APPOINTMENT OF JUDGES AND THE COMPOSITION OF NATIONAL JUDICIAL APPOINTMENT COMMISSION: THE BASIC STRUCTURE CONUNDRUM

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ABSTRACT

This article scrutinizes the necessity of prescribing the composition of National Judicial Appointment Commission ["NJAC"] in the Constitution as opposed to the National Judicial Appointments Commission Act. It refutes the postulation of Standing Committee that since a statutory provision cannot be tested against the basic structure doctrine, the composition of NJAC being included in NJAC Act will not have protection of basic structure. While due value is given to such bona fide premise, it is argued that same level of protection is also available to a statutory provision and reliance is placed on jurisprudence of Supreme Court. In this way, the authors opine that even if the composition of NJAC had been prescribed in a statute, any alteration in the same could have been struck down for violating basic structure provided that it affected the independence of judiciary or any other aspect of basic structure of the Constitution.

INTRODUCTION

The Constitution (121st Amendment) Bill, 2014 and the National Judicial Appointment Commission Bill, 2014 have been introduced in the Parliament in lieu of the lapsed Constitution (120th Amendment) Bill, 2013 and the withdrawn Judicial Appointment Commission Bill, 2013. In most ways, the former can be considered an *alter ego* of the latter. However, the primary difference between the two sets of Bills lies in the fact that the 2014 set enumerates the composition of the Judicial Appointments Commission [hereinafter "JAC"] in

the Constitution[1] itself unlike the 2013 set which left it on the Parliament[2] to do so by enacting a statute (JAC Bill, 2013).[3] The underlying rationale for such a marked change is related to the protection offered by the basic structure doctrine to the composition of the JAC which was absent in case of a mere statutory provision.[4]

This article advocates the idea that the inclusion of the composition in the Constitutional Bill is a needless attempt by the lawmakers on account of an unwarranted fear. Consequently, it argues that a statutory provision can also be tested against the basic structure of the Constitution, in addition to any constitutional provision.

Part I of the article outlines the two sets of amendment Bills and differentiates them on the basis of the provision regarding the composition of the JAC. Part II uncovers the history of the appointment of judges in India. It makes the historical case that the procedure of appointment of judges is a significant aspect of independence of judiciary. Part III proceeds to argue that the composition could have been provided in the statutory Bill itself. The final part concludes the paper and presents the comments of the authors.

A ROAD-MAP TO THE CONSTITUTIONAL AMENDMENT BILL

Articles 124(2) and 217(1) of the Constitution of India, 1950 provide the procedure for appointment of judges in the Supreme Court and the High Courts respectively. The literal

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[1] The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, cl. 3.

[2] *Id*.

[3] *Judicial Appointments: Comparison of the 2014 Bills with the 2013 Bills*, PRS LEGISLATIVE RESEARCH (Nov. 5, 2014), http://www.prsindia.org/uploads/media/constitution%20121st/Comparison%20of%20the%20Bill,%202013%20and%202014.pdf.

[4] Standing Committee, Rajya Sabha, *64th Report: The Judicial Appointments Commission Bill, 2013*, ¶ 39.

interpretation of the provisions reveals that the appointment of judges of the Supreme Court and the High Courts is primarily an act of the President who acts in accordance with the aid and advice of the Council of Ministers under Article 74(1) of Constitution of India. A Constitutional obligation is cast on the President to *consult* the Chief Justice of India and the Chief Justice of the High Court concerned, for the appointment and transfer of judges of the higher judiciary.[5]

The Law Commission, in its 214th Report, observed that these two Articles are among the checks and balances in the Indian Constitution where both the executive and judiciary have been given an equal and balanced role.[6] The Standing Committee examining the JAC Bill has stated that these two Articles ensure the independence of judiciary, which forms a part of the basic structure of the Constitution.[7]

The Supreme Court in the three *Judges' cases viz*. the *SP Gupta* judgement (1982),[8] the *Advocates-on-Record* judgement (1993)[9] and the *Special Reference* Advisory Opinion (1999)[10] has unnecessarily upset this balance with its interpretative tools. In contrast to the literal interpretation of the provisions, the *consultation* with judges has been read as *concurrence*.[11]

[5] The Constitution of India, 1950, arts. 124(2), 217(1).

[6] Law Commission of India, *Report No. 214: Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs UOI reported in 1993 (4) SCC 441 and In Re: Appointment and Transfer of Judges reported in 1998 (7) SCC 739,* at 53 (2008).

[7] Standing Committee, Rajya Sabha, *64th Report: The Judicial Appointments Commission Bill, 2013*, at 9.

[8] S. P. Gupta and ors. v. Union of India, 1982 2 SCR 365.

[9] Supreme Court Advocates-on-Record Association and anr. v. Union of India, (1993) 4 SCC 441.

[10] In Re: Appointment and Transfer of Judges, 1998 (7) SCC 739.

[11] Supreme Court Advocates-on-Record Association and anr. v. Union of India, (1993) 4 SCC 441; ¶¶ 52-57.

In the *First Judges'* (*SP Gupta*) *case*, the majority held that *consultation* with the Chief Justice of India under Article 124 does not mean *concurrence*; therefore his opinion is not binding on the President-executive. The Apex Court in its decision gave a twofold reasoning: first, the executive is not bound to act in accordance with the opinion of all constitutional functionaries.[12] Second, primacy should be given to the executive as it is accountable to the people while the judiciary is not subject to such accountability.[13]

At the same time, in order to curtail the arbitrary power of the executive, the Supreme Court held that the consultation would have to be full and effective and any departure from the opinion of the respective judges is to be justified with strong and cogent reasons.[14] In this way, the Court maintained the balance between separation of power and the system of checks and balances.

Subsequently, a nine-judge bench of the Supreme Court in the *Second Judges'* (*Supreme Court Advocates on Record*) *case* overturned the *First Judges' case*. The majority (5)[15] held that judicial independence requires the opinion of the Chief Justice of India in the matter of appointments and transfers to be determinative.[16] It hence interpreted *consultation* to mean *concurrence*.[17]

The Court also devised a new system of appointment *viz.* the collegium system. The term *Chief Justice of India* occurring in Articles 124(2), 217(1) and 222(1) was extended to mean a

[12]S.P. Gupta case, at ¶¶ 29 (Bhagwati, J.).

[13] *Id*.

[14]*Id* at ¶ 1069.

[15] Majority comprises Hon'ble Justices J.S. Verma, YojeshwarDayal, G.N. Ray, A.S. Anand and S.P. Bharucha.

[16]Supreme Court Advocates-on-Record Association case, at ¶¶ 52-57.

[17]*Id*.

collegium of selected Judges.[18] It held that the Chief Justice of India in consultation with his two senior-most colleagues should make the recommendation under Articles 124(2), 217(1) and 222(1), and that the executive should act in conformity with such recommendation.[19]

Since then the view of the Chief Justice of India for appointment and transfer of judges to higher judiciary has been given primacy over the decision of the Union Government. It made the judiciary the *de facto* appointing authority for themselves, clearly overlooking the intention of the Constitution framers and circumscribing the aid and advice tendered by the Council of Ministers to the President of India under Article 74(1) of Constitution. A quick glance at the Constituent Assembly Debates would however suggest the contrary. The Constituent Assembly deliberately followed the procedure of appointment of judges as it existed under the Government of India Act, 1935 *i.e.* the sole discretion was given to the executive (the Crown).[20]

The *Second Judges' case* was unanimously reaffirmed by a nine-judge bench of the Supreme Court in the *Third Judges'* (*In re: Special Reference*) *case*. The third case clarified the modalities of how the judicial collegium would actually perform the task of appointments which was not clear in the *Second Judges' case*. While doing so, it further extended the collegium from three to five *i.e.* the Chief Justice of India and his four senior-most colleagues.[21] The extension of the collegium to five was done, in the absence of any detailed reasoning. The reasoning was limited to the rationale of selecting the best available judicial talent in the country for the higher judiciary, in ensuring the need for the independence of the

[18] *Id* at ¶¶ 58, 68-70.

[19] *Id* at ¶¶ 68-70.

[20] Constituent Assembly Debate, vol. VIII, 246-247 (24th May 1949).

[21] In Re: Appointment and Transfer of Judges, at ¶ 14.

judiciary.[22] However, no nexus was established between the extension and selection of the best talent.

In the light of the opinion preferred by the Supreme Court, Department of Justice, Ministry of Law and Justice prepared detailed Memorandum of Procedures [23] for the purpose of appointment and transfer of Judges of higher judiciary.

The new system was criticized[24] both factually (due to some questionable appointments) and theoretically (on the ground that it upset the system of checks and balances, and independence of judiciary). The National Commission to Review the Working of the Indian Constitution recommended the establishment of the Judicial Appointments Commission for the appointment, transfer and removal of judges of higher courts.[25]

In this regard, in order to restore the balance and to further equal and effective participation of both executive and judiciary in the appointment of judges, the Constitutional (120th Amendment) Bill was introduced. It proposed the establishment of a Judicial Appointments Commission, replacing the existing controversial collegium system, to make recommendations to the President on appointment and transfer of judges of the higher

[22] Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN J. CONST. L. 99, 103-04 (2011).

[23] Memorandum showing the procedure for appointment and transfer of Chief Justice of India and Judges of the Supreme Court of India, http://doj.gov.in/sites/default/files/memosc.pdf accessed 10 Feb 2015; Memorandum showing the procedure for appointment and transfer of Chief Justices and Judges of High Courts, http://doj.gov.in/sites/default/files/memohc.pdf, accessed 10 Feb 2015.

[24] Law Commission of India, *Report No. 214: Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta v. UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association v. UOI reported in 1993 (4) SCC 441 and In Re: Appointment and Transfer of Judges reported in 1998 (7) SCC 739* (2008). *See generally* ArghyaSengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN J. CONST. L. 99 (2011).

[25] National Commission to Review the Working of the Indian Constitution (2002).

judiciary.[26] In addition, it empowered the Parliament to pass a law providing for the functional and procedural aspects of the JAC.[27] To this end, the Judicial Appointment Commission Bill, 2013 was introduced simultaneously in the Parliament. Unfortunately, the Constitutional Bill lapsed and subsequently the JAC Bill was withdrawn.

To revive these bills, the Constitution (121st Amendment) Bill, 2014 and National Judicial Appointments Commission Bill, 2014 were introduced in the Parliament on similar lines. The National Judicial Appointments Commission Bill, 2014 received the assent of the President after being passed by both houses and is now the National Judicial Appointments Commission Act, 2014. The National Judicial Appointments Commission Act, 2014 prescribes the composition of the JAC in the Constitution[28] itself unlike the former Bill which had left it to the wisdom of the Parliament to decide by law.[29]

The following section will focus on the necessity of the incorporation of the composition of the JAC in the constitutional provision.

JUDICIAL APPOINTMENT COMMISSION: BASIC STRUCTURE AND ORDINARY LAWS

As is not unusual with any proposed law, the JAC Bill, 2013 was accompanied with some ambiguities, which needed to be clarified. Accordingly, it was referred to the Standing Committee for review. One of the several recommendations of the Committee was that the

[26]The Constitution (One Hundred and Twentieth Amendment) Bill, 2014.

[27]*Id*.

[28]*Id*.

[28]The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, cl.3..

[29]*Judicial Appointments: Comparison of the 2014 Bills with the 2013 Bills*, PRS LEGISLATIVE RESEARCH (Nov. 5, 2014), http://www.prsindia.org/uploads/media/constitution%20121st/Comparison%20of%20the%20Bill,%202013%20and%202014.pdf.

composition of JAC should be prescribed in the Constitution itself instead of in a statute,[30] while the procedure to be followed by the JAC may be determined by a statute. The Standing Committee submitted a two-pronged reason for this suggestion: *first*, the committee observed that if the composition is prescribed in the Constitution itself, in order to alter the same, the Parliament has to undergo a rigorous procedure under Article 368.[31] On the other hand, an amendment in an ordinary statute can be made by a simple majority in the Parliament. Therefore, the Standing Committee feared that if the composition is provided in an ordinary statute (JAC Bill), it can be altered at the whims and fancies of the then government and there will not be any check over such an action.

Second, the Committee was of the opinion that an ordinary legislation would not be afforded protection by the Basic Structure doctrine.[32] The Standing Committee relied on the position of law that suggested that the *vires* of a legislation can only be tested on two grounds: competence of the legislature to enact it and whether the legislation is *ultra vires* the Constitution. Therefore, it was noticed that a situation wherein the JAC Act was amended to comprise four non-judicial members as opposed to three judicial members would go without redressal as it would not fall within any of the pigeon holes. However, the prescription of the composition of the JAC in the Constitution would have made sure that the amendment was negated based on the principle of judicial independence and the system of checks and balances which formed a part of the basic structure of the Constitution.[33]

[30] Standing Committee, Rajya Sabha, 64th Report, *The Judicial Appointments Commission Bill*, 2013, ¶ 39.

[31] *Viz.* (1) enactment by a super-majority of both houses of India's Parliament (at present, the Constitution Amendment Bill has only been passed by the upper house); (2) ratification by the legislatures of half the states in India; and (3) assent by the President.

[32] Standing Committee, Rajya Sabha, 64th Report, *The Judicial Appointments Commission Bill*, 2013, ¶ 39.

[33] Supreme Court Advocates-on-Record Association case, at ¶¶ 9-11.

The Standing Committee's anticipation is based on the premise that the ground of basic structure violation is not available for the review of an ordinary statute. In this context, it is submitted that the basic structure doctrine can be applied to constitutional as well as statutory provisions.

Raj Narain[34] was the first case in which the question regarding the applicability of the basic structure doctrine to statutes was discussed and decided by the Supreme Court. The Court decided by majority (3:1)[35] that the basic structure doctrine is applied to determine the validity of constitutional provisions only – not statutory provisions. Per Justice Ray,[36] the acceptance of the theory would imply that there are two kinds of limitations for legislative measures: *first*, the competence of the legislature in accordance with Articles 245 and 246 and the requirements to be in compliance with Part III of the Constitution by virtue of Article 13. *Second*, no legislation can damage or destroy the basic features of the Constitution. The latter, according to the Judge, would amount to the rewriting of the Constitution and will be an encroachment on the separation of powers.[37] In his opinion, no legislation can be free from challenge on the ground even though the legislative measure falls within the plenary powers of the legislature.[38]

The transition towards the position of applicability of basic structure doctrine to statutory provision can be traced to Justice Beg's dissent in *Raj Narain*[39] itself. Justice Beg observed

[34] Smt. Indira Gandhi v. Shri Raj Narain and anr., AIR1975 SC 2299.

[35] The majority opinion comprises concurring opinions of Ray C.J., Mathew J. and Chandrachud J. Justice Beg dissented and Khanna J. abstained from deciding on the issue.

[36] Smt. Indira Gandhi v. Shri Raj Narain and anr., AIR1975 SC 2299, ¶ 134.

[37] *Id* at ¶¶ 134-136.

[38] *Id* at ¶¶ 134.

[39] *Ibid.*

that the courts have to test the legality of laws, whether *ordinary* or constitutional, by the norms laid down in the Constitution basing his conclusion on the supremacy of the Constitution.[40] Considering that the statutory law cannot go beyond the range of constituent power and the exercise of constituent power is itself subject to the Constitution,[41] it was concluded that even statutory law is subject to the basic structure doctrine.

The majority judgment was consistently followed in a catena of cases.[42] In spite of the stated position of law, the Supreme Court has struck down statutory provisions in the case of *L. Chandra Kumar*[43]and *Indira Sawhney*[44] – Section 28 of Administrative Tribunal Act, 1985 and Sections 3, 4 and 6 of Kerala State Backward Classes Reservation Act, 1995[45] respectively – on the basis of the violation of basic structure of the Constitution. Additionally, the nine judge bench of the Apex Court in *I.R. Coelho*[46] concluded that any statute afforded the protection from Part III of the Constitution by its inclusion in the ninth schedule[47] will continue to be subjected to the doctrine of basic structure.[48] The Court's reasoning was not nuanced: it opined that if the Parliament is incapable of enacting a constitutional amendment destroying the secular character of a state (secular character being a part of the basic

[40]*Id* at ¶ 623 (Per Justice Beg).

[41]*Id*.

[42]State of Karnataka v. Union of India and Anr. AIR 1978 SC 68; State of Andhra Pradesh and Ors. v. McDowell & Co. and ors. AIR 1996 SC 1627; Public Services Tribunal Bar Association v. State of U.P. and anr. AIR 2003 SC 1115; Kuldip Nayar v. Union of India AIR 2006 SC 3127.

[43]L. Chandra Kumar v. Union of India 1997 (3) SCC 261.

[44]Indira Sawhney v. Union of IndiaAIR 2000 SC 498.

[45]Kerala State Backward Classes (Reservation of Appointments or Post in the Services under the State) Act, 1995.

[46] I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu and ors.AIR 2007 SC 861.

[47]INDIA CONST. art. 31B.

[48]*supra*note 46 at¶ 81(i).

structure), neither can the Parliament exercise its power to produce the same result by protecting laws which produce the same effect.[49] To hold the contrary position would signify that the doctrine of basic structure can be subverted by first enacting such laws and then affording them the protection under the ninth schedule.[50]

The applicability of the basic structure test to ordinary legislations has been discussed by the Supreme Court in a couple of cases recently and has been answered in the affirmative. Interestingly, the Apex Court in *K.T. Plantations &Anr.v. State of Karnataka*[51] starts by citing *I.R. Coelho*[52] and therefore the discussion never veered towards the question as to whether a statute is subject to the basic structure doctrine. Rather, the Court has singularly focused on the question in relation to the legality of a statute in case it violates the 'rule of law'. The Court cites a number of authorities, domestic and foreign, to conclude that rule of law is a part of the basic structure of the Constitution[53] and has held that a statute may only be invalidated if it violates a rule of law which has the status of a basic structure rule.[54] Such a conclusion would further the fact that courts have accepted the notion that a statute cannot violate the basic structure. The second case relating to the decision of the Supreme Court in *Madras Bar Association*[55] which has declared the National Tax Tribunal to be unconstitutional, re-affirms the above position of law. The Court states that the basic

[49]*Id*, ¶¶ 49-50.

[50]*Id*, ¶ 49.

[51]KT Planatations & anr.v. State of Karnataka AIR 2011 SC 3430.

[52]*Id* at ¶ 134.

[53]*Id* at ¶¶ 136-139.

[54]*Id* at ¶ 140.

[55]Madras Bar Association v. Union of India (2014) 10 SCC 1.

structure doctrine remains applicable to any ordinary legislation even though the statute was enacted by following the prescribed procedure.[56]

CONCLUDING REMARKS

All in all, the overall changes in the procedure of appointment of the judges in the higher judiciary proposed by the Constitutional (121st Amendment) Bill, 2014 and enshrined in the National Judicial Appointment Commission Act, 2014 are welcome and calculated to give better security to the independence of judiciary, while preventing disregard of meritorious judges through false objective criteria. The recommendation of the Standing Committee that the composition of the JAC requires constitutional entrenchment is based on an erroneous interpretation of the basic structure doctrine of the Constitution. Notably, judicial trend evidences that even statutory provisions can be tested against the basic structure doctrine.

The National Judicial Appointment Commission Act, 2014 has a bigger fish to fry *viz.* the overriding effect of the JAC over the practices such as seniority while deciding the Chief Justice of India, judges sitting in the panel to decide their own fate etc., which have attained the status of custom over the years. These issues will be upfront while making the regulations regarding the procedure of appointment of judges. As of now, both the JAC Bill, 2013 as well as the National Judicial Appointment Commission Act, 2014 do not throw any light on these matters. The 2014 Act lays down broad criteria of seniority, ability and merit for the purposes of appointment of judges.[57] The regulations to the Act shall provide additional parameters of the same. The overriding effect of the Act on the aforementioned customs can only be further analysed in the context of these regulations, when released.

[56] *Id* at ¶ 65 (Per Justice Jagdish Singh Khehar).

[57] National Judicial Appointments Commission Act of 205 s. 5