Text of speech delivered on *JUDICIAL INDEPENDENCE AND ACCOUNTABILITY* on 4th April, 2025 by Mr. K G Raghavan, Senior Advocate

14th March 2025 was a firey day in the annals of Indian Judiciary. Coincidentally on the same day I received a request from Senior Advocate Ms. Anuradha to speak at this august forum on the topic "Judicial Independence and Accountability". I wonder today whether she had prophesied and played the role of the soothsayer in Shakespeare's Julius Caesar who famously warned and said , "Beware the Ides of March". The event which has unfolded since then has provoked debate, healthy but unrestrained, from all quarters, legal, and non legal. What is unfortunate and most concerning is not the debate, per se, but it's unrestrained and unruly character. By such debate, and I seek your pardon to characterise it as irresponsible, more harm has been done to the independence of the Judiciary and its accountability than otherwise. Having said that, it is true that the topic of today's deliberation is timely. It has always been and will continue to be. It is an ever evolving one.

The subject has two components. Firstly the "Independence" and secondly, "Accountability" of the Judiciary, an indispensable institution in a democratic set up. Neither of the two is subordinate to the other. They have to work in tandem. The term "Independence" in the context of the judiciary has many hues and colours. It mainly connotes independence from interference by the political and executive arms of the administration. The Constitution of India insulates the higher judiciary from incursions, directly and indirectly, by these two wings of administration of the polity. The Constitution does so in three ways. Firstly, in the matter of appointment of judges to the higher judiciary namely the High Court and Supreme Court, Article 124 and Article 217 mandates that requirement of a consultative process amongst the constitutional functionaries mentioned therein. Secondly, in the in the matter of removal an elaborate impeachment process is provided. Thirdly, conditions of service is regulated by a parliamentary statute. The salary of a Judge is a charge on the consolidated fund of India and not subject to budgetary control.

The march of the law/Independence of the judiciary:

Question arose as to whether "consultation" – in Article 124/217 connotes "concurrence", meaning thereby whether the concurrence of the judicial functionaries named therein is a must. Additionally, will the Chief Justice of India have primacy in the consultative process. These two Articles were interpreted by three Constitution bench judgments of the Hon'ble Supreme Court

popularly known as the First[1], Second[2] and Third[3] judges case. The First judges case was overruled by the Second and the Third which arose out of a presidential reference reaffirmed the correctness of the Second Judges case. The second and the third judges wrested primacy in the judiciary in the matter of the appointment of judges. In other words, judges ought to appoint judges was the mandate. Then came the Memorandum of Procedure in consonance with the aforesaid two judgments.

The first judges case arose out of a challenge to the action of the Union of India in the matter of transfer of judges from one high court to another. In that case, Justice Bhagwati as he then was, said,

'*The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. ... it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective.*"

Adverting to the intent of the Constitution makers on this subject, he said,

" It was felt that the concept of independence of the judiciary was not limited only to the independence from executive pressure or influence, but it was a much wider concept, which took within its sweep, independence from many other pressures and prejudices."

Justice Pathak, as he then was, observed on the concept of independence of judiciary,

"*While the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of people. Indispensable to such faith was the 'independence of the judiciary'. An independent and impartial judiciary, it was felt, gives character and content to the constitutional milieu."*

Justice E. S. Venkatramaiah, as he then was opined,

"*Independence of the judiciary was one of the central values on which the Constitution was based. In all countries where rule of law prevails, the power to adjudicate upon all disputes between man and man, and a man and the State, and a State and another State, and State and the Centre, was*

[1] S P Gupta vs. Union of India [1981 Supp SCC 87]
[2] Supreme Court Advocates-On- Records Association vs. Union of India [1993 4 SCC 441]
[3] Special Reference No.1 [1998 7 SCC 739]

entrusted to a judicial body, it was natural that such body should be assigned a status free from capricious or whimsical interference from outside so that it could act without fear and in consonance with judicial conscience."

The second judges case categorically held, that the opinion of the judiciary symbolised by the view of the Chief Justice of India and formed in the manner indicated, has primacy and that no appointment of any judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India. In other words it was held that consultation meant concurrence.

In the third judges case the law declared in the second judges case was affirmed. In other words judges appointing judges was accepted as the correct constitutional position. The NJAC judgment reaffirmed the view in the Second and Third judges case.

In the context of appointment of judges, it is apposite to refer to the contrary view expressed by Sri T. T. Krishnamachari in the Constituent Assembly to the following effect.

"The independence of the judiciary should be maintained and that the judiciary should not feel that they are subject to favours that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interest of the Executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this House or of the Framers of the Constitution that they want to create specially favoured bodies which in themselves become an ***imperium in imperio****, completely independent of the Executive and the legislature and operating as a sort of superior body to the general body politic."*

The delicate balance between maintaining the independence of judiciary vis a vis appointment of judges and creating a situation of imperium in imperio was explained by Dr.B.R.Ambedkar, in the course of the debates in the Constituent Assembly thus:

"*How are judges of the Supreme Court to be appointed? The first proposal is that the judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States….There can be no difference of opinion in this House that our*

judiciary must both be independent of the executive and must also be competent in itself. And the question is how these objects could be secured."

Dr.Ambedkar then refers to the system of appointment of judges in the superior courts both in England and the United States. Referring particularly to the practice in the United States of confirmation of appointment by the Senate, he continues,

"It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article therefore steers the middle course."

On the question of concurrence of the Chief Justice in the matter of appointment as opposed to consultation, he said,

"*With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I think therefore that this is also a dangerous proposition."*

Obviously Dr. Ambedkar could not visualise the turn of events over the decades to come, even in the United States. Today as we debate this important issue in India, in the United States the SCOTUS is openly being accused of being partisan depending upon the political party which nominated the particular judge and deciding cases on the basis of the ideology of that party. If the Constitution makers had visualised this turn of events, possibly they also would have had a second thought as to the interference of the political body as being undesirable. Thankfully, that course was abandoned in India at the very inception. So that option is a non-starter in India. In this context in book titled "Debates on Judicial Appointment" one of the leading jurists said

" *But when politicians talk thus, or act thus without talking it is precisely the time to watch them most carefully. There usual plan is to invade the constitution stealthily, and then wait to what happens. If nothing happens they go on more boldly; if there is a protest they reply hotly that the Constitution is worn out and absurd and that progress is impossible under the dead hand. This is the time to watch them especially…Their one and only object, now and always, is to get more power inti their hands that it may be used freely for their advantage and to the damage of everyone else. Beware of all politicians at all times, but beware of them most sharply when they talk of reforming and improving the Constitution."*

That the executive should not interfere with the independence of the judiciary is axiomatic. That appointment of a particular person as a judge is integrally connected with the preservation of independence of the institution is self-evident. Obviously you cannot have a committed judge to make up for an independent body. So that option of appointment of a judge by the executive is again not an option at all.

Would you then trust the view of the Chief Justice singly as the deciding factor in the matter of appointment? What role then does the executive government have to play? That an institutional decision (in the instant case the collegium) is superior in quality to individual decision of the Chief Justice is without cavil. In fact the collegium system is the fall out of the judgment of the Supreme Court in the Second Judges case.

It is in this background that the Memorandum of Procedure as formulated by the Central Government and accepted by the Supreme Court gains credence. It seems to maintain a just balance between the participatory role of the judiciary and the executive which contemplates 8 steps in the matter of appointment of a judge to the higher judiciary.

No system for the appointment of judges is flawless. Each has its merits and demerits. The wisdom is to identify the core or the basic issue which in the instant case is to insulate the judiciary from political interference through the executive wing of the Government. As the idiom goes, "Do not miss the Forest for the Trees." The collegium system has been criticized for appointing "bad judges". Is this generalization correct? In my view not. Individual failings of men who are involved in the actual functioning of the executive, the legislature and the judiciary, do not necessarily lead to the inference of the system which selects them and assigns to them their role is defective. In other words do not throw a baby out with the bath water.

Another criticism against the functioning of the collegium system is the opaqueness of the deliberations within the collegium. This is a vexed issue. A delicate balance has to be maintained between confidentiality and transparency. Deliberations within the collegium as to the suitability of a particular person to be appointed as a judge, necessarily has wide ranging ramifications vis a vis both the institution and the individual. From the point of view of the institution, it is better to obfuscate the details of the merit and demerits of the individual since the respectability of the institution depends largely on the respectability of the individual being considered for appointment as a judge. Trust is the foundation of a judicial body. It is assumed that judges are the most trusted lot amongst the three wings of functioning of the governance system as envisaged in the Constitution. If that is the unfailing faith that the Constitution has reposed in the higher judiciary, a valid assumption to make, there is no reason why the objective assessment of the collegium should be doubted. "**Trust we must in the judges."** That is the mantra. If we don't, then we should abandon the democratic form of government.

Now let's examine from the point of view of the person whose name was considered for elevation by the collegium and not recommended. If the deliberations are disclosed as to why the person was found unfit, it will irretrievably damage the reputation of that person which is the "**most unkindest cut of all"**. Yet another reason why the deliberations should not be disclosed in its veritable details.

Therefore, Ladies and Gentlemen, it is my view is that the present system of judges appointing judges is most suited in the Indian environment and with the modifications to the extent of disclosure of the deliberations of the collegium as now adopted, the same augurs well towards the maintenance of the independence of the judiciary in the matter of appointments. The modifications are always work in progress.

If this was an Oxford type debate, I would seek the affirmation of this august body to retain the collegium system and the principle that judges appoint judges.

Accountability :

Judges as appointees have one or more of the human failings. I commenced by saying that the incursions into the independence of the judiciary is by two sources, viz., Executive and Legislature. But there is a third source, and equally dangerous one namely, from within. The danger to the independence of the judicial system comes from all directions. The most dangerous is the attacks that come from within. The Indian judiciary have suffered and sustained these

attacks. The brutal attack on the judiciary from within came on the 12th January 2018 when four judges of Indian Supreme Court held the infamous press conference to air in public their grievance against the then Chief Justice of India. These judges have done yeoman disservice to the reputation of the institution by venting their grievance in public. They forsook the larger interest of the institution for petty causes. This intrigue within the judiciary is in fact very poignantly referred to by H M Seervai in his treatise on the Constitutional Law of India. He quotes Justice Jackson who said " Judges are more often bribed by their ambition and loyalty rather than by money." Be that as it may, the scathing remarks made by judges against the judiciary after their retirement is yet another glaring example of betrayal by those from whom loyalty was expected both when in office and after demitting the office.

How should a stray misconduct of a judge of superior court be dealt with. That's the moot question. How accountable should the judiciary be to the public in the matter of their dealing with an errant judge. Should the judiciary be bound by the same standards as applicable to the executive which largely comprises of appointees through a statutory process, for example, Union and State public Service Commissions. While dealing with an errant judge how much "sunlight" is called for and considered enough? These questions have erupted time and again and have lead to scathing attack on the judiciary as a whole. Attempts have been made irresponsibly from again within and without about the lack of trust in the whole judicial system because of a single or a stray incident of an errant judge ignoring again the oft quoted idiom *" Single swallow does not make a summer."*

Quis custodiet ipsos custodes?- who is there to watch the watchmen themselves is a nagging question which troubled even the Romans. It is not capable of an easy answer. Accountability of a particular judge and independence of the institution are closely intertwined. Misdemeanour by a judge is not akin to an act of misdemeanour by a public servant as popularly understood. Any act of misdemeanour by a judge of the high judiciary has great ramifications on the credibility of the institution itself. Therefore a judge owes a greater sense of answerabilty and commitment towards his job than the holder of any other public office. It is in recognition of this unique position that a judge of the higher judiciary holds, that the Constitution has made a special provision for impeachment of a judge. That power has been vested with the highest law making body of the country and the exercise of such power is circumscribed by several stringent requirements including the provisions Judges (Inquiry) Act, 1968. There is a criticism that in the last 75 years of the coming into force of the Constitution there has not been a single case of

impeachment except an attempted one in the case of [4]Justice K Ramaswami of the Supreme Court. The criticism in my view is without justification. It is as it should be. The power of impeachment is useful more as a deterrent than in its actual use. Hiss but don't bite is the rule. There is an inhouse mechanism for enquiry as laid down in Ramaswami's case. The mechanism involves the top most functionaries of the judiciary. It is assumed that the power of enquiring into an allegation of misdemeanour by a judge is vested in the high functionaries of the system, it will be fair and proper. There is an element of confidentiality too. That the independence of the judiciary on the one hand and the requirement of fair investigation are both important is without any question. The balance to be maintained between the two is a delicate one. The most devastating for both is the irresponsible and hazardous publicity and debate that follows from sections of the public criticising the judiciary. "The judiciary has betrayed the trust of the people" proclaims one section. "The judicial system has been exposed" cries the other. "The public have lost confidence in the judiciary" laments the third. Protests, seminars and interviews galore within a few minutes of the misdemeanour being reported by various eminent personalities from the Bar and Bench and the Associations. Friends, this unrestrained reaction lacking in sobriety and deliberation as to the larger ramification of this type of reaction is highly regrettable. It is true that in some cases sunlight as opposed to secrecy is the best disinfectant and the remedy for darkness is sunlight and more sunlight**.** But too much exposure to sunlight burns and burns severally. It can result in sunstroke.

But every such rule has its own limitations. Even an ordinary departmental enquiry has its own limitation in terms of disclosure or transparency. It is more demanding in the case of a judge since as I said above, judge represents an institution i.e. the court and the majesty of the law is represented by the courts. Therefore, I plead, My Lords the former judges of the judicial system, do not berate the system in public on the basis of unjustified, unverified self formed conclusions. I plead to my fellow colleagues in the profession, not to sensationalize issues arising out of allegations against a judge through public interviews and statements carried on 9 'o' clock news. To the fourth estate the Press both print and media, I plead with them to exhibit restraint and not conduct a trial which will harm the institution. Notwithstanding that the pen is mightier than the sword, there are severe limitations on the veracity of press reports and the damage that per chance a wrong report can cause to the standing of the institution would be irreparable. Do not forget, my friends in the press, that the Indian Judiciary has been the watchdog of press freedom and individual liberty. A point in stance, is the release from custody of Mr. Arnab Goswami of republic TV by even taking his case out of turn when many others were languishing in jail for a

[4] Sub Committee on Judicial Accountability vs. Union of India and Ors.1991 4 SCC 699

longer period. Circulation and TRP should not be the guiding factors for the press and TV when it concerns sensationalizing the Judiciary.

There is another angle to be debate on accountability. Unlike in the past, today the judges are engaged in a lot of non judicial work on the administrative side e.g. approval of tenders, appointment of staff , transfers etc. The standards and procedure that one needs to adopt in the matter of investigation into an act of misdemeanour of judge while exercising such functions should be different consistent with the rules of confidentiality. Therefore, a time has possibly come to differentiate between the conduct of a judge in the discharge of his or her judicial functions and in discharge of administrative duties.

The Indian judiciary has a high and respectable standing in the world. It is known for its courage, forthrightness and impartiality. If there is one place in this country where calm and incise deliberation takes place it is within the courts and that should not be put at stake by irresponsible and light comments. A few or solitary instances should not be used to undermine the institution. It is time to revive a debate on the appointment of Judicial ombudsman in line with the Judicial Standards and Accountability Bill, 2010.

This debate on the accountability of a judge of a superior Court is not peculiar to India. Allegations of financial impropriety against Justice Clarence Thomas and Justice Samuel Alito of the US Supreme Court have raised serious issues even the United States. But the criticism has been guarded ensuring that the status of the court is not diminished in any manner whatsoever. So too scandals in the White House involving Presidents like Andrew Jackson (Petticoat Affair), Ulysses Grant (The Whiskey Ring), Warren G Harding (The Teapot Dome Scandal), Richard Nixon (Watergate Scandal), Ronald Reagan (Iran Contra Affair) and Bill Clinton (Monica Lewinsky Affair) have also made headline news without shaking confidence in the White House. There is lesson to be learnt.

Let me conclude with the words of Justice Albie Sachs of the South African Constitutional Court *"If respect for judiciary is to be regarded as integral to maintenance of the rule of law, such respect will be spontaneous, enduring and real to the degree that it is earned rather to the extent that it is commanded."*

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