



Working Paper No.1/2014

Recasting the Judicial Appointments Debate: Constitutional Amendment (120th Amendment) Bill, 2013 and Judicial Appointments Commissioner Bill, 2013

I. Introduction

In 2013 two Bills were introduced to reform the process of judicial appointments in the Supreme Court and the High Courts. The Constitutional (120th Amendment) Bill, 2013 ("Amendment") and the Judicial Appointments Commission Bill, 2013 ("Bill") seek to establish a Judicial Appointments Commission ("JAC") to appoint judges to the Supreme Court and the High Court.

Currently, the appointment of judges to the Supreme Court and the High Court is provided for, under Article 124(2) and Article 217(1) of the Constitution of India, 1950. The President of India is required to "consult" with the Chief Justice of India and in case of High Court appointments, to consult the Governor and the Chief Justice of the respective High Court. The Supreme Court in the case of *Supreme Court Advocates-on-Record Association v. Union of India*¹ in dealing with Article 124(2) and 217(1) of the Constitution interpreted the word "consultation" to mean "concurrence". The Advisory Opinion² of the Supreme Court in 1998 prescribed a distinct process of appointment whereby the judiciary through its "collegiums" consisting of the Chief Justice and two or four senior judges, as the case may be, would recommend names to the President, who then is bound by the decision of the Collegium. This procedure of appointment in effect, confers upon the judiciary the power to appoint judges of the higher courts.

The Amendment proposes a new Article 124A to create a Judicial Appointments Commission and provides that the structure, composition and functioning of the JAC will be enacted in a

¹ (1993) 4 SCC 441

² Special Reference No. 1 of 1998, Re: (1998) 7 SCC 729

separate law by the Parliament. The Amendment provides for the President to make appointments on the recommendation of the JAC.

This Working Paper is divided into three parts. In the first part we review the appointment process as it currently stands, by analyzing the judgments and the socio-political conditions surrounding them. In the second part we present the different models of appointment in constitutional democracies around the world and argue why the judicial appointments commission model is the best possible option amongst the different available models. In the third part, we analyze the gaps and shortcomings of the Bill and the Amendment and make recommendations to resolve some of these gaps. We conclude that the creation of a Judicial Appointments Commission is not a step back to the original constitutional position in the Constitution of India, 1950 but rather, a concrete opportunity to create a new participatory and transparent method of appointment to the judicial positions in line with contemporary constitutional design. This reform would restore parity between executive and judiciary in appointment of judges, which is constitutional and in conformity with rule of law and separation of powers.

II. Appointment Process As It Currently Stands

In the course of the Constituent Assembly debates³, when it was suggested that the appointment of a judge of the High Court or Supreme Court is to be made in “concurrence” with the Chief Justice of India, Dr. B.R. Ambedkar gave a disclaimer on using the word “concurrence”-

“With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority

³ For a discussion on the constitutional assembly debates pertaining to judicial appointments, See Arghya Sengupta “History’s Lessons for Constitutional Reforms” in *Seminar* (Vol. 642, February 2013)

*to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.”*⁴

The Supreme Court in *S.P. Gupta v. President of India* (1981)⁵ held that the executive would appoint the judges in ‘consultation’ with the Chief Justice rather than in ‘concurrence’. Justice P.N. Bhagwati speaking for the majority stated that *“The opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in Clause (1) of Article 217.”* (Para 29)

Justice Bhagwati cautioned us in saying *“We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation.”* Unmindful of his advice, this is precisely what the court went on to do a decade later in *Supreme Court Advocates-on-Record Association v. Union of India*⁶ (*Second Judges case*) where a majority in the 9-judge bench came to the conclusion that ‘consultation’ would mean ‘concurrence’ or ‘consent’. It was held that no appointment of any judge to the Supreme Court or any High Court can be made unless such appointment is in conformity with the opinion of Chief Justice of India (“CJ”). The norm was of seniority wherein the senior-most judge would be appointed as the Chief Justice if considered fit to hold the office. In 1998, the President of India exercised his power under Article 143 invoking the advisory jurisdiction of the Supreme Court to clarify the appointment process (*Third Judges Case*).⁷ In this judgment, the court went on to clarify the composition and functions of the judicial collegiums which needed to be consulted with and prescribed that the collegiums

⁴ Constituent Assembly Debates, 24th May, 1949; Vol. VIII

⁵ AIR 1982 SC 149

⁶ (1993) 4 SCC 441

⁷ Special Reference No. 1 of 1998, Re: (1998) 7 SCC 729

should comprise of the CJI, accompanied by the senior most judges of the Supreme Court as the focal body for appointments. Accordingly, the CJI would have to consult his four senior most judges for Supreme Court appointments and 2 senior most judges for the High Court appointments. From this point on, the substantive power of appointments was clearly vested in the judiciary, with the President being a mere nominal head.

In trying to contextualize the *Second and Third Judges case*, it is commonly suggested that the primacy of the judiciary in making its own appointments without interference from the other pillars of the government, comes out of the post-Emergency suspicion or distrust of the executive. It is often mistakenly argued that such an insulated process of judicial appointment is provoked and justified by the concerns raised by the inter-institutional tussles of the Emergency period and hence by virtue of separation of powers and rule of law, the appointments model is justified. The fact however is that by the early 1990's, coalition governments were in place and the centre was rather weak. The Supreme Court by then had already widened its jurisdiction, giving substantive remedies which were legislative in nature as evident from *Laxmikant Pandey v. Union of India*⁸ or *Vishaka v. State of Rajasthan*⁹. It substantively relaxed *locus standi* and procedures, with strides of judicial activism and populist tendencies as evident in the evolution of public interest litigation through the 1980's. Therefore, the shift from *SP Gupta* case to *First and Second Judges Case* must not be misinterpreted as redemptory post-Emergency shift towards judicial independence and insulation from authoritative political influence. It was rather evidence of an active and opportunistic judiciary while weak coalition governments were in power at the Union Government.

India is the only constitutional democracy where the judiciary appoints its own judges. The concern around the current process of appointment is that it possibly lacks (1) accountability (2) a clear merit-based criteria and (3) diversity in composition. The process is not open to public scrutiny and the norm of seniority has become a proxy criterion for judging merit. Neither the executive nor the legislature has any say in the appointment of judges. Given these

⁸ (1984) 2 SCC 244

⁹ (1997) 6 SCC 241

weaknesses in the current schemes of appointment, in the following section we analyze the different models of appointment methods available to us.

III. **Models of Judicial Appointment: An International Move to the JAC Model**

Most constitutional democracies of the world adopt one of the following models of judicial appointments:-

1. **Judiciary-Executive model:-** It entails appointment by the executive in consultation/concurrence with the judiciary. India as per its original constitutional scheme adopted this model but has currently moved to a more insulated model of judicial primacy in judicial appointments.
2. **Executive-Legislative model:-** It involves a selection of candidate by the executive and an approval of this candidate by a legislative body. For example, in appointments made to the higher judiciary in the United States, the President nominates a candidate which then requires confirmation by the Congress.

More recently several constitutional democracies have moved to a more innovative inter-institutional model of appointment where a statutorily constituted judicial appointments commission plays a significant role. This commission, consisting of the judicial and the executive branch, is charged with the responsibility of making recommendations or appointments of judges based on a procedure that ensures transparency and judicial independence. England, South Africa and Malaysia are examples of this model. The proposed Bill in India would also follow a similar model.

This third model of the JAC therefore involves the creation of a new institutional arrangement to facilitate collaboration between the judiciary and executive branch. The UN Basic Principles on the Independence of the Judiciary provide that individuals *“selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of*

race, color, sex, religion, political or other opinion, national or social origin, property, birth or status..."¹⁰ The JAC makes possible the conformity with this principle.

It is increasingly being accepted that judicial independence is compromised by a system that confers undue power of appointment upon a single body, be it the executive, judiciary or the legislature. Separation of powers in this third model is not conceptualized as mutual exclusion of the different wings of the government, but rather a collaborative process of deliberation and multiple points of view. The collaborative process also operates as a check and balance to ensure that no single institution has an overweening influence on judicial composition. Where two independent institutions collaborate to appoint the judiciary, protocols of consultation and concurrence have to be developed to shape this relationship. Further, judicial independence can be secured by other means that focus on the functioning of the judges rather than just appointments. This is often done by regulating salaries, tenures, retirement and such other administrative mechanisms. Unfortunately the discussion on judicial independence in India has come to be understood largely in terms of non-politicization of the appointment process. To rethink the doctrine of judicial independence or separation of powers in the context of the JAC is to think of these doctrines in terms of collaborative and inter-institutional processes which are transparent and accountable. The proposed JAC Bill in India is therefore not a move back to the older executive-judiciary model but a step towards a new institutional niche, an institutionalization of the executive-judiciary model through the JAC.

IV. **Recommendations**

Though the JAC model is constitutionally justifiable, the present proposal needs significant changes. This section will focus on the weaknesses of the Bill and makes recommendations to overcome them.

A. Preamble and Object

In its current form, the preamble of the Bill states: *"that to provide for the composition of the Judicial Appointments Commission for the purpose of recommending persons for appointment*

¹⁰ Article 10, UN Basic Principles on the Independence of the Judiciary

as Chief Justice of India and other Judges of the Supreme Court, Chief Justices and other Judges of High Courts, its functions, procedure to be followed by it and for matters connected therewith or incidental thereto.” The preamble of the Bill is underspecified and does not adequately articulate the motivations and the legislative intent of this major constitutional reform. A purposive and holistic interpretation of provisions of law requires a clearly stated preamble to it.

Given that the preamble and the object of the Bill is currently inadequate, it is recommended that it be framed broadly and in conformity with the UN Basic Principles on the Independence of the Judiciary, 1985.¹¹ The object of the legislation should mandate the appointment of a competent, independent and impartial judiciary capable of upholding constitutionalism and rule of law in the country, through a process that ensures selections solely on merit and encourages diversity in the range of persons appointed, so as to enhance public confidence in the institution. This needs to be stated along with the statement of object and reasons that is currently mentioned in the Constitutional Amendment that *“The proposed Bill would enable equal participation of Judiciary and Executive, make the system of appointments more accountable, and thereby increase the confidence of the public in the institutions.”*

B. Constitutional Entrenchment

Section 3 of the Bill states as follows:

“(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;

¹¹ Basic Principles on the Independence of Judiciary, endorsed by General Assembly resolution 40/32 or 29 November, 1985 and 40/146 of 13 December, 1985. Available on <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (last accessed on 7th January, 2013)

(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.”

A major criticism of the bill is that Section 3(1) can potentially be amended by a simple majority in the parliament or even by an ordinance. In the system as it currently stands, judicial appointments can be amended only through a constitutional amendment that requires the support of two-thirds of members of each House of Parliament, and half of the State Assemblies. The Bill follows the English model, wherein the composition and functioning of the Commission is laid down in the Constitutional Reforms Act, 2005. But the Indian constitutional tradition departs from UK because it has a written constitution and therefore needs to entrench this provision in the Constitutional Amendment rather than in the Bill.

Nevertheless the Bill may be protected from abuse of power. India has several provisions of utmost constitutional importance which are not entrenched in the Constitution. For example, the Representation of People's Act, 1951 and the Citizenship Act, 1955 deal with constitutional questions of electoral democracy and citizenship respectively, but these are legislated as central government statutes and are not entrenched in the Constitution. The proposed Bill could also be such a statute of constitutional significance. Further, the Supreme Court has protected and regulated appointments to high constitutional bodies such as the Central Vigilance Commission¹² and the Public Service Commissions¹³. It recognizes certain authorities as constitutional authorities, as opposed to statutory and administrative authorities, and specially safeguards these constitutional authorities from abuse of power.¹⁴

However, the better approach would be that the proposed Article 124A of the Constitutional Amendment be expanded to include the composition of the JAC and the process of appointment. If not, it will potentially be open to abuse by temporary majorities in Parliament, thus posing a threat to the rule of law. It is recommended that this reform of

¹² *Centre for PIL v. Union of India* (2011) 4 SCC 1

¹³ (2013) 5 SCC 1

¹⁴ (2010) 13 SCC 586

judicial appointments be entrenched more fully, through a constitutional amendment resembling Sections 174 and 178 of the South African Constitution, 1996. We recommend that the Constitutional Amendment contain provisions with respect to (a) constitution of the JAC; (b) the need for appointments to be solely on merit and reflective of diversity in composition; (c) resembling Section 174(3) and (4) of the South African Constitution, the Amendment needs to state broadly, the procedure of appointment with regard to the number of nominations to be sent by the JAC to the President, the power of the President to accept, reject or send back to JAC for review of the nominations.

C. Procedure for Discharge of JAC Functions Inadequate

The procedure for the JAC in discharging its functions is specified in Section 9(1) and (2) of the Bill. It merely states that the JAC has the power to specify, by regulations, the procedure for discharge of its functions. This is highly inadequate. The bill has to clarify the powers of the JAC in discharging its functions but as it currently stands, the bill has entirely delegated this authority to the realm of rules.

Further, the regulation of the JAC in its everyday functioning is also crucial. UK which recently adopted the JAC model of appointment is facing problems due to delay in the process of appointments. The average time in each stage of review and the length of the whole process is an urgent concern in the implementation of the law.¹⁵ The other concern in implementation faced by UK is in its capability to forecast vacancies. A more accurate forecasting makes the selection process timely.¹⁶

We recommend that the bill clarify- (a) regulations and quorum for meetings of JAC in taking decisions; (b) provisions for removal of the members of the JAC when necessary; (c) a basic

¹⁵ Judicial Appointments for the 21st Century: Independence, Responsibility and Accountability” Response of the Judicial Appointments Commission to the Ministry of Justice Consultation Paper ‘The Governance of Britain: Judicial Appointments” (2008) available on http://jac.judiciary.gov.uk/static/documents/JAC_Response_to_MoJ_Consultation_Paper_170108.pdf (last accessed on 27th November, 2013) p. 6

¹⁶ ID at p. 7

framework for making appointments such as the process of inviting applications, eligibility for applications, criteria for short-listing of candidates based on merits and ensuring diversity in candidates can be included within the legislation instead of delegating it to executive decision making; (d) the power of the JAC to reconsider or review its nominations; (e) the regulations may propose a specified time frame during which vacancies should be filled or recommendations be made.

D. Qualifications for Appointment: Ensuring Merit and Diversity in Appointments

D.1 - Merit based appointment

The Bill in section 4(c) states that “the person recommended is of ability, integrity and standing in the legal profession.” This is the only provision in the Bill which hints at the need for a merit based criteria for appointment. Section 12(2) of the Bill delegates the procedure for recommendation and short listing of candidates to the JAC. Currently in practice is a long established convention of ‘seniority’ in appointment of the Chief Justice.¹⁷

It may be suggested that there can be a standardized criteria for evaluating merit. For example, the American Judicature Society (“AJS”) and the American Bar Association (“ABA”) administer an official performance evaluation of the judges.¹⁸ Official performance evaluation programs such as the above are typically administered by an independent commission, created for that purpose and responsible to the state’s highest court. The composition of these commissions varies, but both the ABA and AJS recommend a broad-based, independent group of judges, lawyers, and non-lawyers familiar with the judicial system.¹⁹ The recommended performance evaluation criteria include-: legal ability, integrity and impartiality, communication skills, professionalism and temperament, administrative capacity, necessary skills for jurisdiction of court.

¹⁷ ArghyaSengupta “Judicial Independence and the Appointment of Judges To The Higher Judiciary in India: A Conceptual Enquiry” in *Indian Journal of Constitutional Law* (Vol. 5, 2011) p. 118

¹⁸ “Judicial Selection: The Process of Choosing Judges” (American Bar Association, 2008) p.13 available in http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selecti on_roadmap.authcheckdam.pdf (last accessed on 27th November, 2013)

¹⁹ ID at p. 13

The South African Constitution mandates that that an “appropriately qualified” and “fit and proper” person maybe appointed. While realizing the difficulty in interpreting such wide phrases, the Judicial Services Commission in 2010 created supplementary criteria to select meritorious candidates²⁰. The criteria are:

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
 - (a) Technically competent
 - (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
 - (a) Technically experienced
 - (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?

We recommend that there needs to be a shift from the seniority-based appointment practice towards a merit-based appointment. Meritorious quality of appointment is central to the aims and objectives of such legislation and this cannot be left to be stipulated by delegated legislations. Provisions asserting this maybe clearly stated in the bill similar to Constitutional Reforms Act of 2005 in the United Kingdom where Section 63(2) states that the “*Selection must be solely on merit.*” and Section 63(3), “*A person must not be selected unless the selecting body is satisfied that he is of good character.*”

D.2 - Diversity Mandate

²⁰Summary of the Criteria Used by the Judicial Services Commission when Considering Candidates for Judicial Appointments, Republic of South Africa available at www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf (last accessed on 3 December 2012)

Under the proposed Bill, there is no mention of a mandate to ensure a diverse judiciary. A diverse judiciary can have a powerful symbolic value in promoting public confidence in the fairness of courts, thus important in terms of access to justice. This is one of the central guiding principles of the UK legislation as well.²¹ Referring to research conducted in the United States, on a panel of judges from a diverse background, it was observed that the judges were more likely to debate a wider range of consideration and it also becomes an increasingly important element in achieving an independent judiciary.²² Diversity and merit are not contradictory; rather in a pluralistic society like ours, diversity makes the judiciary more representative, thus fostering impartiality and enhancing the moral legitimacy of the institution.

Though the Constitution of India permits three categories of individuals to be appointed to the court- 'judges, lawyers and academics'- legal academic scholars have rarely been appointed.²³ In practice, several unwritten rules of appointment have evolved such as, no judge below the age of 55 years has been appointed to Supreme Court since the 1980's onwards.; to be considered for appointment in the Supreme Court, one has to be either a Chief Justice of the High Court or in rare cases, a very senior judge of the High Court; the regional and demographic diversity is also narrow and limited.²⁴ In lines of gender and caste for example, only four women judges have been justices of the Supreme Court, over 40% of the judges in any time period were Brahmins and 50% were from Forward Castes while barely 10% have been of Schedule Caste/Schedule Tribe and Other Backward Classes.²⁵ The Bill however makes no mention of diversity. The constitution of the JAC is itself not guided by any principles of diversity.

We recommend that the Bill should encourage diversity in appointment, in terms of gender, religion, caste and ethnicity. In Constitutional Reforms Act, 2005 of the United Kingdom, Section 64 specifies the need for “*Encouragement of diversity*”. It states that, subject to the

²¹ See; Dr Cheryl Thomas “Judicial Diversity in the United Kingdom and Other Jurisdiction” (2005); commissioned by ‘Her Majesty’s Commissioners for Judicial Appointments’

²² ID at p.10

²³ Abhinav Chandrachud “Age, Seniority, Diversity” *Frontline* (May 3rd, 2013)

²⁴ ID available on <http://www.frontline.in/cover-story/age-seniority-diversity/article4613881.ece> (last accessed on 27th November, 2013)

²⁵ Madhav Khosla, Sudhir Krishnaswamy “Inside Our Supreme Court” Book Review of George H. Gadbois Jr. *Judges of the Supreme Court of India* (OUP, 2011) in *Economic and Political Weekly* (Vol.XLVI No. 34, Aug 2011) p.29

condition of merit and good character, *“The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.”* Similarly, the South African Constitution requires that persons appointed as judges must reflect the racial and gender composition of the country.²⁶ We recommend a similar approach in the Bill as well.

E. Clarifying “Recommendation” and Powers of the President

As per the Bill, the JAC is not responsible for the appointment of the judges but only for its selection.²⁷ The appointment will still be made by the President. The 120th Amendment Bill, 2013 in Section 2 states *“on the recommendation of the Judicial Appointments Commission as referred to in article 124A”* (emphasis added) will substitute the current Article 124. In Section 4 of the JAC Bill, it states *“It shall be the duty of the Commission— (a) to recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; (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”* (emphasis added). The use of the word “recommendation” is bound to cause multiple interpretations similar to the words “after consultation” in the current Article 124 of the Constitution.

By making the JAC a selecting body and not an appointing body, an important check and balance has been placed. Yet, the nature of this check would hinge on the interpretation of the word “recommendation” in the proposed Article 124 of the 120th Amendment Bill, 2013. Does the President have the power to review or reject the nominations? As per the current judicial interpretation, the word “consultation” implies that the Chief Justice (judicial collegiums) is not just a selection body but in practice, with limited discretion given to the President, is disguised as an appointing body as well.

²⁶ See 174(2) of the South African Constitution.

²⁷ For a discussion on Selection Model, Appointment Model and Hybrid Model, See “Judicial Appointments for the 21st Century: Independence, Responsibility and Accountability” Response of the Judicial Appointments Commission to the Ministry of Justice Consultation Paper ‘The Governance of Britain: Judicial Appointments’ (2008) available on http://jac.judiciary.gov.uk/static/documents/JAC_Response_to_MoJ_Consultation_Paper_170108.pdf (last accessed on 27th November, 2013) p. 4

In the UK, under the Constitutional Reforms Act, 2005, the Commission produces a single name. The Lord Chancellor may reject it or ask the Commission to reconsider, but only on limited grounds which she/he must justify by giving reasons. Even then, if the Commission is asked to reconsider, it can come up with the same name. This system applies to substantially all judicial appointments including tribunal appointments, with the exception of appointments to the Supreme Court. Supreme Court justices are required to be selected by a special commission under the JAC.

The proposed Article 124 of the Constitutional Amendment has to clarify the nature of the 'recommendation' made by the JAC and the discretion and powers of the President in the appointment of judges based on the recommendations made by the JAC. The Amendment has to clarify whether the President has the power to reject the recommendation or resend it to the JAC for reconsideration. As per Section 174(4) of the South African Constitution, the Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President. The President makes the appointment from this list, but if nominations are unacceptable, it can be resent back to the Commission once. We recommend a similar approach in the Constitutional Amendment as well.

V. Conclusion:

Most constitutional democracies in the world follow an inter-institutional model of appointing judges. This could be either an 'executive-judiciary' model or an 'executive-legislature' model. The recent trend however is a JAC model of appointment, realizing it as the best of the available models. India is the only nation where the appointment of judges to the higher courts is an insulated process with little or no involvement of the executive or the judiciary. Restoring parity between the executive and the judiciary in the appointment process is in accordance with rule of law and separation of powers. The proposed Indian model of the JAC is therefore a novel shift into an institutional niche allowing for a transparent collaborative process between the executive and the judiciary.

The JAC model in itself is constitutionally justifiable. The proposed Bill and Amendment however need some significant changes. An underspecified preamble and statement of objects, lack of constitutional entrenchment, inadequately specified functions and operations of the JAC, to clarify the need for a merit-based approach that encourages diversity, are some of the recommendations we make to the Bill and the Amendment.