



Historical development of national judicial appointments commission

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Abstract

National Judicial Appointments Commission was a proposed body which would have been responsible for the appointment and transfer of judges to the higher judiciary in India. The Commission was established by amending the Constitution of India through the ninety-ninth constitution amendment vide the Constitution (Ninety-Ninth Amendment) Act, 2014 passed by the Lok Sabha on 13 August 2014 and by the Rajya Sabha on 14 August 2014. The NJAC would have replaced the collegium system for the appointment of judges as invoked by the Supreme court via judicial fiat by a new system. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission. The NJAC Bill and the Constitutional Amendment Bill, was ratified by 16 of the state legislatures in India, and subsequently assented by the President of India Pranab Mukherjee on 31 December 2014. The NJAC Act and the Constitutional Amendment Act came into force from 13 April 2015.

On 16 October 2015 the Constitution Bench of Supreme Court by 4:1 Majority upheld the collegium system and struck down the NJAC as unconstitutional after hearing the petitions filed by several persons and bodies with Supreme Court Advocates on Record Association (SCAoRA) being the first and lead petitioner. Justices J S Khehar, MB Lokur, Kurian Joseph and Adarsh Kumar Goel had declared the 99th Amendment and NJAC Act unconstitutional while Justice Chelameswar upheld it.

Keywords: judicial, commission, appointments, collegium, unconstitutional, amendments

Introduction

However on as many as four occasions, it was proposed to amend the Constitution in relation to the procedure for the appointment of judges of the Supreme Court and the High Courts. A study has been made in this chapter about these Bills. These proposed amendments are considered below.

1. The Constitution (Sixty-seventh Amendment) Bill, 1990

The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced in the Lok Sabha on 18th May, 1990 and it proposed to set up a National Judicial Commission (for short the NJC), though not in line with the recommendations of the LCI. The composition of the NJC was to vary with the subject matter of concern, namely, the appointment of a judge of the Supreme Court or the appointment of a judge of the High Court.

For the appointment of a judge of the Supreme Court, in terms of the proposed Article 307A of the Constitution, the NJC was to consist of the Chief Justice of India and two other judges of the Supreme Court next in seniority to the Chief Justice of India. For the appointment of a judge of the High Court, the NJC was to consist of the Chief Justice of India, the Chief Minister or Governor (as the case may be) of the concerned State, one other judge of the Supreme Court next in seniority to the Chief Justice of India, the Chief Justice of the High Court and the judge of the High Court next in seniority to the Chief Justice of the High Court. There was no provision for the appointment of the Chief Justice of India or the Chief Justice of the High Court. The procedure for the transaction of business of the NJC was to be determined by the President in

consultation with the Chief Justice of India and was subject to any law made by Parliament. The Amendment Act also provided that in the event the recommendation of the NJC is not accepted, the reasons therefore shall be recorded in writing.

The Bill was criticized (in part) by the Arrears Committee which stated that: "The Committee is unable to find any logic or justification for different commissions.... Keeping in view the objects and reasons for the constitution of the commission, namely, to obviate the criticism of executive arbitrariness in the matter of appointment and transfer of High Court judges and to prevent delay in making appointments, there is no justification for the executive through the Chief Minister to be on the commission. Instead of removing the vice of executive interference which has vitiated the working of the present system the presence of the Chief Minister on the recommendatory body actual alleviates him from the status of a mere consultee to the position of an equal participant in the selection process of the recommendatory body. By making the Chief Minister an equal party when he is not equipped to offer any view in regard to the merit, ability, competency, integrity and suitability of the candidates for appointments, the scope of executive interference is enhanced." The Bill was not taken up for consideration due to the dissolution of the Lok Sabha in May, 1991.

2. The Constitution (Ninety-eighth Amendment) Bill, 2003

On 22nd February, 2000 – barely 8 months after the issuance of the (Revised) Memorandum of Procedure mentioned above – the Government of India issued a notification setting up a

National Commission to Review the Working of the Constitution (for short the NCRWC), including the procedure for the appointment of judges of the superior judiciary. The terms of reference of the NCRWC were as follows:

“The Commission shall examine, in the light of the experience of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socioeconomic development of modern India within the framework of parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features.”

On 26th September, 2001 an Advisory Panel of the NCRWC issued a Consultation Paper on Superior Judiciary. This Paper dealt with the procedure for appointment of judges of the Supreme Court and the High Courts, the age of retirement of judges, the transfer of judges of the High Courts and the procedure for dealing with ‘deviant’ behavior of a judge and for his/her removal. In the context of appointment of judges of the superior judiciary, paragraph 8.20 of the Paper is significant since it tacitly acknowledges that the procedure evolved over the years particularly as a result of the *Second Judges case* and the *Third Judges case* was quite satisfactory.

The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

The Chief Justice of India: Chairman

Two senior most judges of the Supreme Court: Member

The Union Minister for Law and Justice: Member

One eminent person nominated by the President after consulting the Chief Justice of India: Member

The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.”

Pursuant to the recommendations of the NCRWC, the Constitution (Ninety-eighth Amendment) Bill, 2003 was introduced in Parliament on or about 8th May, 2003. The Statement of Objects and Reasons of the Bill states, inter alia, that the Government of India has been committed to the setting up of an NJC for appointment of judges of the Supreme Court, Chief Justices and Judges of the High Courts as well as their transfer so as to provide for the effective participation of both the executive and the judicial wings of the Government. It is mentioned that the NCRWC also considered this matter and recommended the establishment of an NJC.

The Statement of Objects and Reasons refers to the composition of the NJC and while the NCRWC had recommended the nomination in the NJC of one eminent person by the President of India after consulting the Chief Justice of India, the Constitution (Ninety-Eighth Amendment) Bill modified this recommendation and proposed that one eminent citizen be nominated by the President of India in

consultation with the Prime Minister of India for a period of three years.

The Constitution (Ninety-eighth Amendment) Bill proposed the insertion of Chapter IVA in the Constitution consisting of one Article namely Article 147A. This Article related to the establishment of the NJC in terms of the Statement of Objects and Reasons.

The Bill was not passed in any House of Parliament due to the dissolution of the Lok Sabha in March 2004 and the general elections being called.

3. The Constitution (One Hundred and Twentieth Amendment) Bill, 2013

After this a third attempt was made to amend the Constitution for the purposes of appointment of judges of the superior judiciary. This was by the introduction of the Constitution (One Hundred and Twentieth Amendment) Bill, 2013 introduced in the Rajya Sabha on 24th August 2013.

The Statement of Objects and Reasons to the Bill referred to the *Second Judges case* and the *Third Judges case* as well as the Memorandum of Procedure. It was mentioned that the Memorandum confers upon the judiciary itself the power of appointment of judges of the superior judiciary. It was further stated that after a review of the pronouncements of this Court and relevant constitutional provisions, a broad based judicial appointment commission could be established for making recommendations for the selection of judges. This commission would provide a meaningful role to the executive and the judiciary to present their viewpoint and make

the participants accountable while introducing transparency in the selection process. The Statement of Objects and Reasons also mentioned that the proposed Bill would enable equal participation of the judiciary and the executive in the appointment of judges to the superior judiciary and also make the system more accountable and thereby increase the confidence of the public in the judiciary.

The Constitution (One Hundred and Twentieth Amendment) Bill proposed the insertion of Article 124A in the Constitution establishing a commission known as the National Judicial Appointments Commission (for short the NJAC). The composition of the NJAC, the appointment of its Chairperson and Members, their qualifications, conditions of services, tenure, functions and the procedure as well as the manner of selection of persons for appointment as Chief Justice of India, judges of the Supreme Court, Chief Justices and other judges of the High Courts was to be provided by law made by Parliament.

The Constitution (One Hundred and Twentieth Amendment) Bill was passed by the Rajya Sabha on 5th September 2013 but the Lok Sabha was dissolved in May 2014 before the Bill could be sent to it and the general elections called.

Strangely, the Statement of Objects and Reasons completely overlooked the fact that there already was ‘equal participation of the judiciary and the executive in the appointment of judges to the superior judiciary.’ In the *Second Judges case* it was clearly, explicitly and unequivocally stated that: “The process of appointment of Judges to the Supreme Court and the High Courts is an integrated ‘participatory consultative process’ for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must

perform this duty collectively with a view primarily to reach an agreed decision, sub serving the constitutional purpose, so that the occasion of primacy does not arise.” However, in the event of a difference of opinion, one of the constitutional authorities must have the final say and given the constitutional convention over the decades the final say ought to be with the Chief Justice of India, the head of the judiciary in India under certain circumstances and with the President under certain circumstances. Otherwise, a stalemate or deadlock situation could arise which the Constituent Assembly obviously did not anticipate from two constitutional functionaries. The *Second Judges case* and the *Third Judges case* gave this shared responsibility to the President and the Chief Justice of India. For the appointment of a judge of the Supreme Court, the collegium of 5 (five) judges must make a unanimous recommendation. The President is entitled to turn down a 4-1 or 3-2 recommendation. If the unanimous recommendation does not find favour with the President for strong and cogent reasons and is returned to the collegium for reconsideration, and it is unanimously reiterated, then the President is obliged to accept the recommendation. However, if the reiteration is not unanimous, then the President is entitled to turn down the recommendation. The theory which the Constitution (One Hundred and Twentieth Amendment) Bill, 2013 [and subsequently the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014] sought to demolish that ‘judges appoint judges’ is non-existent.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014

The fourth and final attempt (presently successful and under challenge in these petitions) to amend the Constitution was by the introduction on 11th August, 2014 of the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014. This Bill was passed by the Lok Sabha on 13th August, 2014 and by the Rajya Sabha on 14th August, 2014. It received the ratification of more than one half of the States as required by Article 368(2) of the Constitution and received the assent of the President on 31st December, 2014 when it became the Constitution (Ninety-ninth Amendment) Act 2014.

It may be mentioned *en passant* that the learned Solicitor General was requested to place on record the procedure adopted by the State Legislatures for ratification of the Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 but that information was not forthcoming, for reasons that are not known. The intention was not to question the factum of ratification but only to understand the process and to add transparency to the process, since there have been instances in the United States where the courts have examined the issue of the ratification of an amendment to the Constitution. Transparency is not a one-way street.

Section 1(2) of the Constitution (Ninety-ninth Amendment) Act 2014 provides that it shall come into force on such date as the Central Government may by notification in the official gazette, appoint. The appointed date is 13th April, 2015. Simultaneous with the passage of the Constitution (One Hundred and Twenty-First Amendment) Bill, Parliament also considered the National Judicial Appointment Commission Bill, 2014. The Bill was introduced in Parliament on 11th August, 2014. It was passed by the Lok Sabha on 13th August,

2014 and by the Rajya Sabha on 14th August, 2014. The National Judicial Appointments Commission Act also received the assent of the President on 31st December, 2014 and it was brought into force by a gazette notification issued on 13th April, 2015. Both the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 were challenged in the Supreme Court and as discussed above both were struck down by the Supreme Court.

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