

The National Judicial Appointments Commission Bill, 2014

“Feathering the old hat or buying the new one”

The National Judicial Appointments Commission Bill, 2014 (NJAC Bill) that seeks to replace the present collegium system of judges choosing judges, was passed by the Lok Sabha on August 13, 2014 and by the Rajya Sabha on August 14, 2014. The NJAC Bill, which is currently pending for President’s assent, was introduced in conjunction with the Constitutional (121st Amendment) Bill, 2014, which gives constitutional status to the proposed Commission (‘NJAC’ or ‘Commission’). The Commission is the proposed body responsible for the appointment and transfer of judges of the higher judiciary {Supreme Court (SC) and High Courts (HC)} in India. The Constitutional Amendment Bill, if ratified by half the state legislatures in India and assented by the President of India, will become an Act. A new Article 124A (which provides for the composition of the Commission) will be appended in the Constitution, if the amendment is ratified.

The Bill at a Glance

Highlights

- ◆ Proposal to constitute the NJAC to provide an institutional framework for the appointment and transfer of judges in higher judiciary.
- ◆ Replacing the present collegium system, which allegedly lacks transparency.
- ◆ Reference to the NJAC within 6 months in advance, in case a vacancy is arising due to the completion of term and within 30 days, if the vacancy arises due to death/resignation.
- ◆ Binding nature of the recommendation on the President after reconsideration by the NJAC.

Lowlights

- ◆ Lacks objective parameters and transparency in selection of a competent person.
- ◆ Unfettered discretion to the NJAC in appointments and transfer of judges.
- ◆ Increase in the role of executive may undermine the independence of judiciary.
- ◆ Ability to thwart the appointment, if any two members disagree.
- ◆ No timeline for the NJAC and the President to make recommendations /appointments.
- ◆ No public scrutiny in appointment of judges.

Action Points

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- In relation to appointment of Chief Justice of India (CJI), the criteria “if he is considered fit to hold the office” is quite vague and subjective and should be amended accordingly.
- The phrase “ability, merit and any other criteria of suitability” should be clearly defined.
- The senior-most judge of the Supreme Court after the CJI should also be a part of the selection committee. Alternatively, the selection committee must take decisions by consensus.
- ‘Eminent Persons’ should be defined in a clear and categorical manner.
- Members should be able to disagree with recommendations only upon providing reasoned clarifications.
- Timelines must be prescribed for the Commission, the Governor, the Chief Minister and the President to provide their recommendations, views, as the case may be.
- Representatives from the Bar Council of India (BCI), civil societies and legal academicians should be inducted in the Commission
- The Commission must recommend the individuals along with the written reasons highlighting the selection criteria for the same.

Introduction

Independence of the Judiciary is a part of the basic structure of the Indian Constitution¹. An independent judiciary is an important tool to sustain the efficacy of the Constitution. The concept of independent judiciary not only entails separation and independence of judiciary from the executive and the legislature, but it has a much wider scope. The most important element of an independent judiciary is to have judges, who are capable to take decisions based on the law of the land, without being influenced by any factor. Independence of the Judiciary deals with the independence of the individual judges regarding their appointment, tenure, payment of salaries and non-removal except by the process of impeachment.

There has been a long debate within the judicial fraternity about the present collegium system of appointments and transfer of judges in higher judiciary on the parameters of its foundation in the constitution and transparency in appointment process. The consensus reached amongst the lawyers, judges and the legislators about the present system that it has failed in totality and needs to be changed for a better one. This system lacks transparency and is a product of judicial fiction. Dissatisfaction with the opaque functioning of this system lead to a need to establish a Constitutional Commission, which would ensure transparency in appointments and transfer of judges in higher judiciary².

In this background, there have been numerous attempts to set up a Constitutional Body, which would ensure transparency in appointment and transfer of judges in the higher judiciary, since almost a decade. Eventually, the NJAC Bill, 2014 along with the Constitutional Amendment Bill was passed by both the houses of Parliament scrapping the present system, which had come under the hammer by proposing to establish the NJAC. The same was challenged in the SC on the ground that it cannot be passed by both Houses of the Parliament until the Constitution Amendment Bill is ratified by the states and the President's assent to the same is obtained, which was the basis of empowering the government to bring in the NJAC Bill. But the SC refused to entertain the petition

termining it as "Premature" and refused to interfere in the parliamentary process at this point of time.

Though the NJAC Bill though came with the objective of ensuring transparency and accountability in the process of appointments and transfer of judges but it falls short in certain areas which still needs to be reconsidered. These areas are addressed in this Bill Blowup.

Composition of the NJAC

The composition of a body like NJAC is 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 Judicial Commission is its composition. The effectiveness of the Commission can be judged by looking at its composition. For better governance, a strong government is needed. Under the Bill, the proposed NJAC shall comprise the following members:

1. The Chief Justice of India (CJI)– the Chairperson of the Commission
2. Two other senior judges of the Supreme Court next to the CJI
3. The Union Minister in charge of Law and Justice
4. Two eminent persons to be nominated by the Committee consisting of the Prime Minister, the CJI and the Leader of Opposition of the Lok Sabha or the Leader of the single largest Opposition Party in the Lok Sabha. At least one of them shall be nominated from the SC, ST, OBC, Minorities or Women.

The reason given for such a composition of NJAC is to provide an effective participation of both judicial and executive organs of the state. Moreover, it would be important to see how effective this assimilated composition would work in the coming days.

Though the composition of the NJAC for making recommendations in relation to appointments and transfer of judges is clearly prescribed under the Bill, but it fails to address various aspects in relation to transacting business and quorum at the meetings, which can make the Bill

unworkable. If there is a deadlock in the Commission or any member of the Commission opts to be absent, how things will work will then be a concern. There must be a clearly defined quorum or any other alternative arrangement for making recommendations for appointment and transfer of judges while notifying the regulations in accordance with clause (i) of sub-section (2) of Section 12 of the Bill. Further, if for any unavoidable circumstances, the CJI or any of the two senior-most judges of the Supreme Court are not available, how the nomination of the judges would take place has not been specified in the Bill. To curb this limitation, there must be a specific provision like the regulations clearly stating that the three senior-most judges available would suffice in place of the absent judicial members of the Commission.

With regard to the 'two eminent persons' in the Commission, the Bill is silent on who would qualify as an 'eminent person'. The term 'eminent person' gives wide discretion to the selection committee to choose any person as a member of the Commission. This unfettered discretion of the Commission could prove to be fatal. Thus, this should be clearly and categorically defined. The eminent person can be from a civil society, a person having legal knowledge or a member/representative of the BCI so as to appreciate the task of judicial appointments in a true sense. Further, it should be kept in mind that the persons who are to be recommended for appointment should be having '*ability, merit and any other criteria of suitability as may be specified by regulations*'. Therefore, a recommendation on these criteria can only be made by a person who himself is well versed in the legal field.

Absence of Transparency

Initiation to the present Bill was made in tune with the purpose of ensuring transparency and accountability in appointment of judges in the higher judiciary. But unfortunately, it has nothing to ensure either transparency or accountability and it seems that the purpose is lost somewhere. The procedure to be adopted for appointment of judges has been left to the Commission

and the Commission is under no obligation to make the whole process transparent. Also, there is no provision, which talks about the “criteria” on which judges will be transferred. Therefore, it is unclear whether this Bill was introduced in response to the popular demand for transparency and accountability in the appointment or transfer of the judges in the higher judiciary or the government perceiving the judiciary overstepping its limits.

In order to make the Commission more democratic, transparent and participative representatives from the BCI, civil societies and legal academicians should also be inducted. This would facilitate wider consultation on assessing the suitability and integrity of judicial appointees. Further, the involvement of the public and timely completion of the appointment process is very essential. Therefore, once a candidate is shortlisted for a recommendation, the general public can be asked for their comments, if any, for a specified time period, about the eligibility of the candidate.

The Commission must recommend individuals along with the written reasons highlighting the selection criteria for the same. In case any recommended person is related to any member of the Commission, reasons must be provided as to why such recommendation should not be rejected, on *prima facie* basis. In such case, the related member of the Commission may recuse himself/herself as soon as the name of such a candidate is taken for consideration, and must not participate or interfere, directly or indirectly, in the proceedings of the Commission.

Quality measures must be statutorily and uniformly applied throughout the selection process to ensure that adequate procedures are followed and the highest standards are maintained. An independent observer may be appointed to oversee the selection process for ensuring transparency in the machinery, who would report to both the houses of the Parliament.

The Commission must be required to keep proper books of accounts and records in relation to its functions. Further, the same should be duly audited by the Comptroller and Auditor General of India (CAG). In addition, the annual

performance report of the Commission must be laid down before both the Houses of the Parliament. Also, the Chairperson of the Commission should be answerable to a select Parliamentary Committee, assigned with the task of reviewing the report.

Political Element

An important aspect of this Bill is that it seeks to give an enhanced role to the executive in matters related to the appointment and transfer of judges. The proposed composition of the Commission provides for the presence of the Union Minister in charge of Law and Justice along with “two eminent persons” to be nominated by the selection committee comprising of the Prime Minister, the CJI and the Leader of Opposition/the leader of the largest party in the Lok Sabha.

The arithmetic of selecting “two eminent persons” runs the risk of political taint, considering the fact that committee responsible for selecting these two eminent persons has two political members (i.e., the Prime Minister and the Leader of Opposition/the leader of the largest party in the Lok Sabha) as against one judicial member (i.e., the CJI). Therefore, one senior most judge of the Supreme Court after the CJI should be part of this committee. Alternatively, there should be full consensus in the committee nominating the two eminent persons. In order to make the Commission financially independent, a substantial amount of the fees and allowances payable to the eminent persons could be paid out of the court fee charged from the litigating parties.

Further, the ability of the two members of the Commission to exercise veto powers will cause much consternation. If any two members disagree, then appointment will not take place. This empowers the executive to stop the appointment of the judge as the Union Minister in charge of Law and Justice and one of the eminent persons may not agree with the nomination of a candidate. Moreover, this veto power is also possessed by the judicial members so they can also make a cartel against any proposed nomination. Therefore, there should be a specific provision in the law so as to ensure that this power is not being misused by the members. The

members not agreeing with the recommendations must provide written reasons for the same. Also, they can be allowed to use this power only once in every appointment cycle.

The fear of the presence of the political element in the composition is that this could curtail the judicial independence. There have been instances in the past where judicial appointments and transfer have been guided by political considerations. The Executive’s participation in appointment or transfer of judges could seriously undermine the independence of the judiciary. 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 the Executive in the process of appointment and transfer. The Arrears Committee comprising Chief Justices of three High Courts 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.

Inapt Eligibility Criteria

Article 124 of the Constitution of India provides for the manner of appointing judges to the Supreme Court. However, no specific provision is made as to the appointment of the CJI; as a result, the CJI is appointed in the same manner as the other judges of the Supreme Court. As per the proposed NJAC Bill, 2014, for appointment as a CJI, the Commission shall recommend the senior-most judge of the Supreme Court, *if he is considered fit to hold the office*. So, it is left open to the Commission to decide whether the senior-most judge of the Supreme Court is considered fit to hold the office. This criteria for appointment of the CJI is quite vague and subjective and accordingly should be done away with.

Further, the criteria for appointment of judges includes *ability, merit and any other criteria of suitability, as may be specified by the regulations*. There is no system in place for judging ability of a person and the Bill also does not define it either. Section 5(2) of the NJAC Bill, 2014 provides for the appointment of the judges for the Supreme Court prescribes

'... any other criteria of suitability, as may be specified by regulations'. Similar provision has also been incorporated in the Bill for appointment of High Court judges. However, '...other criteria of suitability' is nowhere defined in the Bill.

In Australia, as per the selection criteria published by the Attorney General's Department, merit is the overriding principle for judicial appointments. In addition, there is a commitment to actively promote diversity in the judiciary. Consideration is also given to legal experience, professional qualities, applied experience, ability to discharge duties promptly, working under pressure, communication skills, etc. Similar qualities in addition to those specified in section 25 of the Constitution Reform Act, 2005 for being appointed as a judge of the Supreme Court of United Kingdom (UK), have also been identified by the Judicial Appointments Commission of UK. These are intellectual capacity, personal qualities, ability to understand and deal fairly, authority and communication skills and efficiency. For posts requiring leadership skills, efficiency is replaced with leadership and management skills³. It has also laid down guidelines to determine good character⁴. So, it could be worthwhile to borrow some of the above qualities to meet the *other criteria of suitability*.

Also, for the appointment of High Court Judges, the NJAC Bill, 2014 also requires the views of the Governor and the Chief Minister to be given *in the manner as may be specified by regulations*. But there is no provision as

to what will happen if the Governor or the Chief Minister or both will object. Therefore, there must be a specific provision to deal with this sort of situation in the bill. Also, a time limit must also be specified within which the Governor and the Chief Minister are required to provide their views, in order to avoid any unnecessary delays in appointment process.

Binding Nature of Recommendations

One positive feature of this Bill is that the recommendations made by the Commission are binding on the President. This demonstrates the importance of making a correct recommendation, which in turn, depends on the composition of the Commission and the adopted procedure to make the recommendations. However, the President may, if deemed necessary, require the Commission to reconsider the recommendation made by it. The Commission after reconsiderations is again required to make recommendations and the President shall make the appointment accordingly. Thus, the recommendations are binding on the President.

Conclusion

It is always advisable to add feathers to your old hat rather than buying a new one, so that the antiquity is preserved and the crown is refurbished. But if the old one is tarnished completely, the better idea is to buy a new one. The Policy makers can be criticised as much as one wants to, but they are the ones who ignite

the dead most sparks under the darkest clouds.

There has been a whisper in the judicial fraternity about the new mechanism for the appointment of the judges in the higher judiciary, since almost a decade but when the NJAC Bill, 2014 came, there was a bubble of joy and hope, which would not last long. The initiative of constituting the Commission was a right initiative, but its composition and the procedure adopted to deal with the issues on hand – are flawed, which not only undermines the effectiveness of the Commission, but also impinging the independence of judiciary. On one hand, it provides for the increased role of executive in the appointment process, which could restrain the independence of the judiciary whereas on the other hand, it lacks transparency and time bound procedures, which were the *prima facie* idea for introduction of this sort of machinery. Thus, there is a definite need to have correct composition and ensuring adoption of a transparent and time-bound procedure to deal with such issues proposed in the paper. The regulations to carry out the provisions of the Bill are yet to be notified, therefore, it is important that due consideration should be given to various issues flagged above and necessary provisions are incorporated in the same to ensure transparency, accountability and dependence of the Commission – thus making the Commission a timeless institution.

Endnotes

1. *S.P. Gupta vs. Union of India & Others [1981 Suppl. SCC 87] and Shri Kumar Padma Prasad vs. Union of India & Others [1992 (2) SCC 428]*
2. *Shri Prashant Bhushan, an eminent Lawyer and founding member of the Aam Aadmi Party (AAP)*
3. <http://jac.judiciary.gov.uk/application-process/112.htm>
4. <http://jac.judiciary.gov.uk/application-process/113.htm>

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