the governments work, I heard two birds twitter in the bush on the roadside. They seemed to say:

***"Who rules our country? Our Parliament.***

***Who rules our Parliament? The Cabinet under the dictatorship of the Prime Minister.***

***Who rules the Cabinet? The MNCs and the syndicate of the foreign investors, and the domestic calculators."***

Shortly before his death, President Abraham Lincoln (1809-1865), the 16th President of the United States, expressed, on 21 November 1864, his apprehension about the future of his Republic:

***"I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country... Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."***

What he said with agony has already overtaken the USA. Noam Chomsky has perceptively written in his ***Failed States*** (at p. 238):

'One predictable result has been a "new, higher level of corruption." Corruption includes extensive gerrymandering to prevent competition for seats in the House, the most democratic of government institutions and therefore the most worrisome.... More generally, there have been "profound" effects on "the way the country is governed".... Not only is legislation increasingly skewed to benefit the richest interests, but

Congress itself has been changed," becoming a "transactional institution", geared to implementing the pro-business policies of the increasingly powerful state.'

The WTO Treaty, the BITs, and the Regional Trade Pacts are the Treaties the sort of which the history of the world had never known. The impact of the WTO Treaty has been thus summarised by Prof. Stephen Clarkson of the University of Toronto<sup>1</sup> examining things from the Western constitutional observation-post: to quote-

***"When a country signs a treaty it partly internationalizes the state's legal order to the extent that domestic laws are harmonized with the norms embodied in the accord. Before the advent of the new global trade order, even hundreds of international organizations (IOs) did not constitute a significant constitutional challenge to the conventional nation state, whose legal sovereignty was barely compromised. If a state strongly disagreed with an IO's mandate, it could abrogate its commitment - as the United States and Britain did by withdrawing from UNESCO because they considered that its policies responded too much to Third World concerns. Nor was a government bound to comply with a ruling by an international body that it considered adverse to its interests or incompatible with its culture. Canada has occasionally been willing to flout international law that challenges a constitutional norm,<sup>1</sup> but generally it has self-consciously played a model role: when it has been shown to be in violation of a multilateral convention that it has signed, it has mended its ways. In sharp contrast with most international organizations, the WTO creates a new mode of economic regulation with such broad scope and such unusual judicial authority that it has transformed not just the nature of global governance, but the political order of each of the 144 states that had become members by 2002."***

Our Executive Government refused to recognise the constitutional restraints on its powers. Without Parliamentary approval, and without even placing matters before our people, our Executive Government participated in the Uruguay Round negotiations (culminating as the WTO Treaty) without consulting our people, or our Parliament. Its Art XVI (4) of the WTO Treaty prescribes: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Its import can be better understood if read with Art III (5) of the WTO Charter: "the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." Again Article XVI(4) of that Charter requires: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." The same approach is evident in other bilateral pacts, and trade agreements: see Art. 6 the Indo-Singapore CECA pertaining to 'Prohibition of Performance Requirement': to quote--

***"The Parties reaffirm their commitments to WTO Agreement on Trade-Related Investment Measures ("TRIMs") and hereby incorporate the provisions of TRIMs, as may be amended from time to time, as part of this Agreement." Its Art. 15 (1) goes to the extent of requiring each party to the treaty to ensure, in its territory, the observance and fulfilment of the "obligations and commitments under this Agreement". Analogous provisions are in Article Art. 15.1 of the CEPA between India and Korea:***

***"Each Party shall ensure, in its territory, the observance and fulfillment of its obligations and commitments under this Agreement."***

Through such treaties the Executive government has created situations which have been aptly portrayed by experts in such comments as these:

(i) "From both the narrow and wider perspectives, the Uruguay Round negotiations have been conducted by the Union of India in a way that has undermined democracy in ways inimical to fundamental rights and re-written India's Constitution in ways subversive of its basic structure....The sovereignty of the nation has been bargained away. Such a treaty is not constitutionally binding within the Indian Constitutional system and, in the facts and circumstances, cannot be given effect to." (The **Peoples' Commission Report on GATT**

(by V R Krishna Iyer, O Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court); and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court) p. 164 of the **Report**)

(ii) "This takes us to the question of whether the Final Act impinges on India's internal sovereignty by preventing the Centre or the States form legislation on any subject. The Final Act is comprised of 28 sections and cover subject in virtually the entire economy, *inter alia*,

agriculture investment, intellectual property, textiles, pharmaceuticals, health and sanitary standards, regulation of the

professions, banking and finance, insurance, telecommunications and air transport" (at p.161 of the said **Report**)

(iii) "Apart from having only a limited relation to free trade, these "agreements" are certainly not agreements, at least not if citizens, who are generally opposed, are regarded as part of their countries. The "agreements" are reached only by secrecy and other devices to marginalize the annoying public. In the term "North American Free Trade Agreement" (NAFTA), the only accurate words are "North American." Other agreements are generally no different." [Noam Chomsky, **Failed States** p. 219]

(iv) "In sharp contrast with most international organizations, the WTO creates a new mode of economic regulation with such broad scope and such unusual judicial authority that it has transformed not just the nature of global governance, but the political order of each of the 144 states that had become members by 2002." [[Prof. Stephen Clarkson at the University of Toronto].

(v) "The main argument of this article is that because of its inherent lack of democratic legitimacy, WTO law cannot serve constitutional functions, as often claimed in legal theory or political discussions. Rather, WTO law presents a challenge to democratic constitutionalism." [KRAJEWSKI, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' **Journal of World Trade** 35(1) : 167-186, 2001]

### (c) An Inquest on facts in the constitutional context

'Market' is good as a mechanism of providing services and as a device to create conditions of the weal of people. It cannot be allowed to become an imperious force of greed working to create a mart where virtues and vice are on sale, and the humans are no more than commodities on the counter for sale. Market forces have been so much glamourised in this phase of global economy that most governments have allowed their souls to be mortgaged just the way Doctor Faust had done whilst bartering his soul for obtaining some moments with most beautiful and intoxicating Helen. See my 'Global Economy : a Deal with the Devil' that forms part of the Postscript VI of my book referred to above. For the convenience of my readers, I have put that on my website at:

[see "[Global Economy: A Deal with the Devil](http://www.shivakantjha.org/pdfdocs/constitution/global_economy_deal_with_devil.pdf)

" (URL: [http://www.shivakantjha.org/pdfdocs/constitution/global\\_economy\\_deal\\_with\\_devil.pdf](http://www.shivakantjha.org/pdfdocs/constitution/global_economy_deal_with_devil.pdf)) on [www.shivakantjha.org](http://www.shivakantjha.org)]

Strategies adopted in such pursuits have let loose forces which have imperilled both the national constitutions, and the democratic features. We are building a Taj Mahal Economy with the same lust as the Doctor had pursued his phantom of delight, Helen, believing " **all is dross that is not Helena**". [ To know what I mean by 'Taj Mahal Economy' see my book **On the Loom of Time: Portrait of My Life and Time** (2nd ed.) at pages 398-399.]

Why has our Parliament failed in controlling the 'cabinet' effectively? Why should we allow situations to emerge when the great institution of parliament becomes non-functional. Things are bound to become worse if we allow the 'corporations' to dominate. It is not difficult to see why the Big Business is so happy with the Executive Government. The dominance of the Executive Government helps the mighty international investors, and sharp operators to have their ways. Democracy languishes, and 'Constitution' is made a mere scarecrow. The United States emerged from World War II with a studied strategy to play an intrusive and overbearing (in effect, imperial) role. 'From the role of "the elder brother" it worked ceaselessly to transform itself as a global trend-setter, a role model, and a protean creature' turning into police, magistrate, and judge rolled into one'. Writing on June 16, 1933 Pandit Nehru wrote so perceptively on the role of the Big Business in the USA. He wrote: "the population of the United States was only 6 per cent of the world's population. The general standard was thus very high, and yet it was not as high as it might have been, for wealth was concentrated in the hands of a few thousand millionaires and multimillionaires. **This "Big Business" ruled the country. They chose the President, they made the laws, and often enough they broke the laws . There was tremendous corruption in the Big Business, but American people did not mind so long as there was general prosperity.**" And this 'Big Business', which had ruled the country, Nehru wrote in 1933, "was found to be thoroughly corrupt, and confidence in the leaders of finance and industry was shaken." It deserves to be noted that our Constitution was drawn up in that sort of ethos. This is amply illustrated by the provisions of our Constitution: to mention a few points --

(a) The 'sovereignty' is wholly distributed in terms of the Constitution. Even our Supreme Court erred in not noticing this feature when it decided the **Berubari Case**

. I have written in the Postscript VI of my book, referred above, that "the power of entering into a treaty is an inherent part of the sovereign power of the State", is not correct as 'We the People' have distributed the entire gamut of the State's 'sovereign power' in terms of the provisions of the Constitution leaving no residuary, or reserved, or extra-constitutional power to our executive government, as under our Constitution no power can ever be outside the Constitution, since the grant of the residuary power would cover it.

(b) Justice Holmes decided the Case involving the **Migratory Bird Treaty Act of 1918**,

, taking note of the provisions of the U.S. Constitution. He articulated his core reason in the Opinion that he gave in the U.S. Supreme Court. He said : "The treaty in question does not contravene any prohibitory words to be found in the Constitution . The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment." But under our Constitution all powers of all the organs of the State are subjected to strict constitutional discipline through "prohibitory words" clearly mentioned in the Constitution.

(c) Lord Atkin examined the Canadian position in **Attorney General for Canada v. Attorney General for Ontario**. Lord Atkin's distinction between (1) the **formation**, and (2) the **performance**

of the obligations created under a treaty is correct and well understandable under the British Constitution. **In India the Executive possesses no extra constitutional power.**

As a creature of the Constitution it is subject, both in the matter of the **formation** of a treaty and the performance **of obligation**, to the limitations placed by the Constitution and the law. Whether a person functions in Delhi, or Detroit, he must conform to the Rule of Law. As our Executive Government possesses no extra-constitutional powers at the 'international plane', it cannot, like the US President who holds such powers at the international plane [**United States v. Curtiss-Wright Export Corp** . [299 U.S. 304 (1936)], can ever become the Grand Mughal as President Regan had done by issuing the **Executive Order 12662**

to shield the decisions of the binational panels and the Extraordinary Challenge Committees having the effect of trumping the US Constitution.

### III

#### (I) The Strides to tame Judiciary

In his "**The Law of Free Monarchies**"

, James I held that judicial and executive powers inhered in the King alone who was God's vice-regent on the earth. This legal position still continues in England : "**In the contemplation of the law the Sovereign is always present in the court...**"<sup>2</sup>

The Attorney-General, addressing the court in the **Five Knights' Case**

(one of the state trials of Stuart England) for the Crown asked, "Shall any say, The King cannot do this? No, we may only say, He will not do this."<sup>3</sup> It was precisely to ensure that in the American system one would be able to say, "The State **cannot**

do this," that the people in America enacted written Constitution containing basic limitations upon the powers of government<sup>4</sup>. But in course of a long and complex British constitutional history, to say in the words of Bertrand Russell, "the judiciary became a third independent branch of government alongside of the legislature and the executive."<sup>5</sup>

In England the Superior Courts are answerable, as Holdsworth says, "Only to God and the King"<sup>6</sup>

. But we have done away with King or Queen. Then, to whom are our superior courts answerable? Our Constitution knows no Grand Mughal. Our superior courts are, on reasonable reflection, answerable to the high institution of Judiciary itself. If a judgment causes gross miscarriage of justice, or it fails to protect and/or sustain fundamental rights, justice can be demanded under Art 32 of the Constitution. In providing such remedies against their own orders the Superior Courts are answerable to themselves **as an institution**, bound by the very inherent logic of its existence to do complete justice. But this view is yet to be approved by our Supreme Court with clarity and assertiveness.

But the Executive's craze for more and more untamed power never diminished. Even after our closely structured Constitution that creates organs of the State with prescribed powers and mandated duties, our Government thought it fit to write, in 1951 itself, to the Secretary General of the UNO informing him, and the whole world also, that

**"the President's power to enter into treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions."**

After a long journey through errors, the Supreme Court declared, on the text and context of our Constitution, (a) the Doctrine of Basic



Structure, (b) the collegium system for the appointment of the Judges for our superior courts. The doctrine of the "Basic Structure" of our Constitution was judicially perceived and evolved in **Kesavananda Bharati v. State of Kerala**, and was reiterated, after examining it in depth, in **Minerva Mills Ltd. v. Union of India**. It recognises certain features of our Constitution so fundamental as not to be considered subject to the powers of amendment. The concept of the Basic Structure; of our Constitution is made up of those fundamental principles without which our Constitution would lose its *raison d'etre*

. 'No organ of the State can damage this Basic Structure because its negation would deprive the State from getting obedience from the political society represented by "We the People".'

I have said that the doctrine of the Basic Structure of the Constitution is a judicially perceived doctrine. I have reasons to believe that before this was perceived, even our Courts felt that our Constitution can be read in the same light in which they read the British and American Constitutions. When our Constitution was drafted, our Constitution-makers had known what had imperilled democracy in the those countries. Those Constitutions permitted themselves to be interpreted for the benefit of the 'propertied people', the 'Big Business' and the MNCs. It is to ensure that none succeeds in high-jacking our Constitution to promote what "We the People" considered unworthy. So the British and the U.S. norms governing the appointment of the Judges are to be taken with a pinch of salt.

The Collegium System ensures judicial system by limiting the role of the Executive in the appointment of the judges for the superior courts. This doctrine has been primarily erected on the creative interpretation of the word 'consultation' occurring in the Article 124(2) of the Constitution of India that empowers the President of India to appoint the Judges of our superior courts "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary". For obvious reasons, the Executive and the Big Business never appreciated these judicial declarations as these limit the zone of the discretion of the executive government, and the global corporate lobby which intends to subjugate our Constitution to establish an imperius regime under which the domestic sovereign space gets reduced becoming less and less of less [see 'An overview of our world in which we and our institutions are on trial' at the pages 546-547 of my book **On the Loom of Time: Portrait of My Life and Time** (2nd ed.)], (and also "

[Some of my recommendatory comments for our Government and Citizenry to consider](http://www.shivakantjha.org/pdfdocs/constitution/recommendatory_comments.pdf)

" (URL: [http://www.shivakantjha.org/pdfdocs/constitution/recommendatory\\_comments.pdf](http://www.shivakantjha.org/pdfdocs/constitution/recommendatory_comments.pdf)) on [www.shivakantjha.org](http://www.shivakantjha.org) ]. The conventional arguments that the independence of Judiciary is well assured (i) because of the judges' guaranteed tenure, (ii) because their emoluments are charged on the Consolidated Fund of India, and (iii) because the judges of our superior courts cannot be removed except through the process of impeachment, do not survive with cogent efficacy when it has become easy for the executive government to lead Parliament by the nose, AND it is easy for the vested interests to dominate the executive government. This game of stealth reminds one of the game of chess that was well portrayed by Thomas Middleton in **Women beware of Women**, a tragic play written by one of Shakespeare's contemporaries.

I wrote about **Women beware of Women** in my Memoir, **ON THE LOOM OF TIME: The Portait of our My Life and Time**. Without dwelling on the relevance of that story, I think I should quote that even at the cost of being reprimanded for descending from the sublime to ridiculous. The story is metaphorical. I would invite my readers to consider the import of the following stories in order to understand what we see around ourselves in this locust-eaten time.

***"Women beware of Women tells us about Binaca Capello, an Italian beauty, who was ravished in the background of her husband's house, whilst in the foreground her protector was engrossed playing chess wholly unmindful to what was happening inside. This crime of ravishment was facilitated by Livia, professionally a procuress and corruptor, who had become a partner in the game of chess. When the sentinel on the qui vive, abandons trust, roguery takes a toll. Middleton came again to the game of chess in his Game at Chess in which the characters are chessmen, the white ones being the English (the White King was King James of England, and the White Knight was Prince Charles) and the black ones, the Spaniards. It turned out a political allegory portraying how they played a sort of a geopolitical game of chess totally unmindful of the things getting worse and worse for them in their countries. Their cumulative sins visited King Charles, who had not only received a short Mr ft from Parliament, but even had his head cut off in 1649. The business lobby, the remote predecessor of the present-day corporate lobby, could not help him to save his soul. Even the dexterous Lionel Cranfield, a business tycoon working for the king with no holds barred, failed to help him out. And he kissed his doom providing lessons for all of us. This is how the world goes. But playing the game of chess can be disastrous. T.S. Eliot, in his The Waste Land, composed a section on 'A Game of Chess' where the players come to say:***

***And we shall play a game of chess,***

***Pressing lidless eyes and waiting for a knock upon the door"***

The doctrine of judicial collegium as an overriding mechanism for the selection of the Judges of our Superior Courts, deserves to be deliberated in depth before any verdict is passed on its worth. The Constitution (Ninety-ninth Amendment) Act, 2014, and its sequel National Judicial Appointments Commission Act, 2014, are the recent governmental responses. The constitutionality of the National Judicial Appointments Commission Act, 2014 has been questioned before our Supreme Court. The question of this Act's constitutionality is sure to drag the said Constitutional amendment under our constitutional scanner.

**IV**

**(a) The Constitutional Questions**

As the questions pertaining to the constitutionality of the aforementioned Act are before the Supreme Court, I deem it appropriate not to go the whole hog into the matter. I intend to cast a fleeting critical focus only on the Articles 124A-124C sought to be inserted by the aforesaid Constitutional amendment, and Section 5 of the National Judicial Appointments Commission Act, 2014 that prescribes the procedure for the selection of Supreme Judges.

Before I undertake this exercise, I would say a few words on the art of exploring the meaning of words, whether in law or literature. Our Constitution is to be read on its text in right context, and in the light of the wisdom under the over-all ethos of our polity as built by us through our Constitution. It is unwise to go into mere semantics of the words as gathered from various lexicons and dictionaries. As all theatre-goers know, the actors on the stage under the fleeting glare of shifting light in variegated colours are seen much different from what they are on the road. I wish our lawyers find time to go through ***The Critical Sense*** by James Reeves and ***The Meaning of Meaning*** by C. K. Ogden and I. A. Richards. The makers of our Constitution had observed how most Constitutions of the world were defaced and defiled by the forces wielding powers to deflect law and constitution in their favour. To ensure such things never to happen in our Republic, they created our Constitution under which all organs are the creatures of the Constitution authorised to act within limits and under restraints, As already stated, this uniqueness of our Constitution has been brought out in the Postscript VI to my book ***On the Loom of Time: Portrait of My Life and Time*** (2nd ed.), also put on my website the links to which I have already mentioned above.

The Articles 124A-124 C inserted in our Constitution by the aforesaid Constitutional amendment, and Section 5 of the National Judicial Appointments Commission Act, 2014 deserve a close reading. These are quoted to facilitate some reflections on them: first the insertions in the Constitution --

***"124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:â€“â€“***

***(a) the Chief Justice of India, Chairperson, ex officio;***

***(b) two other senior Judges of the Supreme Court next to the Chief Justice of India â€“â€“Members, ex officio;***

***(c) the Union Minister in charge of Law and Justiceâ€“â€“Member, ex officio;***

***(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People â€“â€“ Members:***

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

***(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.***

***124B. It shall be the duty of the National Judicial Appointments Commission to-***

***(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;***

***(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and***

***(c) ensure that the person recommended is of ability and integrity.***

***124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it."***

And to quote Section 5 of the National Judicial Appointments Commission Act, 2014:

***"5 . (1) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office:***

***Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.***

***(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution:***

***Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:***

***Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.***

***(3) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary."***

**(b) The aforementioned changes: a critique humbly stated**

The National Judicial Appointments Commission, a body of 6 persons, includes the Law Minister as an ex officio member, and two eminent persons nominated by "the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People". Some Prime Ministers may be paragons of perfection, but nothing prevents below average persons ascend that height, History has examples in legions of stupid and corrupt ministers and Prime Ministers. Pandit Nehru was right in writing at page 677 of his ***Glimpses of World History***



***"Men in authority-kings, statesmen, generals, and the like-are advertised and boomed up so much by the Press and otherwise that they often appear as giants of thought and action to the common people. A kind of halo seems to surround them, and in our ignorance we attribute to them many qualities which they are far from possessing. But on closer acquaintance they turn out to be very ordinary persons. A famous Austrian statesman once said that the world would be astounded if it knew with what little intelligence it is ruled So these three, the "Big Three", big as they seemed, were singularly limited in outlook and ignorant of international affairs, ignorant even of geography!"***

Despite the Corrupt Practices Act of 1854 of Britain, 'corruption' was the most powerful motivator, and the most effective of all the remedies. "During the mid-Victorian years the way to Parliament often led through the pigsty", Some of the most important politicians had acquired the eminence by being most corrupt. We know how Jagat Seth, Rida Khan, and Jagat Seth had become 'eminent' persons during the early years of the East India Company only to betray their masters to ruin. We have seen how many of them acted only for private gains whilst holding such exalted posts. We have known how many Prime Ministers and Presidents acted in hands and glove with the sharp operators of commerce, and the armament industry (as had been done by Sir Basil Zahoroff). Disraeli did not give good account of himself, and David Lloyd George of Britain could receive, on good grounds, unworthy comments from Keynes: "this goat-footed bard, this half-human visitor to our age from the hag-ridden magic and enchanted woods of Celtic antiquity". [Quoted in Harrod, cited by John Kenneth Galbraith, ***A History of Economics, The Past as the Present***. P. 230 ]. One may acquire ***eminence grise*** by becoming some powerful politician's confidential agent exercising enormous power unofficially as was done by Cardinal Richelieu's private secretary, Pere Joseph.

There is nothing to prevent an illiterate in law to become a nation's law minister. We had seen how shabbily the Uruguay Round Negotiations were conducted, and how the Minister signed the WTO Treaty without reading it: surely so, on all probability, without understanding it. We all know how the lobbyists get such person on their side, how the point man works against our national interest to sell virtue and vice on the trade mart. I am boggled to think how the committee would nominate two eminent persons. "Eminence" acquired in which field? and in what way. Didn't David Hume say in his Essays, Moral and Political: "Beauty in things exists merely in the mind which contemplates them."? John Milton differentiated 'good eminence' from 'bad eminence' when he said: "Satan exalted sat, by merit raised / To that badÂ eminence". And Wordsworth wrote in his "Resolution and Independence":

As a huge stone is sometimes seen to lie

Couched on the bald top of an eminence;

Wonder to all who do the same espy,

By what means it could thither come, and whence;

So that it seems a thing endued with sense:

Like a sea-beast crawled forth, that on a shelf

Of rock or sand reposes, there to sun itself;

We do not know how 'eminence' is acquired. We have seen that 'eminence' is easily acquired by being the WTO-IMF compliant, or by receiving certificates of merit from them. The demonic persons deify mighty capitalists. To illustrate: the Medicis of Italy were the great bankers in Italy during the Renaissance. Botticelli celebrated them in his ***Adoration of the Magi*** as the wise men in the service of Jesus. "The painting was commissioned by the head of the Bankers' Guild as a tribute to that family. It should perhaps have been called ***The Adoration of the Medici***

. Having once being damned, bankers were close to divinity." This 'Rogue Finance' succeeded in establishing good relation on the principle of 'give and take' amongst the power wielders and the financiers to promote their common GREED. The Rogue Finance of our days can easily make its servile devotees 'eminent', even its pleasure is enough to grant 'eminence' even on the most unworthy. Besides, Iago had a point when he told Cassio: " Your physical health matters more than your reputation. A reputation is a useless and fake quality that others impose on us.". It is difficult to know whether to call someone 'eminent' is different, or no different, from Antony calling Brutus " an honorable man"

The real question is: "Is this Selection Committee competent to do the job that law assigns to it?" The point to be considered is: whether the gentlemen composing the Committee are competent to select persons to man the superior judiciary as created, and mandated, under the

Constitution of India. The fact that three members out of 6 are the Judges themselves is material but the point is to see to what extent they can play their role when they are up against the other three whose exposure to judicial decision-making may not be of any worth. True, everyone is a decision-maker in matters, trivial or momentous. Good judges must have judicially trained sensibility. They should have competence at the judicial decision-making. To understand what differentiates judicial-decision from the decision-making in other spheres, one should study 'Thought and Thought Processes' in the **Encyclopaedia Britannica**

Vol. 28 at pages 650-656. What is most demanded from a judge is not a mere vast learning, but a well cultivated capacity to remain detached, free from concealed mental tilt that invites stock-responses and concealed references to be at work. Dealing with the lawyers in the courts is easy as both the lawyers and the judges share same philosophy and are committed to same values. God knows how they would be able to select the judges when three out of six would have mental-tilt towards the neoliberal agenda which may not be in tune with our Constitution.

The Selection Committee may, perish the thought, may facilitate the subservience of our superior courts to the corporatocracy patronised by the WTO-IMF-World Bank Agenda backed by the direct, or crypto-psycho propaganda by the neoliberals. After all this is going to be the effect of our commitments under the WTO Treaty and the other Regional Trade Pacts which, in fact, are going to make even our Supreme Court a mere subordinate court of residuary jurisdiction. This sinister trend reaches its climax in the Investment Treaties (viz, the numerous BITs). There is a growing view that the power of the nation state is being eroded by globalisation. But one never thought that it would go to the extent of an award being passed by an arbitral tribunal in Singapore criticising the Supreme Court of India for its delay in handling cases and directing the Government of India to compensate an investor from Australia for such a delay (

**White Industries Australia Limited and the Republic of India**

2011). This award should alarm any right-thinking person and compel him or her to wonder at the way in which the babus draft international treaties; and the manner in which the Government of India conducts international arbitrations.

Article 124B prescribes one of the duties of the National Judicial Appointments Commission to "ensure that the person recommended is of ability and integrity". And Section 5 of the NJAC Act, 1914, already quoted above, is couched in words which suggest more than what they can mean to a school student carrying some elementary lexicon. It is not possible to dwell on these details but a few suggestive comments are worthwhile:

(i) Section 5(1) provides that the "Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India **if he is considered fit to hold the office**

:" (italics supplied). It is enough to enable the Commission to ignore the senior most Judge on the ground that in the opinion of the Commission he is not 'fit' for the job.

(ii) Section 5 (2) prescribes that the Commission "shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution". The Commission, as it is sought to be constituted, does not deserve conferment of such wide discretionary powers.

(iii) The Commission may not hesitate considering someone qualified under Article 124(3)(c) to become a Judge because he is dexterously hoisted as a distinguished jurist. At least the two eminent persons and the Law Minister may not see any impropriety in that. The second proviso grants virtually a right to veto enabling the two of these three powerful enough to block any recommendation.

(iv) As if the discretion to hold an inquest on the candidate's ability is not enough to generate arbitrariness, Article 5 (3) grants powers to the Commission to frame regulations prescribing "such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary." At present we do not know what sort of creative labyrinth will be set up.

Article 124C. empowers our Parliament to

**"by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it."**

The wide discretion and open-ended power may, in some locust-eaten years of our great Republic, help, perish the thought, help set up a regime in which the Hon'ble Judges of our Superior Courts would have no option but to become WTO-IMF-World Bank compliant. When I think on the provisions of these treaties, I apprehend we are on way to establish in our country two legal systems, one for us and the other for them (the non-residents, foreign investors, and foreign traders). We had seen where similar folly had taken us in the past. G.B. Shaw quoted Georg Wilhelm Hegel in his **Revolutionist's Handbook**

:" What experience and history teach is this-that people and governments never have learnt anything from history, or acted on principles

deduced from it." But now the evasion of reality would be a crime for which we and our institutions would be weighed by history

## V

### Mr. Dattu did the right thing by dissociating himself from NJAC to select Members.

I would end this article with the words I had begun it: "As a citizen of this great Republic I am proud to know that our Chief Justice of India Mr H.L. Dattu refused to participate in the National Judicial Appointments Commission till the Supreme Court decides its validity". I hope our Supreme Court would appreciate the unique features of Constitution, and would uphold it despite the corporate blizzards let loose against it. In any case the Court will have to take a broad spectrum view guided by judicial statesmanship.

Let us keep in our mind what Whittier said:

For all sad of tongues or pen

The saddest are these: 'It might have been'.

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[1](#) Stephen Clarkson Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty? ISBN: 0-88627-281-5 October 2002

[2](#) O. Hood Phillips' **Constitutional and Administrative Law** 7th ed 371

[3](#) Howell's **State Trials** 45 (1627)

[4](#) Bernard Schwartz, **Some Makers of American Law** Tagore Law Lectures p. 37

[5](#) Bertrand Russell, **History of Western Philosophy** Chapter XIV "**Locke's Political Philosophy.**" p. 615

[6](#) It is this line of thinking which made Prof. Holdsworth to recognize the theoretical impossibility of a judgment of a superior Court being a nullity, even if it had acted **coram-non-judice**, as "**there is no legal tribunal to enforce that liability.**" **History of English Law** Vol. 6 page 239

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