AN UNPRECEDENTED CHALLENGE BEFORE INDIAN DEMOCRACY: SUPREMACY OF CONSTITUTION OR PRIMACY OF JUDICIARY

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ABSTRACT

Human Welfare is a corner stone and signature tune of every democratic government. Historically, French Revolution of 17th century gave a momentum to uproot the dynastic rules, worldwide.

Thomas Hobbes, John Locke, Charles Montesquieu and Jean-Jacques Rousseau stirred the political thought processes and gave a new direction for the articulation, formation, structure and functioning of democratic governments, parliamentary democracy and most important and critical doctrine 'Separation of Powers'.

India, in her reinvented independence and parliamentary democracy evolved through well-designed constitution, which had ignited many minds of political thinkers, sociologists, economists and legal luminaries to lead India to zenith of progress, development and prosperity.

However, even after 75 years of our independence, all these three arms of Constitutional Governance could not properly reconcile themselves for the transformation of the long cherished dream seen by the freedom fighters and articulated by our Constituent Assembly. Since 1947, many governments came into power with their plan and their commitment to their ideologies and political philosophies, but as their thought processes were fractured and fragmented, they, in real terms have not contributed substantially and India remained struggling for its glory.

In last few years only Indian democracy has become vibrant and started taking strides towards fructifying the Constitutional Dreams, but the tensions still persist amongst legislature, executive and judiciary and apparently all three are very forceful, vocal and assertive about their own versions. Each of is coming with new edition of 'My Doctrine'.

> Time has come now, to give up 'I am superior' and put full and complete allegiance and commitment to the Constitution, which has given birth to these three arms, so that by recognising and respecting each other, valuing other's existence and views and functioning and parallel contribution and adopting the guiding principle of 'Check and Balance', all can grow and create confidence in the minds of all citizens of the country.
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> On this premise, an Inter-Relation, Inter-Action and Inter-Dependence of Legislature, Executive and Judiciary are being studied within the four corners of the Constitution by considering all relevant and cogent dimensions.

1.0 Prologue: The supremacy of the Constitution is essential to bring social changes in the national policy evolved, with the passage of time. Normally, controversies about the proper cannons of interpretation of a constitution remain a matter of essentially professional concern. But when they touch vital political and social questions, they may have far deeper repercussions….Lawyers as well as laymen have again advanced the proposition that the **Court must stick to the interpretation of the Constitution**, as it can be deduced from the actual or presumed intention of the Founding Fathers……..Far more serious is the revival of the time-worn thesis that the **Court should 'apply', but not 'make', the law, that it should not intrude into the field of policy-making**; for this found the qualified approval of the Conference of Chief Justices held in August 1958.

Ultimately, the proper balance between the conflicting values of stability and change can only be struck by judicial tact rather than abstract principle. To quote Judge Learned Hand, "No doubt it is inevitable, however circumscribed his duty may be, that the personal proclivities of an interpreter will do some extent interject themselves into the meaning he imputes to a text, but in very much the greater part of a Judge's duties, he is charged with freeing himself as far as he can, from all personal preferences, and that becomes difficult in proportion as these are strong. The degree to which he will secure compliances with his commands depends in large measure upon how far the community believes him to be the mouthpiece of public will, conceived as the resultant of many conflicting strain that have come, at least provisionally, to a consensus.

Does the sway of the battle leave us with anything more than the resigned acceptance of changing political tides and pressures, of individual preferences dictated by the conflicting beliefs of individual judges and resulting in shifting and accidental majority decisions?

…..**Chief Justice Traynor agrees that there are many such problems whose resolution entails extensive study or detailed regulation or substantial administration that a court cannot appropriately or effectively undertake.**[1]

It is established that laws need to be changed with the changing time and sociological changes in the society. It helps in matching the pace with the time; else there will be chaos and conflict in the society. In order to avoid such conflict, it is the bounden duty of the representatives of the people to empathise with people and put forth their feeling to bring in the changes required in the existing laws. The legislative is meant for sensing and empathising with people and accordingly enliven those expectations through policy changes and law-making or laws' modifying (amending).

2.0 Constitutional Philosophy: The role of the jusiciary in the processs of socila transformaiton and application of law in accordance with the need of the time is no less important. It seeks to protect people deom oppression and upholding the rule of law. The Supreme Court in its recent judgment in Common Cause vs. Union of India [(2018) 5 SCC 1 (Para 166)] has reiterated that law must take cognisance of the changing society and marrch in consonance with the developing concepts. [Studies in Jurisprudence & Legal Therory, Paranjape, N. V. Dr., Central Law Agency, 2019, ISBN: 978-81-940036-8-7]

Constitutional Law is, as its name implies, is the body of those legal rules, which determine the constitution of the state. It is not possible to draw any hard and fast line between the constitution and the remaining portions of the state's organisation. Neither, it is possible to draw any such line between constitutional law and other branches of the legal system. The constitutional law includes amongst other things, the basic rules of recognition of a state's legal system. Every constitution has an extra-legal origin and the resulting constitutional law depends on the pre-establishment de facto of actual usage and operation. Courts, legislatures, and the law had alike their origin in the constitution could not dervive its origin from them. But the fact that constitutions of extra-legal origin are not determined by pre-existing law does not prevent the fundamental rules of such constitutions from qualifying as legal rules. The ordinary legal rules, however, they differ in one important respect: their authority cannot logically be derived from some more basic legal rule, because they are themselves the basic rules of the legal system. The constitutional provisions regarding the authority of the legislature were to be enacted by legislation. What would this add? If the legislature has no legal authority, the enactment is void. It has legal authority, then the enactment is valid, but it owes its authority,

not to itself, but to the already rxisting rule conferring authority on the legislature. The constitution as seen by the eyes of the law may not agree in all points with the objective reality. Much constitutional doctrine may be true in law but not in fact, or true in fact but not in law. Power may exist *de jure* but not *de facto*, or *de facto* but not *de jure*. A rebellious province may have achieved its *de facto* indepedence, that is to say, it may have ceased to be in the *de facto* possession and control of the state, long before this fact receives *de jure* recognition. A complete account of a constitution, therefore, involves a statement of constitutional custom, as well as constitutional law. Although the constitution *de jure* and the constitutuon *de facto* are not necessarily the same, they nevertheless tend towards coincidence. They seek expresion and recognition through legislation, or through the law-creating function of the courts. The law, although it necessarily involves a pre-existing constitution, the Constitutional practice may alter, while constitutional law remains the same, and vice versa, but the most familiar and effective way of altering the practice is to alter the law.[2]

The Constitution has, from beginning, adopted the principle of 'Separation of Powers'. It is expected that all three wings of 'State', should not cross the threshold of their house and transgress the boundaries created by the Constitution. The recent pronouncement of Hon. Supreme Court of India in the case of Election Commission is a clear undesirable Judicial Activism. **It is the function of legislative to legislate the law, and not the Hon. Supreme Court at all.**

3.0 Constitution Law:

3.1 President's Power & Authority stipulated in Article 324 of the Constitution.

It is important to go through the provisions pertaining to the powers of President in respect of the election bestowed on the Election Commissioner.

Let us look at the exact wordings of these provisions, before we go ahead.

3.2 Article-324: Superintendence, direction and control of elections to be vested in an Election Commission:

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the State Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix *and the appointment of the Chief Election Commissioner shall, subject to the provisions of any law made in that behalf by Parliament; be made by the President.*

"The wording is clear and unambiguous. There is no confusion arriving from it. Normally, when the main clause is to be governed by some conditions, a proviso is added invariably, but in this case, no proviso is appearing. It means that the clause is complete in itself and therefore, no external intention or help is to be supplied and imported for interpreting the said clause.

3.3 Power and Authority of Supreme Court under the Constitution

Before we go ahead and discuss the subject, it will be pertinent to understand the powers conferred by the Constitution, through the Parliament,

(a) **Article – 138: Enlargement of the Jurisdiction of the Supreme Court** :

(1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as ***Parliament may by law confer***.

(2)The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, ***if Parliament by*** **law** provide for the exercise of such jurisdiction and powers by the Supreme Court.

Article-139: **Conferment on the Supreme Court of powers to issue certain writs:** ***Parliament may by law confer*** on the Supreme Court power to issue directions, orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, or any of them, for any purposes other than those mentioned in clause (2) of Article 32.

(c) **Article-140: Ancillary powers of Supreme Court**: **Parliament may by law make provisions for conferring** upon the Supreme Court such supplementary powers not inconsistent with any of the provisions of this Constitution, as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise for *jurisdiction conferred upon to by or under the Constitution.*

(d) **Article-142: Enforcement of decrees and orders of Supreme Court and orders as to discovery etc.**

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order, as is necessary **for doing complete justice**, in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or **under any law made by Parliament** and, until provision in that behalf is so made, in such manner as the **Parliament may by order prescribe**.

3.4 Parliament's Power, Authority and Responsibility:

Article 142 (2) Subject to the provisions of **any law made in this behalf by Parliament**, the Supreme Court shall, as respects the whole of the territory of India, have all an every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of court.

All above mentioned four articles, namely from Art. 138 to 142, have clearly mentioned and emphasised that whatever is required by the Supreme Court,

- **Parliament may by law confer,**
- **if Parliament by law provide for**
- **Parliament may by law confer on the Supreme Court power to**
- **Parliament may by law make provisions for conferring upon the Supreme Court such supplementary powers,**
- in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the Parliament may by order prescribe,
- *Subject to the provisions of any law made in this behalf by Parliament*, the Supreme Court shall

This makes it abundantly clear that whether it is 'jurisdiction' or 'power', other than what is already conferred upon it by the Constitution, **it cannot usurp powers not bestowed upon it. It has to be conferred on it by Parliament. Parliament is a vehicle for bestowing the power**

and authority on Supreme Court for the enforcement of law, including the Apex Law, i.e. the Constitution.

4.1 Parliament's authority to amend Constitution under

Article-368: Power of Parliament to amend the Constitution and procedure therefor:

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution *in accordance with procedure laid in this article*.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose, in either House of Parliament, and when the Bill is passed in each House by a majority of not less then two—thirds of the members of the total membership of the House present and voting [it shall be presented to the President who shall give his assent to the Bill and thereupon, the Constitution shall stand amended in accordance with the terms of the bill:

Provided that if such amendment seeks to make any changes in….

(a) Article 54, Article 55, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) Any of the Lists in Seventh Schedule, or

(d) The representation of States in Parliament, or

(e) The provisions of this article,

The amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provisions for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any Court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

In this connection, it will be pertinent to look at the essence (Ratio) of the judgment of the Hon. Supreme Court of India[3], in which it has reversed the judgment again and held that "Law" in Art.13 only means ordinary law made under legislative power. The 24th amendment is only clarifying that position and so, it is valid. However, it further held that "amendment" means that *the original spirit of the constitution must remain intact after the amendment. Thus, the basic structure or feature or features of the constitution cannot be changed.*

Section 55 of the Constitution (42nd Amendment) Act is beyond the amending power of the Parliament and is void since it removed all limitations on then power of the Parliament to amend the Constitution and confers power upon it to amend the Constitution, so as to damage or destroy its basic features or its basic structure.[4]

5.0 Judicial Activism:

"Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time, the dividing line between judicial activism and judicial overreach is a thin line." is said by the then Prime Minister Dr. Manmohan Singh, while addressing a conference of Chief Ministers and Chief Justices of the High Courts in April 2007 at New Delhi. The Constitution of India provides for Judicial Review under Article 32 by Hon. Supreme Court and Article 226 by Hon. High Court. The Supreme Court has said that the Judicial Review is the fundamental feature of the Constitution. These powers of judicial review are given not with a view to make the judiciary a supreme body superior to the other wings of the constitutional framework, **but to ensure a system of checks and balances between the legislature and the executive on one hand and the judiciary on the other.**[5]

Dr A. S. Anand, former Chief Justice of India and former Chairperson of the Human Rights Commission of India, while addressing on "Judicial review….judicial activism……need for caution" said: "The legislature, the executive and the judiciary are three coordinate organs of the state. **All the three are bound by the Constitution**. The ministers representing the executive, the elected candidates as Members of Parliament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take oaths prescribed by the Third Schedule of the Constitution. **All of them swear to bear true**

faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution.

The Indian Constitution does not envisage a rigid separation of powers, the respective powers of the three wings being well-defined with the object that **each wing must function within the field earmarked by the constitution.** The Supreme Court took all this into account[6] stating that "Special responsibility devolves upon the judges to avoid an over activist approach and to ensure that they do not trespass within the spheres earmarked for the other two branches of the State."

The judges should not enter the fields constitutionally earmarked for the legislature and executive. Judges cannot be legislatures, as they have neither the mandate of the people now the practical wisdom to understand the needs of different sections of society. They are forbidden from assuming the role of administration, governmental machinery cannot be run by judges as that is not the intention of our constitution makers.

In the words of Mr Justice J. S. Verma, the then Chief Justice, "the judiciary should only compel performance of duty by the designated authority in case of its inaction or failure, **while a takeover by the judiciary of the function allocated to other branch is inappropriate.** Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial 'adhocism' nor 'judicial tyranny."

Mr Justice Markandey Katju in Minor Priydarshini's case[7] has explained, "……The judiciary must therefore exercise self-restraint and eschew the temptation to act as a super legislature. By exercising restraint, it will only enhance its own respect and prestige. Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State…….If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators."

Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs. [Judicial Activism and Overreach in India, Shaunmugasundaram, R, in Amicus Curiae, Issue 22, winter 2007].

6.0 Why and How Supreme Court can amend Article 324 of Constitution?

The Part – XV of the Constitution delas with the 'Elections'. The relevant article runs as under:

6.1 Superentendence, direction and control of elections, to be vested in an Election Commission:

We have seen this Article-324 at the beginning of this paper. Clause (1) and (2) of Article-324 does not have any governing and / or controlling proviso. There is a proviso after the Sub-clause (5), which is not relevant to Sub-clause (1) and (2) of which the wording is clear and unambiguous. There is no confusion arriving from it. Normally, when the main clause is to be governed by some conditions, a proviso is added invariably, but in this case, no proviso is appearing. It means that the clause is complete in itself and therefore, no external help or intention is to be supplied for interpreting the said clauses.

If we careffully look at the above sub-clause, we will find that these clauses, it is emphasised that '*made by the Parliament'*. It shows that all rules etc. **are to be made by the Parliament** and neither by the President or Judiciary. The later part of Sub-clause (1) clealry states that 'as the President may from time to time fix and the appoint the Chief Election Commissioner and other Election Commissioners shall, *subject to the provisions of any law made in that behalf by Parliament, be made by the President.* So, the constitutional mandate is bestowed upon the Parliamement for making any law pertaining to the appointment of the Election Commissioner, and not by consulting the Surpeme Court. And therefore, the pronouncement by Hon. Surpeme Court to form a committee for the appointment of Election Commissioner and inlcude therein the Hon. Chief Justice of the Supreme Court is neither tenable nor a legally valid proposition. A question crops up in the mind is that, how the Supreme Court is usruping the power not vested in it by the Constitution. Why this transgression and how Apex Court justifies its interference in the legislative function without any authority to do that.?

In a case, S.S. Dhanoa v. Union of India[8], the facts were, in October 1989, the President of India notified that besides the Chief Election Commissioner the Commission should have two other members called 'Election Commissioners' with co-ordinate powers. On 1st January 1990, the President revoked his Notification of 1989, as a result of which, the two Election Commissioners, who had been appointed, lost their office as Election Commissioners. One of them challenged the said revocation of the Notification on various grounds. Hon. Supreme Court rejected the petition under Article 324 holding that,

(a) Even though it was desirable that the highly vital functions of the Election Commissioners should be exercised by more than one individual, **the creation and abolition of posts was a prerogative of the Executive and Article 324 (2) left to the President to fix and appoint such number of Election Commissioners as he may, from time to time determine.**

(b) While it was obligatory to appoint the Chief Election Commissioner, the appointment of other Election Commissioners or Regional Commissioners **was left by the Constitution to the discretion of the President.**

(c) In the absence of any evidence that the abolition of the posts and the removal of the incumbents thereof was made on the recommendation of the Chief Election Commissioner, it could not be held that the President or the Chief Election Officer was actuated by malice.

7.0 Appointments is an Executive function and not Judicial function: From the above Case, it becomes absolutely clear that the appointment of Election Commissioner is purely an Executive function, for which Constitution has bestowed all powers on the President of India and in case, of need, Parliament can give more powers to President of India. In such circumstances, when the Constitution has given the power and authority to the President of India to appoint the Chief Election Commissioner, how and why Hon Supreme Court has usurped the power, not granted to it by the Constitution? It is inappropriate and against the spirit of the Constitution. It is straightway encroachment on the jurisdiction of the parliament of making and amending the laws.

How Supreme Court is encroaching upon the power and authority of Parliament to legislate? To legislate is the core function of the legislature, i.e. Parliament. The main and primary function of the Supreme Court is to test the law passed by the Parliament, only if it is challenged, being the *ultra vires* the Constitution. Let us refer to the provisions of Article 13 of the Constitution, which runs as under:

8.0 Article-13: Laws inconsistent with or in derogation of the fundamental rights:

(1) All laws in fore in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void,

(3) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

In numerous pronouncements, Supreme Court has declared and emphasised upon the 'Basic Structure' and stated that it is not amenable to amendment. Keshvanand Bharati[3], Minerva Mills Ltd.[4], Waman Rao[9] and H. S Srinivas Raghavachar[10], the Supreme Court is again and again saying that the '*Basic Structure*' cannot be altered, amended, changed. Then, how it is taking unreasonable and unjustified liberty to disturb the '*Fundamentals of Basic*'; namely, '*Separation of Powers'*, as envisaged by the *Makers of the Constitution, namely, The Constituent Assembly.*

9.0 Evolution of Parliamentary Democracy: The very foundation of our Constitution is "*Parliamentary Democracy"*, which presupposes the independence of all three wings of the State, namely, Legislature, Executive and Judiciary and the principle of 'Check & Balance'. However, the thin line between these three arms of State is disappearing very fast, which is undesirable, especially, between Legislature and Judiciary.

9.1 Aftermath of French Revolution: After the French Revolution in 17th Century, world over the governments have started realising the new wave of Independence, Democracy, Equality, Liberty and Fraternity. Hobbes, Locke, Montesquieu and Rousseau had done tremendous work on 'Government', which is very important. Since 1600, European philosophers started debating the question, who should govern the nation, as the absolute rule of kings weakened. In 1649, a Civil War broke out over, who would rule England, Parliament or King Charles. The war ended with the beheading of the king and soon after Charles I was executed. An English philosopher, Thomas Hobbes (1588-1679) wrote *Leviathan,* a defence of the absolute power of kings. That title of the book is mythological and refers to whale-like monster that consumed complete ship. Hobbes compared that leviathan with government, a powerful State created to impose order.

9.2 Thomas Hobbes (1588-1679): Hobbes began his Leviathan by describing the 'state of nature', where all individuals were naturally equal. Every person was free what he or she wants to do to survive. As a result thereof, everyone suffered from 'continuous fear and danger of violent act by others and life of man was solitary, poor, nasty, brutish and short.' There were

no laws to govern and there was nobody to approve, recognise and endorse them. Hobbes borrowed a concept from English contract law that of implied contract. Hobbes stated that people agreed among themselves to 'lay down' their natural rights of equality and freedom and give up absolute power to some sovereign authority, which was not specified and articulated. The sovereign authority created by people, might be a person or a group. The sovereign would make and enforce the laws to secure a peaceful society, making life, liberty and property possible. Hobbes called this contract as "Social Contract".

9.3 John Locke (1632 – 1704): Locke was the Reluctant Democrat. He lived during the period 1632 and 1704. He was born immediately before the English Civil War. He stood by the Protestant Parliament against the Roman Catholic King James II in the Glorious Revolution of 1685. This event reduced the power of the king and made parliament the major authority in English government. In 1690, Locke published his book 'Two Treatise of Government'. Though to some extent he concurred with Hobbes, he argued that *natural rights such as life, liberty and property existed in the state of nature and could never be taken away or even voluntarily given up by individuals.* These rights were 'inalienable' (impossible to surrender). Locke also disagreed with Hobbes about the '*Social Contract*' concept. Locke was of the view that it was not the simply a contract amongst people but it was rather a contract between people and King. He was of the opinion that those natural rights of individuals limited the power and authority of the King. Thomas Jefferson used his theory in writing the *'Declaration of Independence'*, less than 100 years after the Locke. Although Locke spoke about the freedom of speech, thought and religion, he believed that the property to be the most important natural right. His opinion was that Government is necessary for promoting the *'Public Good'*. Locke had spelled out clearly in unambiguous terms that supreme authority of government should reside in the law-making legislature like England's parliament. The executive (Prime Minister) and courts would be creations of the legislature and under its authority.

09.4 Charles Montesquieu (1689-1755): When he was born, France was ruled by authoritarian Louis XIV. In 1722, he wrote a book, criticising the reign of Louis XIV and the doctrines of Roman Catholic Church. Montesquieu published his greatest work titled as 'The Spirit of the Laws' in 1748. In his opinion, the main purpose and function of the Government is to maintain law and order, political liberty, and the property of the individual. In his book, power was concentrated much in Parliament, the National Legislature. He concluded that the best form of government was one in which the legislative, executive and judicial powers were separate and kept each other in check to prevent any branch from becoming more powerful

than others. He believed that concentrating all powers as in the monarchy like Louis XIV would lead to despotism. While Montesquieu's separation of powers theory did not accurately describe the Government of England, American later adopted it as the foundation of the U.S. Constitution.

Jean-Jacques Rousseau was born in Geneva, Switzerland. In 1751, he won an essay contest. He was of the opinion that the so called Social Contract was not willing agreement, as Hobbes, Locke and Montesquieu had believed, but a fraud against people, committed by the rich. In 1762, Rousseau published his most important work on political theory titled as 'The Social Contract'. He strongly stated that 'Man is born free and everywhere he is in chains'. He agreed with Locke that the individuals should never be forced to give up his or her natural rights to a King. His solution was for people to enter into a social contract. They would give up all their rights, not to a king, but to "The Whole Community", all the people. He was of strong opinion that the general will of people could not be decided by elected representatives.

He believed that citizens must obey the laws or else be forced to do so as long as they remained a resident of the state. This is a 'Civil state' Rousseau says, where security, justice, liberty and property are protected and enjoyed by all'. All political powers according to Rousseau, must reside with the people exercising their will. His general will was later embodied in the words "We the people….." at the beginning of the U.S. Constitution. He realized that democracy as he envisioned it would be hard to maintain.

9.5 Translating Democratic Principles: The import of an expression like *democratic due process* in an administrative matter is apprehensive with at least three serious consequences, First, in a manner of speaking *non-enforcement of a statutory process* without any declaration of its invalidity; Second, import of a process which is not "due" as per the prescribed law but is deemed to be *due as per the subjective notions of the Court.* In the State of M.P. v. Narmada Bachao Andolan, Mr Alladi Krishnaswami Ayyar has stated that "three gentlemen or five gentlemen sitting as a Court deciding or accepting an argument *against the expressed wishes of the legislature or the action of an executive responsible to the legislature*; and Third, withdrawing the task of governance from the democratically elected representatives including the executive thereby creating an illusory bar on the exercise of their power, to function freely despite being within the four corners of the law.[9]

10.0 Transparency and independence: Recently Supreme Court, in one case Anoop Baranwal vs. Union of India[11] has pronounced that in Appointment Process, Chief Justice of

Supreme Court will have to be involved. I am producing the salient features below from the said judgement; based on which reasoning, Supreme Court has delivered this judgement.

a) The office of the Election Commission is an independent constitutional body,

b) Article 324(5) of the Constitution is intended to ensure the independence of the Election Commission free from all external political interference,

c) The said article *expressly provides that the removal of the Chief Election Commission from office shall be in like manner as on the grounds as of a Judge of the Supreme Court. Nevertheless, a similar procedure has not been provided for other Election Commissioners under second proviso to Article 324(5) of the Constitution,*

d) Keeping in view the *importance of maintaining the neutrality and independence of the office of the Election Commission to hold free and fair election which is a sine qua non for upholding the democracy as enshrined in our Constitution,*

e) We declare that the appointment of the Chief Election Commissioner and the Election Commissioners shall be made on the recommendations made by a three-member Committee comprising of the Prime Minister, Leader of the Opposition of the Lok Sabha and in case no Leader of Opposition is available, the Leader of the largest opposition party in the Lok Sabha in terms of numerical strength *and the Chief Justice of India.*

f) It is desirable that the grounds of removal of the Election Commissioners shall be the same as that of the Chief Election Commissioner that is on the like grounds as a Judge of the Supreme Court subject to the recommendation of the Chief Election Commissioner.

Now, before going ahead, let us look at the provisions of appointment of Judges of the Supreme Court.

11.0 Article - 124: Establishment and constitution of Supreme Court

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, **until Parliament by law prescribed a large number**, of not more than seven other judges [Now Thirty-three (33) after the Amendment Act, 2019].

(2) *Every judge of the Supreme Court shall be appointed by the President* by warrant under his hand and seal and shall hold office until he attains the age of sixty-five years:

The above article emphasises two things, namely,

i) The number of judges can only be increased by the Parliament, and

ii) Every judge of a Supreme Court shall be appointed by the President of India.

It means the Supreme Court, on its own; neither can appoint the Judge of Supreme Court nor can increase the number of Judges. Both these things have to be done by Parliament and President.

However, in the year 2015, Parliament has amended the Constitution by Ninety-ninth amendment and established National Judicial Appointment Commission. In accordance with that amendment mainly two changes were brought into being, for,

11.1 Article – 124B: Functions of Commission:

i) Recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justice of High Courts and other Judges of High Courts;

ii) Recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

iii) Ensure that the person recommended is of *ability and integrity*.

Also important is to see another relevant article.

11.2 Article – 124C: Power of Parliament to make law:

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

Looking minutely at these both the articles, nothing is objectionable, contrary to the provisions of the Constitution or encroaching on the "Basic Structure" of the Constitution. This amendment was perfect to maintain the transparency in the whole process, but what had

happened subsequently, the Articles 124A, 124B and 124C were struck down by the Supreme Court in Advocate-on-Record Association v. Union of India[12] and held that these amendments as *void* and restored the *Collegium System* for appointment of Judges to higher judiciary.

If Supreme Court gave the Directions that the appointment of Chief Election Commissioner should be made President of India only the recommendations by a Three Member Committee and the Chief Justice of India are included in it for the reason of 'Neutrality and Independence', then, by the same corollary and logic, why Supreme Court struck down Article 124A to 124C? What was the reason therefor? No logic. Why the Collegium System does not want,

a) The Union Minister in-charge of Law and Justice, and

b) Two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the 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, to be a member of the Collegium System?

It is noteworthy that on one hand, Supreme Court wants CJI to be included in the committee recommending the name for the position of Chief Election Commissioner to the President of India, but on the same logic it does not want two other members, important in democratic set-up to be included in the Collegium. Moreover, the logic given by Supreme Court is

a) The NGAC violates basic structure of the Constitution, and

b) The Primacy of Judiciary in appointment of Judges cannot be compromised.

It will be pertinent to look at Article–138 regarding the "Enlargement of the jurisdiction of the Supreme Court. The Articles 131 to 137 specified various authorities, powers and Jurisdiction of the Supreme Court of India, but those are not very much necessary for the point under discussion.

Since we have already seen the 'Enhancement of Jurisdiction of the Supreme Court' in Paragraph-3.2, we shall go to next relevant provision of the Constitution. In continuation of this, it will be important to look at Art. 246 of the Constitution,

11.3 Article–246: Subject-matter of laws made by Parliament and by the Legislatures of States:

(1) Notwithstanding anything in clause (2) and (3), *Parliament has exclusive power* to make

laws with respect to any of the matters enumerated in List-I in the Seventh Schedule (in this Constitution referred to as the "Union List"),

12.0 The relevant Entry-77 of the List - I (Union List) is as under:

Constitution, organisation, *jurisdiction and powers of the Supreme Court* (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

This Entry-77 in the Union List clearly empowers the Parliament to make laws about "Jurisdiction and Powers of the Supreme Court".

On this background, who has authority to enlarge the jurisdiction of the Supreme Court is the Parliament and nobody else, as per the Article-246 of the Constitution.

The Supreme Court itself has laid down in **Keshvanand Bharati Case**[3] that Basic Structure cannot be assailed upon and Separation of Power is part of basic structure, in which there was a Constitutional Bench consisting of 13 Judges, presided over by Mr Justice Sikri.

Similarly, in **I.C. Golaknath v. State of Punjab**[13] the Supreme Court has clearly stated **"No authority created under the Constitution is supreme; it is the Constitution, which is Supreme".** It was delivered by a large bench consisting or 11 judges, presided over by the then Chief Justice Mr Justice Subba Rao.

Therefore, when Supreme Court itself has enunciated that Constitution is Supreme and not any other arm of Country, how the Supreme Court is usurping the power and authority not vested in it by the Constitution. All arms, Legislature, Executive and Judiciary have emerged from the Constitution, and hence, no one can use the powers not vested in it. Had there been no Constituent Assembly, there would have been no Constitution and in result there would have been no Legislature, Executive and Judiciary. **It means Constitution is the main and prime source of all these three arms of the State (Nation).**

Here before, we have discussed many aspects of 'Separation of powers' and boundaries of three wings of the State, namely, Legislature, Executive and Judiciary. We have also discussed the 'Judicial Activism' at length. From the perspective of 'how judges influence' judicial pronouncement, certain judicial historical aspects are desirable to be peeped into.

Every human being grows in the society by virtue of different forces applying on him, e.g. religious, social, political etc. Right form the formative age of say 6-7 years to the age of say 21-22, we observe, study, listen and follow various things in the life, which impacts us, irrespective of our financial condition, academic background, religious faith or any other thing. Thereafter, when we enter a particular profession or a vocation, we carry that 'packet of learning', unknowingly, but definitely, affect our thought process and the choices we make in our personal as well as professional life. This is well known and not at all a new invention, as such.

13.0 Judges' Appointment–Behind the Curtain: Now, so far as the legal profession is concerned, the appointment of judges, particularly at High Courts and Supreme Court level, should have been strictly based on merits and talents ascertained with the help of judgements of particular judge. However, in the past, too much interference by the Executive has resulted into the degradation of the judiciary.

In the 1950s, Nehru even tried to get Chagla, the Muslim Chief Justice of the Bombay High Court, appointed chief justice of the Supreme Court, because he wanted a Muslim chief justice of India. In 1960s, when the time came for P. B. Gajendragadkar to supersede Imam, a Muslim, because Imam was suffering from a mental infirmity, Nehru allegedly expressed concern about what Pakistan would think, if a Muslim judge were superseded. (Page-178)

Religious considerations apply in judicial appointments to the high courts as well. Justice Fazal Ali, who was from Bihar, was appointed a puisne judge of the Jammu and Kashmir High Court in April 1958, because Prime Minister Nehru and the home ministry felt that it was necessary to have an outsider, had to be a Muslim. (Page-182)

Several Law Ministers and politicians brought caste considerations into judicial appointments. Law Minister Shiv Shankar wrote a letter to high court chief justices requesting that more Scheduled Caste and Scheduled Tribe judges be appointed. (Page-187) Chief Justice Pathak informed that the law minister, B. Shankaranand, being a Scheduled Caste man himself, wanted judges from the Scheduled Castes to be appointed to the Supreme Court. (Page-187)

The government also rejected judges, who were too independent-minded. For example, G. P. Singh, chief justice of the Madhya Pradesh High Court, was recommended by Chief Justice Chandrachud for appointment to the Supreme Court. Chandrachud wanted Singh in the Supreme Court very badly. However, the government rejected this appointment. This was

because, as chief justice, Singh had refused to recommend names for appointment to the high court which were suggested by a Congress (I) chief minister (Page-192). Around 1988, when Justice Bhagwati was asked what selection criteria the government used for appointing judges, he said that the government wanted judges who were favourable towards it, especially at the high courts where election petitions were being heard. Justice Chinnappa Reddy agreed that the government carefully examined nominees' past in order to see if he was pro or anti-government. He was disillusioned with the Supreme Court. He said that in one case, he was sitting with a senior Supreme Court judge, who told him that the government would be angry with them, if they did not decide the case in its favour (Page-195). Supreme Whisper[14]

14.1 Independence of Election Commission - Article – 324 (5) : This article intends to ensure the independence of the election Commission free from all external political interference and thus, expressly provides that the removal of the Chief Election Commissioner from office shall be in in like manner, as on the grounds as of a Judge of the Supreme Court. Nevertheless, a similar procedure has not been provided for other Election Commissioners under Second Proviso to Article 324 (5) of the Constitution. The other conditions of the service of Chief Election Commissioner / other Election Commissioners have been protected by the Legislature by the Act of 1991.

14.2 Neutrality and Independence of Election Commission: In the facts and circumstances, keeping in view the importance of maintaining the neutrality and independence of the office of the Election Commission, to hold free and fair election, which is a *sine qua non* for upholding the democracy, as enshrined in our Constitution, it becomes imperative to shield the appointment of Election Commissioners and to be insulated from the executive interference. It is the need of the hour and advisable in my view, to extend the protection available to the Chief Election Commissioners, as well until any law is being framed by the Parliament.

15.0 Wish of the Supreme Court:

Now, before the culmination of this, let us look at the penultimate, the unwarranted and undesirable direction of the Hon. Supreme Court.

"**Direction: Para-126:** Until the Parliament makes a law in consonance with Article 324(2) of the Constitution, the following guidelines shall be in effect:

(1) We declare that the appointment of the Chief Election Commissioner and the Election Commissioners shall be made on the recommendations made by a three-member Committee

comprising of the Prime Minister, Leader of the Opposition of the Lok Sabha and in case no Leader of Opposition is available, the Leader of the largest opposition party in the Lok Sabha in terms of numerical strength and the Chief Justice of India.

(2) It is desirable that the grounds of removal of the Election Commissioners shall be the same as that of the Chief Election 89 Commissioner that is on the like grounds as a Judge of the Supreme Court subject to the "recommendation of the Chief Election Commissioner" as provided under the second proviso to Article 324(5) of the Constitution of India.

(3) The conditions of service of the Election Commissioners shall not be varied to his disadvantage after appointment.[11]

16.0 Epilogue:

16.1 Spirit of the Constitution: The spirit of our Constitution is prime and important. No arm is supreme than others. It is a mechanism to have check and balance to ensure that the democracy, which was envisaged and dreamt by the constituent assembly remains secured, safe and unaffected. The words "do Hereby Adopt, Enact and give to ourselves This Constitution" are important. The Constituent Assembly ADOPTED this Constitution, ENACTED and given to ourselves on behalf of THE PEOPLE OF INDIA. It is not a mere obscure legal text; it embodies human values, cherished principles, and spiritual norms. It upholds the dignity of man.[15]

16.2 Ideals & Aspirations of The Constitution: The Preamble to the Constitution mentions the main objectives of the Constitution-makers, as pointed out by Chief Justice Subba Rao in Golak Nath v. State of Punjab[13], it has been stated in Keshvanand Bharati Sripadagalvaree v. State of Kerala[3] that it incorporates in solemn form the ideals and aspirations, which inspired the country in its struggle for independence.

16.3 Ratio Decidendi: The Supreme Court is expected to honour its own pronouncements, which it has unequivocally declared that no authority created under the Constitution is supreme; it is the Constitution which is supreme. Constitution being a living organ, its on-going interpretation is permissible.

16.4 We The People: In a parliamentary democracy, supremacy is with the people. Even, when our Constituent Assembly has drafted and finalised the Constitution, it had specifically and intentionally started The Preamble with the most sacred and unambiguous words, "WE THE

PEOPLE OF INDIA, having solemnly resolved to constitute India into……..", and did not started with "Constituent Assembly…" It clearly indicates the mind and the intention of the constituent assembly that at the fundamental level, it is the People of India, who wished and had created, enacted and adopted 'This Constitution", through the Constituent Assembly; and as a natural consequence thereof, all three arms / elements of The State, namely, Legislature, Executive and Judiciary have come into being. Therefore, the wish and claim of Supreme Court to have primacy over remaining two arms, namely, the legislature and executive is not sustainable and is without any valid, justifiable and logical reasons. Since there is no superior forum over and above the Hon. Supreme Court, to rectify it, it has to take that responsibility, *suo moto* and once again, at the earliest possible opportunity or even it will be better and most appropriate on its part, not to wait for the arrival of such opportunity and instead, call back review its own judgement and order in the matter of Aroop Baranwal [Writ Petition (Civil) No. 104 of 2015, under its power and authority under Article-142 of the constitution, which empower and authorises it, "The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order, as is necessary **for doing complete justice…"**

16.5 Statement of Public Policy: In its recent Judgement and Order dated 1st May 2023, in the matter of Shilpa Sailesh vs. Varun Sreenivasan, Hon. Supreme Court has clarified **the scope and ambit of power and jurisdiction of this Court under Article 142(1) of the Constitution of India**. "This question as to the power and jurisdiction of this Court under Article 142 (1) of the Constitution of India is answered in terms of paragraphs 8 to 13, inter alia, **holding that this Court can depart from the procedure as well as the substantive laws, as long as the decision is exercised based on considerations of fundamental general and specific public policy.** While deciding whether to exercise discretion, this Court must consider the substantive provisions as enacted and not ignore the same, albeit this **Court acts as a problem solver by balancing out equities between the conflicting claims**. This power is to be exercised in a 'cause or matter'."

Endnotes:

01) **Law in a Changing Society** by W. Friedmann, Second Edition, First Indian Reprint, 1996, Universal Book Traders, ISBN: 81-7494-011-1

02) **Salmond on Jurissprudence** (Page-83 to 87) by Fitzerland, P. J., 12th Edition, N.M. Tripathi Pvt. Ltd, Mumbai

03) Keshavanand Bharati v. State of Kerala, AIR 1973 SC

04) Minerva Mills Ltd. V. Union of India, AIR 1980 SC 1789: (1980) 2 SCC 591

05) Judicial Activism and Overreach in India by Shunmugasundaram, R. Amicus Curiae, Issue 72, winter 2007

06) (1986) 4 SCC 632 in the case of State of Kerala vs. A Lakshmi Kutty

07) Minor Priydarshini's case [(2005) (3) CTC 449]

08) S.S. Dhanoa v. Union of India, AIR 1991 SC 1745 : (1991) 3 SCC 567: (1991) 2 LLN 428,

09) Rajeev Suri vs. Delhi Development Authority & Others, Supreme Court of India Civil Original Jurisdiction Transferred Case (Civil) No. 229 of 2020

10) Waman Rao and Ors vs. Union Of India (UOI) And Ors.: (1981) 2 SCC 362, 1981 2 SCR 1: AIR 1981 SC 271

11) H. S Srinivas Raghavachar, AIR 1987 SC 1518

12) Anoop Baranwal vs. Union of India, Writ Petition (Civil) No.104 of 2015

13) Advocate-on-Record Association v. Union of India [(2016) 5 SCC 1: AIR 2015 SC (Supp.) 2463]

14) I.C. Golaknath v. State of Punjab AIR 1967 SC 1643

15) Supreme Whisper – Conversation with Judges of the Supreme Court, 1980-1989, by Chandrachud Abhinav, Penguin Viking, ISBN: 9780670090327

16) Bachan Singh v. State of Punjab, AIR 1982 SC 1325

17) Shilpa Sailesh vs. Varun Sreenivasan, Transfer Petition (Civil) No. 1118 of 2014

154. The import of an expression like democratic due process in an administrative matter is apprehensive with at least three serious consequences, First, in a manner of speaking non-enforcement of a statutory process without any declaration of its invalidity; Second, import of a process which is not "due" as per the prescribed law but is deemed to be due as per the subjective notions of the Court (or if we may borrow the exposition of 264 [see: Joseph Antony (supra) – Para 14 and State of M.P. v. Narmada Bachao Andolan (supra) – paras 36 and 37] 128, Mr Alladi Krishnaswami Ayyar has stated that "three gentlemen or five gentlemen sitting as a Court deciding or accepting an argument against the expressed wishes of the legislature or the action of an executive responsible to the legislature]; and Third, withdrawing the task of governance from the democratically elected representatives including the executive thereby creating an illusory bar on the exercise of their power to function freely despite being within the four corners of the law. [**Supreme Court of India Civil Original Jurisdiction Transferred Case (Civil) No. 229 of 2020 Rajeev Suri vs. Delhi Development Authority & Others**