

# 98<sup>th</sup> Constitutional Amendment Bill

## Seeking to Create a National Judicial Commission



In view of the mounting pressure to have a statutory body to look into the affairs of higher judiciary, including appointments and transfers of judges, the 98<sup>th</sup> Constitutional Amendment Bill seeks to create a National Judicial Commission. However, a closer look of the Bill reveals drawbacks in its recommendations, which once again gives a more-than-desired say to the Executive in the matters of Judiciary. The suggested composition of the Commission has its inherent shortcomings, which is bound to reflect in its decisions, and thus, may not be able to achieve its avowed objective of strengthening the *independent* character of the Third Pillar of Democracy – the Judiciary.

### The Bill at a Glance

#### Highlights

- ♦ The Bill seeks to create a National Judicial Commission (NJC);
- ♦ The Commission would make recommendations for appointment of judges in higher judiciary and transfer of High Court judges, and thus, provide an institutionalised mechanism for appointment and transfer of judges in higher judiciary;
- ♦ The recommendations made by the Commission for appointment and transfer of judges in higher judiciary would be binding on the President, and this would reduce chances of friction between the Executive and the Commission;
- ♦ The Commission would draw a code of ethics for judges in higher judiciary; and
- ♦ It would be empowered to conduct inquiries in cases of misconduct and deviant behaviour of a judge, either on the basis of complaints made or *suo motu*. This would help ushering in judicial accountability.

#### Lowlights

- ♦ The Bill has given the Executive a much larger role in the composition of the Commission, which may undermine the independence of Judiciary;
- ♦ The Bill does not provide for any transparent procedure that the Commission should follow in making appointments and transfers of judges in higher judiciary; and
- ♦ The recommendations made by the Commission, subsequent to the inquiry conducted in cases of misconduct and deviant behaviour of judges, to the Chief Justice of India (CJI) or the Chief Justice of a High Court is not binding on them. Thus, in cases, where the recommendations made by the NJC are not accepted by the authorities concerned, controversies are bound to arise, and this may undermine the institution of NJC.

#### Action Points

- The most important step would be to correct the composition of the NJC;
- The participation of the Executive in the Commission should be limited to the Union Minister of Law and Justice;
- Two eminent citizens to be appointed should be either eminent jurists or eminent lawyers or legal academicians of high repute;
- One of them should be appointed by the President in consultation with the Chief Justice of India and the other in consultation with the Prime Minister;
- The provision to associate the Chief Minister of a state in case of an appointment and transfer of a High Court judge with the Commission should be done away with;
- The Bill should provide for a transparent and time-bound procedure for the appointment and transfer of judges;
- The recommendations made by the Commission on the basis of the inquiry conducted in cases of misconduct and deviant behaviour of erring judges should be binding on the authorities concerned, just as the recommendations made for appointment and transfers are binding; and
- The report of any such inquiry committee should be made public in order to boost transparency and enhance judicial accountability.

# Bill Blowup

### Contents

- ♦ Bill at a Glance
- ♦ Action Points
- ♦ Introduction
- ♦ Basic Features
- ♦ Independence
- ♦ Appointment
- ♦ Indiscipline
- ♦ Composition
- ♦ Conclusion

  
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## Introduction

Amending the Constitution is a serious business and, therefore, constitutional amendments should be viewed with utmost care and caution. A constitutional amendment Bill needs to be understood in the context, in which it would operate. What would be the impact of a constitutional amendment on those features that constitute the pith and substance of our constitutional order? Has the proposed amendment identified the lacunae that it seeks to rectify? What is the proposed mechanism to rectify those lacunae? Or, how efficacious this mechanism would be in tackling the identified problems? These are some questions that need some painstaking pondering in understanding a constitutional amendment.

The 98<sup>th</sup> Constitutional Amendment Bill has to be scrutinised on these yardsticks. This Bill primarily aims at institutionalising the entire process of appointment and transfer of judges in the higher judiciary and to devise cogent ways of bringing in judicial accountability.

### The Bill: Basic Characteristics

It would not be wrong to say that notwithstanding the constitutional provisions in terms of Articles 124 and 217, the process of appointment and transfer of judges in higher judiciary is ridden with ambiguity and lacks a proper institutionalised structure. Similarly, the issue of judicial accountability has also not been duly recognised and appreciated in our Constitution.

The new constitutional amendment Bill has to be understood in this light. The 98<sup>th</sup> Constitutional Amendment Bill has identified these problems and seeks to overcome the lacunae to a great extent.

The following are the salient provisions in the Bill:

1. It seeks to constitute a National Judicial Commission by including Chapter IV(A) in Part V of the Constitution;
2. The Commission will make recommendations for the

appointment of judges in higher judiciary and transferring High Court judges;

3. The Bill also seeks to empower the NJC to look into the disciplinary aspect of judges. In other words, the Bill seeks to create a mechanism under the aegis of NJC to deal with the erring judges except in those matters, which are concerned with the removal of any particular judge; and
4. The formation of NJC would lead to the amendment of Articles 124(2), 217(1), 222(1) and 231(2).

### Independence of Judiciary

The most important step towards unravelling the Bill is to understand its impact, if any, on the independence of judiciary, as it is of paramount importance in our judicial system.

Independence of judiciary is part of the “Basic Structure” doctrine of the Indian Constitution. An independent judiciary is essential to uphold the *rule of law* and to sustain the efficacy of constitutional order. It is, therefore, of utmost importance that any issue of vital importance for the Judiciary is seen through the prism of an “independent judiciary”. In other words, it is extremely important to understand the implications of any issue pertaining to the Judiciary for an independence of judiciary.

Primarily, although the concept of an independent judiciary essentially entails separation and independence of judiciary from the Executive and the Legislature, in fact, it goes beyond that. The most integral element of an independent judiciary is to have judges, who are able to take decisions based on the *law of the land*, by remaining uninfluenced by any other factor. Therefore, it would not be an exaggeration to state that any issue that deals with judges, acquires central place in the concept of independent judiciary.

The issues related to appointment, transfer, deviant behaviour, disciplinary aspect and removal of judges are extremely important, as they have a

direct and positive co-relation with the independence of judiciary. Thus, analysing the impact of the Bill on independence of judiciary would be an integral element in our understanding of the issues related to appointment and transfer of judges and increasing indiscipline amongst judges, which the Bill seeks to address.

### Appointment and Transfer of Judges

#### The NJC: Composition

It is a foregone conclusion that the composition of such a commission would be the most important factor *vis-à-vis* its functioning. The National Commission to Review the Working of the Constitution (NCRWC), in its consultation paper on “Superior Judiciary”, said that fundamentally, the most important issue in relation to the NJC is its composition. How the Commission is constituted would go a long way in determining the most important issue of what possible impact NJC would have on the independence of judiciary: whether it would bolster the independence or make inroads into its independence. Thus, the composition factor would play a lead role in the overall efficacy of the Commission.

The 98<sup>th</sup> Constitutional Amendment Bill has proposed the following composition for the NJC:

1. The Chief Justice of India — the Chairperson of the Commission;
2. Two other judges of the Supreme Court, next to the Chief Justice in seniority;
3. The Union Minister in-charge of Law and Justice; and
4. One eminent citizen to be nominated by the President, in consultation with the Prime Minister.

The reason given in the Bill for this sort of composition is to provide for effective participation of both the Judicial and Executive organs of the state. Thus, at this stage, it would be relevant to devote some time in understanding the participation of Judiciary and Executive in the process of appointment and transfer of judges in the higher judiciary.

### Participation of Judiciary and Executive

The participation of the Judiciary in the process of appointment of judges in higher judiciary is well recognised, by both the virtue of the constitutional provisions and judicial pronouncements.

Articles 124(2) and 217(1) of the Indian Constitution, in very clear terms, lay down that the Judiciary has an integral role to play in the appointment of the judges in the higher Judiciary. These Articles provide for “consultation” with the head of the judiciary or any other member of the judiciary in matters related to appointment of judges (See Box 1).

The ambiguity that surrounded the “kind of consultation” with the judiciary has been done away with by the constant evolution of case law on this front. The Apex Court, through its judgements in the Second and Third Judges Cases, has very clearly laid down the role of the Judiciary in the appointment of the judges in the higher judiciary.

Of late, this role has been so defined that now the entire process of appointment of judges in higher judiciary is being made by a collegium of higher judiciary judges. The role of the Executive in this regard has virtually been nullified.

It is important to note that in the S.P. Gupta vs. Union of India<sup>1</sup> or the Judges Case, the Executive was given primacy over the Judiciary in matters related to appointment of the judges in higher judiciary. In other words, this decision meant that the Executive could appoint or not appoint any judge to the High Court or to the Supreme Court against the wishes of the Chief Justice of India or any other constitutional machinery. This judgement was criticised by one and all. It was seen to be a severe onslaught on the independence of judiciary and had the potential to blow up the very vitals of the Indian judicial system. This all-pervasive criticism of the judgement finally culminated in the

#### Box 1: Consultation with Judiciary in Appointment of Judges

None of the constitutions of the Commonwealth Countries or the Constitution of the USA provides for “consultation” with the head of the judiciary or any other member of the judiciary in matters related to appointment of judges; it is only Indian Constitution that does — and it could not have been without purpose. This innovative procedure can be attributed to the conviction of the Constitution-makers that “at our stage of development and with regard to the propensities of the Executive (to control every organ of the state and every institution of governance), they cannot be vested with the sole power of appointment to Judiciary, a co-equal wing of government”. The requirement of consultation with not only the Chief Justice of India, but also with certain other judges at the Supreme Court and the High Court level in Article 124 is an added indication of the concern the Constitution’s founding fathers had with the independence of judiciary. Evidently, they did not trust the Executive in India to make proper appointments and, hence, incorporated the requirement of “consultation” in the Constitution itself, expressly.

Source: Consultation Paper on *Superior Judiciary*, issued by the NCRWC.

Second Judges Case<sup>2</sup>, which overruled the previous decision that had said that the Executive had primacy in matters related to appointment of judges in higher judiciary. The Second Judges Case, followed by the Third Judges Case, has given predominance to the Judiciary over the Executive in the matters of appointment of judges.

The most cardinal reason that has been advanced for giving a predominant role to Judiciary in matters related to appointment of judges in higher judiciary is to ensure that the independence of judiciary is sustained. It was argued that if the Executive gets a larger say in matters related to appointment or transfer of judges, it could inflict a severe blow on the independence of judiciary, as parochial and vested interests could govern the appointment of judges in higher judiciary.

The Second Judges Case gave primacy to opinion of the Chief Justice of India (CJI) with regard to appointment of judges to the Supreme Court and the High Courts and also with regard to the transfer of High Court judges. This led to a controversy regarding the role of the CJI and this controversy finally culminated in the Third Judges Case<sup>3</sup>, which attempted to resolve the controversy. The Third Judges Case created the present system of collegium that comprises the CJI and two senior-most judges of the Supreme Court. In

cases of appointment of judges to High Courts, a collegium, comprising the CJI and four senior-most judges, was made, which was to review the recommendations made by a similar collegium in the High Courts.

This system of having a collegium to look into the matters related to appointment and transfer of judges has not yielded the kind of results that were expected. On the ground, there are many lacunae that still haunt the process of appointment and transfer of judges in the higher judiciary. The vacancies at ground still remain unfilled as before. Even if a vacancy gets filled, the whole process takes a lot of time. In other words, the avowed objective of streamlining the process of appointment and transfer of judges has not been achieved to the fullest possible extent.

#### Why NJC?

All this has created the need of having a proper institutionalised structure for dealing with matters related to the appointment and transfer of judges in higher judiciary. The demand to create a National Judicial Commission has been gaining strength. It has been argued by many, and rightly so, that having such a Commission would go a long way in institutionalising the whole process of judicial appointments and transfers.

The concept of National Judicial Commission (NJC) is not a new one. The idea of having an NJC was mooted by Justice P N Bhagwati way back in 1982 and first institutionalised by the 67<sup>th</sup> Constitution Amendment Bill, 1990 (since lapsed).

***Flaw in the composition of Commission***

An important component of this Bill is that it seeks to give an enhanced say to the Executive in matters related to appointment and transfer of judges. The proposed composition of the NJC ensures presence of two members of the Executive in the Commission. The Law Minister and the eminent citizen to be nominated by the President, in consultation with the Prime Minister, would be Executive appointees and, thus, representing the Executive.

According to the Bill, in matters related to appointment and transfer of High Court judges, the Chief Justice of that court and the Chief Minister of that state shall be associated with the NJC.

The basic flaw in this composition, once again, pertains to the enhanced participation of the Executive. The fear is that this could curtail judicial independence. Given the fact that the Executive is a major litigant, this fear is not an unfounded one.

There have been instances in the past where judicial appointments and transfers have been guided by political considerations. There are, at least, two oft-remembered unfortunate instances: the first one took place in April 1973, when the time-honoured convention of appointing the senior-most judge of the Supreme Court as the CJI was broken, as the Executive appointed the fourth senior-most judge as the CJI; and in 1977, a mass transfer of High Court judges was effected.

In both instances, the guiding factor for the Executive was similar in nature — the three judges of the Supreme Court, who were superseded, and the transferred judges of the High Courts, had given verdicts against the Executive in cases, where the State was one of the parties. The non-appointment and

transfers were made because the Executive felt antagonised by the judgements of these judges. These examples drive home the point that the Executive’s participation in appointment or transfer of judges could seriously undermine the independence of judiciary — one of the basic features of our Constitution.

It is important to note that all the judicial pronouncements and the committees appointed to look into the matters of appointment and transfer of judges in higher judiciary have been unanimous over the dilution of the role of Executive in the process of appointment and transfer of Supreme Court and High Court judges. The Arrears Committee, comprising Chief Justices of three High Courts and appointed in 1989 to deal with the issue of large arrears in the High Courts, also recommended that the role of Executive in these matters should be minimised.

Viewed in this light, the composition proposed by the 98<sup>th</sup> Constitutional Amendment Bill—giving too much say to the Executive—is uncalled for.

***No transparent procedure for appointment and transfer***

Another major flaw in this Bill is that it does not provide for any transparent procedure for the appointment or transfer of judges. The procedure to be adopted has been left to the Commission and the Commission is

under no obligation to make the whole process transparent. Thus, it is difficult to understand as to how the constitution of such a Commission would be an improvement over the present system of appointment or transfer by a collegium.

***Binding nature of recommendations***

One positive feature of the Bill is that it makes the recommendations for appointments and transfers made by the NJC a binding on the President. This reduces the chances of any possible friction between the Commission and the Executive. Thus, once a recommendation is made by the NJC, it is mandatory for the President to abide by that recommendation. This further demonstrates the importance of making a correct recommendation, and this prudent recommendation is, in turn, dependent on the composition of the Commission and the procedure it adopts to make the recommendations.

***What is the correct strategy for appointments?***

The correct strategy would be to have the correct composition in place and then a time-bound procedure for the appointment of judges. The process of appointment should be initiated six months before a post falls vacant, against which an appointment is to be made — both in the Supreme Court and the High Courts. In the process of appointment, the NJC can also ask the Bar Council of India and the respective

**Box 2: Judicial Corruption**

The chances of removal of a judge in the higher judiciary through impeachment process hinges on political equations, notwithstanding the existence of the Judges (Inquiry) Act, 1968, which prefaces impeachment with judicial inquiry. Thus, even if an inquiry may indict, Parliament may absolve the judge of the charges, as happened in the case of Justice V. Ramaswamy. Therefore, as far as removal is concerned, the question is whether there should be a political add-on after a high-level judicial inquiry is over.

But, as it is, removal is the ultimate procedure. What about day-to-day complaints, whether in relation to an unbecoming conduct of a judge, or complaints about behaviour, graft and general corruption? Removal procedure for judges in the American constitution was supplemented by a legislation in 1939 and again in 1980. These are matters that require immediate attention in India, both for higher judiciary (that has no effective procedure) and for lower judiciary (which has a faulty procedure).

*Source: Rajeev Dhawan, www.hinduonnet.com/The Hindu/ 2002/02/22*

Bar Associations to suggest names for the next incumbent.

The preliminary process of appointment should be completed three months before the post falls vacant. After this, the name of the judge proposed for appointment should be made public, and comments should be invited from the public and the bodies, like the Bar Council of India and the Bar Associations, within a period of 15 days. These comments could be in the nature of bringing to the notice of the NJC misconducts of proposed candidates. The persons/bodies concerned can directly make their comments to the Commission.

After receiving these comments and going through them, the Commission may re/consider its decision or finalise the preliminary appointment, as it would deem fit. In either case, the Commission should offer its reasons for the decision taken. The Commission should give reasons in a comprehensive manner by covering all the issues raised by the person or body concerned. If too serious charges or allegations are made against any proposed candidate, the NJC should not suggest that name for appointment.

This would ensure that there is no delay in the court's work because of a post lying vacant and would also make the whole process transparent. Similarly, for the transfer of High Court judges, a comprehensive and transparent procedure needs to be adopted.

Another integral element to foster transparency is that the NJC should give reasons while recommending the name of a particular person for appointment. In other words, the Commission should explain as to why it thinks that a particular person is fit to be appointed as a judge.

### ***Reflective judiciary and NJC***

The concept of reflective judiciary is extremely pertinent in a multi-lingual and multi-ethnic society like India. A reflective judiciary means that judiciary should reflect the multi-ethnicity of the Indian society by ensuring that all

sections of Indian society are duly represented. This is not to argue for any sort of quota or reservation system or any form of affirmative action for the judges in the higher judiciary, but only to state that the diversity of Indian society cannot and should not be ignored.

In this background the role of NJC is very important, as while making recommendations for the appointment of judges in the higher judiciary, it should keep in mind the diversity and multi-ethnicity of the Indian society.

### **Issue of Increasing Indiscipline Among Judges**

Another important issue inseparably and integrally woven in higher judiciary is judicial misconduct and deviant behaviour of the judges. There have been numerous instances, where it has been found that the judges do not adhere to the working hours, unduly delay judgements or often act in somewhat an un-judge-like manner. In other words, there is no judicial accountability. These observations have been made by the NCRWC in its Consultation Paper on *Superior Judiciary*.

### ***Inadequacy of existing provisions***

It is important to note that there are no provisions in the Constitution to deal with such matters, except the one given in Article 124(4). According to this Article, a Supreme Court judge can be removed only on the grounds of "proved misbehaviour or incapacity" by a process called impeachment. There are three patent lacunae in this provision:

1. It does not define what constitutes proved misbehaviour or incapacity. It is left to Parliament to determine as to what judicial misconduct would amount to proved misbehaviour or incapacity;
2. The process of removal is a difficult process and, therefore, is often very difficult to remove a judge by this process. The failure of impeachment proceeding against Justice V. Ramaswamy is an ample testimony to this fact; and
3. It does not take into consideration that deviant behaviour or

misconduct of a judge, which would attract punishment lesser than removal. There can be numerous instances, where a particular misbehaviour of a judge is serious but not serious enough to initiate an impeachment motion. However, there is nothing in the Constitution that looks into these instances of deviant behaviour or misconduct (See Box 2).

### ***Judicial accountability***

To make judges accountable is a growing demand, as judicial propriety and ethics are equally important to have a buoyant and independent judicial system. The Bill has rightly identified the problem of lacking accountability in the Judiciary. An important feature of this Bill is that it seeks to empower the NJC to draw a code of ethics for judges, inquire into cases of misconduct or deviant actions of a judge, other than those that are punishable with his/her removal and advise the CJI accordingly after such an inquiry.

The judges enjoy excessive immunity from investigation, which makes it almost impossible to conduct a proper inquiry against them. This excessive immunity should be withdrawn by overruling the V. Ramaswamy Case through an Act of Parliament. For an effective inquiry to take place, it is important that the Commission has a separate and independent investigative machinery of its own.

Accountability part in the Bill is a positive feature, as judicial misconduct and deviant actions are on the rise. This particular attribute of the Bill has to be viewed in the light of the lacunae in the existing provisions discussed above. "But how successful and fair the Commission would be in discharging this responsibility" is the moot point, as it again depends on the composition of the Commission.

### ***Flaws in composition vis-à-vis disciplinary aspect in the Bill***

The Government has argued that this Bill is the logical extension of the recommendations made by the NCRWC regarding the formation of a NJC to

deal with disciplinary matters related to judges. This is not the complete truth, as the composition of the Commission that the Bill has proposed is manifestly different from what the NCRWC had proposed. Notwithstanding the categorical statement made by the NCRWC that the Executive should have no role to play in the disciplinary matters related to higher judiciary, the Bill provides for two political appointees to look into matters related to disciplinary aspect of judges.

Viewed in this background and as discussed above, it becomes amply clear that the composition of the Commission proposed by the 98<sup>th</sup> Constitutional Amendment Bill is flawed. The Bill also does not make it mandatory for the CJI to accept the NJC's advice after the inquiry is conducted against the deviant judge. Thus, whether having a Commission empowered to look into disciplinary matters related to higher judiciary would be able to bring about any substantial difference is extremely uncertain.

#### ***What is the correct approach to deal with disciplinary aspects?***

The right approach would be to correct the composition of the Commission and make it a binding on the CJI to accept the advice offered by the Commission on the basis of the inquiry conducted

against the deviant judge. However, if the CJI does not accept the advice, he should give reasons in writing. Then an inquiry should be conducted in a given time-frame, report of which should be made public. If no inquiry is conducted against a complaint received, the Commission shall be under an obligation to give reasons in black and white, which should explain expressly why an inquiry is not being conducted.

#### **What should be the Correct Composition of the Commission?**

The above discussion has abundantly demonstrated that the success or failure of having such a Commission would hinge on its composition. Therefore, in this light, the following composition is, hereby, suggested:

- (a) The Chief Justice of India;
- (b) Two senior-most judges of the Supreme Court, next to the CJI;
- (c) The Union Minister of Law and Justice;
- (d) Two eminent citizens (such as eminent jurists or eminent lawyers or legal academicians of high repute), one to be nominated by the President in consultation with the CJI and the other to be nominated by the President in consultation with the Prime Minister.

In case of appointment or transfer of a High Court judge, the Chief Justice of that High Court and an eminent Lawyer

practising there shall be associated with the Commission.

This is a balanced composition that would ensure that the Commission would function in a transparent and efficacious manner, safeguarding and upholding the high constitutional valour.

#### **Conclusion**

The 98<sup>th</sup> Constitutional Amendment Bill has rightly identified the problems that exist in our Constitution when it comes to dealing with matters related to appointment, transfer and accountability of judges in higher judiciary. However, the mechanism suggested by the Bill to rectify these problems is a half-hearted effort. The first step of constituting an NJC is a right step, but the next two steps—in terms of composition of the Commission and the procedure adopted to deal with the issues on hand—are flawed. The flaw in the second and third steps would undermine the formation of the NJC, apart from impinging the independence of judiciary. Thus, the need is to have a correct composition and adopt a transparent and time-bound procedure to deal with such issues as proposed in the paper. This would strengthen the NJC, which, in turn, would bolster the independence of judiciary.

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#### **ENDNOTES**

- 1 A.I.R. 1982 SC 149.
- 2 Supreme Court Advocates on Record Ass'n vs. Union of India, A.I.R. 1994 S.C. 268.
- 3 In re Presidential Reference, A.I.R. 1999 S.C. 1.

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