

Representation on

**THE JUDICIAL APPOINTMENTS
COMMISSION BILL, 2013**

(Bill No. LXI of 2013)

Submitted to

Department Related Parliamentary Standing
Committee on Personnel, Public Grievances,
Law and Justice

By

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I. Introduction and Overview :

Our nation-builders have acted with great foresight in creating an independent judiciary and nurturing it with respect and care. As a result, judiciary is among the most respected institutions in our country today. It is this trust and confidence that make the general public yearn for judicial resolution of many conflicts. The broad national consensus to the effect that contentious issues like Ayodhya are best left to the judiciary is a tribute to the credibility and trust the higher courts enjoy in our country.

However, in recent years, several credible allegations have been leveled against individual judges. While the judiciary on the whole is conducting itself with admirable dignity and propriety, the actions of a few black sheep are damaging the entire institution. Unfortunately the mechanisms for judicial appointments and transfers have proved to be inadequate in elevating the best and brightest to the bench. The current manner of judicial appointments in India is anomalous and unsatisfactory. Simultaneously, the oversight mechanism too has proved to be cumbersome and ineffective, serving more as a unique interpretation of the laudable principle of judicial independence. However, a restoration of the erstwhile regime of executive control over judicial appointments (addressed in the famous *Shamsher Singh* (1974) and *SP Gupta* (1981) cases by the Supreme Court) too would prove to be neither desirable nor feasible.

In this backdrop, the allegations especially over the past few years against individual judges by prominent members of the bar, and the eloquent silence of all sections of society, indicate that judiciary is increasingly vulnerable to attack on account of indiscretions and malfeasance of a few individuals. If the credibility of the higher judiciary is undermined further, there is a real danger of the nation falling apart. When complex and contentious issues like reservations or Ayodhya create conflict, we need the Court to stand as a bulwark of freedom and constitutionalism.

Now is the time to press for genuine judicial reforms; an honest judiciary enjoying full public confidence is clearly the need of the hour. We are therefore happy at the lawmakers' efforts towards protecting the integrity and image of the higher judiciary by effecting fundamental judicial reforms.

II. Relevant Background Efforts Preceding the *JAC Bill, 2013*:

As a part of the efforts towards judicial reforms and in order to better persuade the judiciary, the three Esteemed Justices of unimpeachable integrity and unassailable moral authority and stature – Sri Justice MN Venkatachaliah, (late) Shri Justice JS Verma and Sri Justice VR Krishna Iyer had come together¹ at the initiative of *Foundation for Democratic Reforms (FDR)*, a non-partisan research-and-advocacy body serving the cause of fundamental democratic reforms. The three Esteemed Justices

¹ Ref: *Joint Views of the Eminent Jurists* publication titled 'Towards Greater Judicial Accountability – Creation of a National Judicial Commission and All India Judicial Service'. Published by Foundation for Democratic Reforms (FDR), Hyderabad; 2011 & 12.

held long and detailed deliberations, and had unanimously agreed upon the following judicial reforms:

- Creation of a mechanism for transparent appointments to the Supreme Court and High Courts (in the form of a National Judicial Commission (NJC), as suggested by the three eminent jurists). The composition and functioning of this mechanism for appointments to various courts as suggested by Sri Justice MN Venkatachaliah and Shri Justice JS Verma and endorsed by Sri Justice VR Krishna Iyer combines the input from the elected branches of the government and the judiciary.
- Replacing the present, cumbersome and unsatisfactory constitutional mechanism of impeachment (under Art.124 (4)) with a more effective mechanism for removal of errant judges, functioning under the NJC framework.
- Creation of an All India Judicial Service (AIJS) on the lines of IAS and IPS, for enhancing the competence and quality of judges in trial courts, under Art. 312 of the Constitution.

Given the above, we welcome the government's intent to put in place fundamental judicial reforms by way of the *Judicial Standards and Accountability Bill (2012)*, *The Constitution (One Hundred and Twentieth Amendment) Bill (2013)*, and the latest *Judicial Appointments Commission Bill (2013)*. It is suggested that the proposals made by the Esteemed Justices could be harmoniously and synergistically reconciled with the provisions sought to be introduced by the *Judicial Appointments Commission Bill, 2013* (also referred to as *JAC Bill, 2013* in this document), as follows.

III. Review of and Recommendations regarding four key issues of the *Judicial Appointments Commission Bill, 2013*

Issue 1 : Composition of the proposed Judicial Appointments Commission (JAC)

The *Judicial Appointments Commission Bill, 2013* in its present format proposes a six-member JAC as below (relevant text directly extracted from the *Bill*):

“ **3.** (1) *The Judicial Appointments Commission, referred to in clause (1) of article 124A of the Constitution, shall consist of—*

- (a) the Chief Justice of India, Chairperson, ex officio;*
- (b) two other Judges of the Supreme Court next to the Chief Justice of India in seniority—Members, ex officio;*
- (c) the Union Minister in charge of Law and Justice—Member, ex officio;*
- (d) two eminent persons, to be nominated by the collegium consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People—Members: Provided that the eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.*

(2) The Secretary to the Government of India in the Department of Justice shall be the convener of the Commission.

.....
”

Creation of a such a mechanism that combines inputs from the judiciary as well as the elected branches of the government is most essential, and

therefore, welcome. However, a six-member committee may have difficulties in the event of evenly divided opinion. It is of relevance to point out here that the 2nd Administrative Reforms Commission (ARC) in its 4th Report titled 'Ethics in Governance' had recommended that the composition of the appointing body (i.e. National Judicial Council, NJC) be as follows (extracted from paragraph 2.9.23 of the aforementioned Report):

A 7-membered body for the Supreme Court :

- 1. The Vice-President as Chairperson of the Council*
- 2. The Prime Minister*
- 3. The Speaker of the Lok Sabha*
- 4. The Chief Justice of India*
- 5. The Law Minister*
- 6. The Leader of the Opposition in the Lok Sabha*
- 7. The Leader of the Opposition in the Rajya Sabha*

The three eminent jurists – Sri Justice MN Venkatachaliah, Shri Justice JS Verma and Sri Justice VR Krishna Iyer together with the Foundation for Democratic Reforms (FDR) had recommended the composition of this appointing body ('NJC') to be as follows:

For the Supreme Court: 5 members

- | | |
|---|----------------------|
| <i>1. The Vice President of India</i> | <i>.....Chairman</i> |
| <i>2. The Prime Minister of India or his
Nominee Union Minister</i> | <i>.....Member</i> |
| <i>3. The Chief Justice of India</i> | <i>.....Member</i> |
| <i>4. The Two senior most Puisne Judges
of the Supreme Court</i> | <i>.....Members</i> |

For the High Courts: 3 members

- | | |
|---|---------------|
| 1. <i>The Chief Justice of India</i> |Chairman |
| 2. <i>The Chief Justice of the High Court</i> |Member |
| 3. <i>The Chief Minister of the State concerned</i> |Member |

Both the above recommendations, propose an odd number of Members for the judicial appointments body, in order to help avoid a tie or deadlock. Further, the three eminent jurists recommended that if no consensus can be reached or the members of the body are evenly divided in their opinion, it is safer to drop the proposed name from consideration. We therefore recommend that there should be a seven-member JAC, preferably chaired by the Vice-President. Alternatively, the law should make it clear that in the event of an evenly divided opinion, the proposed name should be dropped from consideration.

Issue 2 : The State-level Consultation Process Towards High Court Appointments

For appointments to the High Courts, the *JAC Bill, 2013* proposes that the JAC obtain the views of the Governor, Chief Minister and the Chief Justice of the concerned State, in a manner to be prescribed (relevant Sections extracts from the *Bill*):

“.....

5. *In case of appointment of Judge of a High Court, the views of the Governor and the Chief Minister of the concerned State as also*

of the Chief Justice of High Court shall be elicited in writing in accordance with the procedure as may be specified by regulations made by the Commission.

.....”

Based on our country’s past experience with appointments to the High Courts, we suggest that the State-level consultative mechanism should not be unnecessarily cumbersome. There are hundreds of High Court judges, and annually a large number of appointments are made. Often there are long delays, and many posts are kept vacant. It is therefore preferable that the process of identification of individuals, short-listing of names and recommendation of those candidates fulfilling the eligibility criteria for High Court appointments could be achieved by having a 3-member State-level Body comprising:

1. *The Governor*
2. *The Chief Minister of the State , and*
3. *The Chief Justice of the High Court,*

Alternatively, this 3-member body could be as follows:

1. *The Chief Minister of the State*
2. *The Chief Justice of the High Court and*
3. *One eminent person/jurist, to be nominated by a collegium consisting of the Chief Minister, Chief Justice of the High Court and the Leader of Opposition in the State Assembly*

Following the recommendation of candidates by the above 3-member State-level consultative body, the final appointment to the High Court would be recommended by the JAC itself.

Issue 3 : The Consultation Process at the JAC level

The *JAC Bill, 2013* provides for the recommendation of names and shortlisting of candidates as follows (relevant Sections extracts from the *Bill*):

“

8. (1) *The Convenor of the Commission shall initiate the process for selection by inviting recommendations from the Chief Justices of High Courts, the Central Government and the State Governments in respect of candidates fulfilling the eligibility criteria.*

(2) *The Commission may, by regulations, specify the procedure for short-listing of candidates for considering their appointment as Judges to the Supreme Court.*

(3) *The Commission may, by regulations, specify the procedure for short-listing of candidates for considering their appointment as Judges to the High Court.*

.....

12. (1).....

(2) *In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—*

(a) the procedure for recommendation with respect to appointment of Judge of a High Court under section 5;

(b) the procedure for short-listing of candidates for considering their appointment as Judges of the Supreme Court under sub-section (2) of section 8;

.....

.....”

Evidently, the *JAC Bill, 2013* prescribes that the proposed JAC specify and notify the actual regulations and relevant procedures governing the entire process of identification of suitable persons, selection and recommendation of names and short-listing of candidates.

The Report prepared by the three eminent jurists – Sri Justice MN Venkatachaliah, Shri Justice JS Verma and Sri Justice VR Krishna Iyer together with the Foundation for Democratic Reforms (FDR) was of the following opinion on this issue (directly quoted from the Report):

“The constitutional purpose of the process [i.e. consultation process] is joint and participatory to find the most suitable candidate for appointment. It will better serve the purpose if the opinion of each organ (i.e. judiciary and the executive) which is better equipped in the particular field is given the due weight e.g. judiciary’s opinion regarding the legal acumen, executive’s opinion relating to antecedents/character of the candidate and other relevant criteria.”

Further, the three Justices recommended that:

“...it may be desirable to have a wider consultation with participation of other eminent citizens and jurists, and a wide search to identify the eligible pool of candidates from judges as well as jurists; and then to have the list publicly displayed to elicit comments, if any, regarding the antecedents of the candidates or suggestion of any other suitable names. Wide publicity to the process of identification of suitable candidates and views of experts as well as lay persons can be solicited in this manner without addition of another body whose composition may be problematic. This whole process of wider consultation should be faithfully documented. In particular, the NJC should recommend the appointment of judges based on the principle of unanimity and consensus. In other words, if even one or two members express valid reservations about the suitability of any candidate, such a candidate should not be considered for appointment. Only persons with unimpeachable integrity, blemishless record, and un questioned competence should be recommended for appointment.

.....

In the case of direct appointment from the Bar, or of a jurist, a wider consultation with those not likely contenders may become necessary. The NJC must ensure a wide consultation by ascertaining the views of all those likely to contribute in this behalf.

.....

It is imperative that all consultations made by the NJC are documented to form part of the record, and the same is shared with all members before the final decision.”

We therefore suggest that the above recommendations of the three Eminent Justices be incorporated into the body of the *JAC Bill, 2013* (in the relevant sections, as mentioned above) and thereby create a stable and statutory basis for a suitably widespread and robust consultation process leading towards the selection and resulting in the appointment of suitable candidates.

Issue 4 : Transfer of Judges

The *JAC Bill, 2013* provides that the functions of the proposed JAC include those related to judicial transfers, as given below (relevant Sections extracts from the *Bill*):

“.....

4.It shall be the duty of the Commission, ---

(a) ...

(b) *to recommend transfer of Chief Justices of High Courts and the Judges of High Courts from one High Court to any other High Court; and”*

We suggest that transparent and credible guidelines should be notified in respect of transfer of judges, so that the criteria for decisions are widely known to the bar, the bench and the general public.

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