

Dr Jayaprakash Narayan
General Secretary

15th September, 2015

To,

Member of Parliament

Dear -----

The Parliament enacted the Constitution (Ninety Ninth Amendment) Act, 2014 providing for the National Judicial Appointments Commission (NJAC) to recommend appointments and transfers in higher judiciary. This amendment was necessitated as Supreme Court by judicial pronouncements had effectively amended the Constitution and gave unto itself the power to recommend appointments through the collegium of judges.

Foundation for Democratic Reforms (FDR) and Lok Satta Movement have for long strongly believed and articulated that the Supreme Court decisions regarding the binding nature of the advice of the collegiums of judges are antithetical to democracy and accountability. In particular, there are three compelling reasons why judicial appointments cannot be the sole preserve of the judiciary.

First, in a democracy, the legitimacy of every institution must be traced to the will and consent of the people directly and indirectly. The Lok Sabha is elected directly by the people, and the Prime Minister and Cabinet are in turn appointed on the basis of majority support in Lok Sabha, and are accountable to the House. Rajya Sabha is elected by State Legislatures which are in turn directly elected by people and it functions as Council of States. The President is elected by both Houses of Parliament and State Assemblies. Every other institution is appointed either by the accountable executive or by a mechanism involving the executive and legislature by law. In States, a similar mechanism exists. No institution in a democracy can arrogate to itself the power of appointing its own successors. Therefore an unelected institution, however exalted, appointing its own peers and successors is devoid of democratic accountability and lacks legitimacy of people's express or implied consent.

Second, empirically, there is no functioning democracy in the world in which the judiciary appoints itself. The table in Annexure-1 gives a summary of procedure for judicial appointments in select democracies. In every democracy, the executive, and often the legislature, judiciary and lay citizens

(Page 1 of 3)

appointed by law play the critical role, and nowhere is judicial appointment regarded as the prerogative of the judiciary. It is universally accepted that democracy and justice are too important to be left to judges alone.

Third, from a utilitarian point of view, it is important to protect the credibility of the higher judiciary, particularly in a highly polarized society with a propensity to visceral reactions based on primordial loyalties of caste, religion, region and language. The frequent agitations for and against reservations in education and public employment, highly emotive issues like the Babri Masjid-Ram Janmabhoomi dispute, river water sharing, and other highly contentious disputes in a complex and diverse society need to be resolved away from partisan politics, and in the cold light of logic, Constitution and the law. A credible and respected Supreme Court alone can safeguard the Constitution and the nation on such occasions and effectively reconcile justice, Constitution, law, harmony and public good. If the Court's credibility is eroded on account of what is perceived to be usurpation of powers not granted under the Constitution, it will hurt the Court, the Constitution and our democracy.

With this logic, FDR approached a team of the nation's most eminent and credible jurists – Justice MN Venkatachaliah and (late) Justice JS Verma, both former Chief Justices of India, and (late) Justice VR Krishna Iyer, former Judge of Supreme Court. These jurists represent the best in judiciary in a generation, and their integrity, independence and commitment to the Constitution are beyond dispute. These eminent jurists studied the issue with care and caution, and after detailed deliberations recommended the National Judicial Commission (NJC) for recommending judicial appointments. FDR kept the government and opposition informed of this initiative at every stage, and shared all the background research papers and the views of these three eminent jurists. All the relevant papers are enclosed with this letter. The NJAC is a modified version of the NJC.

However, this NJAC now stands challenged before the Supreme Court. Foundation for Democratic Reforms (FDR) sought the Supreme Court's permission to file an Intervention petition. However, the Court took the view that they would not admit any such petitions in this case. Therefore we submitted in writing to the Honorable Judges on the Supreme Court Bench our views and furnished all the supporting documents. Given the reported arguments being made during the hearing of this case and the observations of the Constitution Bench, there is a legitimate apprehension that the Court may be tempted to rule against the NJAC, on specious grounds such as 'executive interference' and 'loss of judicial independence'.

Judicial independence in this context is a means to realize a higher objective i.e. the appointment of competent, independent-minded judges and in a manner that is unbiased, transparent and objective. This is exactly what the NJAC would achieve through a balanced, fair and constitutional mechanism. It would help protect and enhance the independence, competence, integrity and the image of the higher judiciary – all of which form the core of our constitutional order.

It is vital that we protect the independence, credibility, integrity and accountability of the judiciary. It is equally important that we protect the architecture of the Constitution, and democratic legitimacy of all institutions of governance. The perception that higher judiciary is appropriating the sole power of recommending judicial appointments undermines both democratic legitimacy and credibility of judiciary. A direct and open standoff between the Parliament and the Supreme Court is wholly avoidable, and

this is a fit case for judicial restraint. Once we accept the logic that a commission of judges, executive, legislature and eminent lay persons is desirable and constitutional, then clearly the details of composition of such a Commission have to be left to the Parliament. The only issue open to for judicial scrutiny is whether the composition and criteria for selection are rational, transparent and non-arbitrary.

We are confident that the Supreme Court will recognize the supremacy of Parliament in this matter. If, however, the 99th amendment is quashed by the Court, this is a fit case for Parliament to stand its ground and assert its supremacy in determining the procedure for judicial appointments. Democratic accountability and upholding legitimacy of all institutions by tracing them to the explicit or implied consent of people demand such a course of action. We urge all parties to set aside their partisan and political differences and stand united on this vital issue to protect the integrity of the Constitutions, supremacy of Parliament and democratic legitimacy of all institutions.

I urge you, as Member of Parliament, to provide leadership in this endeavour, and use your good offices to protect the Constitution.

With warm personal regards,

Sincerely,

Jayaprakash Narayan

General Secretary

Foundation for Democratic Reforms

Enclosures:

- Annexure A: Table listing appointment mechanisms of higher judiciary in other Democracies
- Annexure B: Our letter to the Honourable Supreme Court (dated June 12, 2015)
- Annexure C: 1. My letter to Prime Minister (dated May 11, 2011),
2. My letter to Prime Minister (dated Aug 6, 2012)
- Annexure D: 1. The joint views of Justice M N Venkatachaliah and Justice JS Verma
2. The concurrent opinion with comments from Justice VR Krishna Iyer.
- Annexure E: Comprehensive background note on the subject which served as backgrounder to the eminent jurists.