

Legislative Brief

The Constitution (120th Amendment) Bill, 2013 and Judicial Appointments Commission Bill, 2013

The Constitution (120th Amendment) Bill and the JAC Bill, 2013 were introduced in the Rajya Sabha on August 30, 2013 and August 29, 2013 respectively. The Constitution (120th Amendment) Bill was passed in the Rajya Sabha on September 5, 2013, and will lapse with the dissolution of the 15th Lok Sabha.

The JAC Bill, 2013 was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice on September 26, 2013. The Committee submitted its Report on December 9, 2013.

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Highlights of the Bills

- ◆ The Constitution (120th Amendment) Bill, 2013 amends provisions related to appointment and transfer of judges to the higher judiciary.
- ◆ It establishes a Judicial Appointments Commission (JAC) to make recommendations to the President on appointment and transfer of judges to the higher judiciary. It empowers Parliament to pass a law providing for the composition, functions and procedures of the JAC.
- ◆ The JAC Bill, 2013 states that the JAC shall comprise: (i) the Chief Justice of India (CJI), (ii) two other senior most judges of the Supreme Court (SC), (iii) the Union Minister for Law and Justice, and (iv) two eminent persons to be nominated by the Prime Minister, the CJI and the Leader of Opposition of the Lok Sabha.
- ◆ The functions of the JAC include making recommendations for appointments of the CJI, SC judges, Chief Justice and other High Court (HC) judges, and transfer of HC judges.

Key Issues and Analysis

- ◆ The current method of appointments has been examined by various bodies including the Law Commission and the Parliamentary Standing Committee. They vary in the role of the executive and judiciary in making appointments of judges.
- ◆ The composition of the JAC has not been included in the Constitution, but has been left for Parliament to decide by law. This implies that modifying the composition of the JAC would not require a constitutional amendment, but may be altered by a simple majority in Parliament.
- ◆ The Standing Committee examining the JAC Bill has recommended that (i) the JAC be composed of three eminent persons, (ii) the broad parameters for short listing of candidates for HC appointments be laid down in the Bill, and (iii) the centre also consider the setting up of state level appointments commissions comprising the Chief Minister, the Chief Justice of HC and the Leader of Opposition.

PART A: HIGHLIGHTS OF THE BILLS¹

Context

The method of appointment of judges to the Supreme Court (SC) and high courts (HC) is provided for in the Constitution in Articles 124(2) and 217(1) respectively. The President appoints the Chief Justice of India (CJI) and Chief Justices of HCs after consulting with relevant SC and HC judges, and the CJI and Governor respectively. Appointments of SC judges are made by the President after consulting with the CJI. He may also consult with other SC and HC judges. In the case of HC judges, the President consults with the CJI, Governor and Chief Justice of the relevant HC.

The term “consultation” has been interpreted in three judgments of the Supreme Court, known as the Three Judges cases, between 1982 and 1999.² Today, a collegium of judges comprising the CJI and four senior most SC judges recommend judges to be appointed to the SC. A collegium comprising the CJI and two senior most SC judges makes appointments of HC judges. The Governor and the HC Chief Justice may also be consulted.

Several bodies, including the Law Commission, Parliamentary Standing Committees and the National Advisory Council have examined the issue of appointment of judges.³ Some have been in favour of setting up an independent commission to make appointments to the higher judiciary. Their recommendations vary in relation to the roles of the executive and judiciary. Incidentally, in 1990, the Constitution (67th Amendment) Bill, providing for a National Judicial Commission to make appointments of SC and HC judges, was introduced in Parliament, but not passed.

The Constitution (120th Amendment) Bill, 2013 amends the Constitution to provide for the JAC. The JAC Bill, 2013 details the composition of the JAC and the manner of selecting SC and HC judges.

Key Features

The Constitution (120th Amendment) Bill, 2013

- The Bill amends Articles 124(2), 217(1), 222(1) and 231(2) related to appointment of SC judges and appointments and transfer of HC judges. It replaces the current collegium system with that of a JAC.
- It empowers Parliament to pass a legislation to determine the composition, appointments, functions of the JAC, and the manner of selection of SC and HC judges.

The Judicial Appointments Commission Bill, 2013

Composition

- The JAC is a six member body comprising: (i) the CJI (ex officio Chairperson), (ii) two other senior most SC judges, (iii) the Union Law Minister, and (iv) two eminent persons to be nominated by a collegium comprising the Prime Minister, the CJI and the Leader of Opposition of the Lok Sabha.

Functions

- The functions of the JAC include making recommendations for: (i) the appointment of the CJI, SC judges, Chief Justices and other judges of the HCs; (ii) transfer of Chief Justices and other HC judges from one HC to another. The JAC will also seek to ensure that the person recommended is of ability and integrity.
- For appointment of HC judges, the JAC will elicit views of the Governor, Chief Minister and Chief Justice of the HC of the relevant state, in writing.

Reference to Commission for filling up of vacancies

- When a vacancy arises in the SC or HCs, the central government will make a reference to the JAC. Existing vacancies will be notified to the JAC within three months of the Act entering into force.
- When a vacancy arises due to the completion of term, a reference will be made to the JAC two months in advance; and for vacancies due to death or resignation, within two months of its occurrence.

Procedure for short listing of candidates

- The Union Secretary of the Department of Justice will initiate the process by inviting recommendations from the Chief Justices of HCs, the central and state governments.
- The JAC may specify the procedure for short listing of candidates through regulations.

PART B: KEY ISSUES AND ANALYSIS

Observations of various bodies on the current method of appointments

The Constitution (120th Amendment) Bill, 2013 and the JAC Bill, 2013, replace the current collegium system of appointment of judges with a JAC.

The current system of appointments has evolved from SC's interpretations of the relevant constitutional provisions, in the three Judges cases. The highlights of these judgments have been summarized in Table 1.

Table 1: Highlights of the judgments in the Three Judges cases

SC Judgment	Highlights of the judgment
First Judges case (1982)	The Constitution requires "consultation" and not concurrence of the CJI in making appointments. The executive should have primacy since it is accountable to the people.
Second Judges case (1994)	Overruled the above judgment. Held that there should be a collegium comprising the CJI and two senior most SC judges, to make recommendations for SC and HC appointments. In the event of conflicting opinions between executive and judiciary, the judiciary would have primacy.
Third Judges case (1999)	Reaffirmed the collegium process. The collegium would consist of the CJI and four senior most judges for making SC appointments, and CJI and two senior most SC judges for HC appointments.

Sources: First Judges Case: S.P. Gupta vs. Union of India, AIR 1982, SC 149; Second Judges case: S.C. Advocates on Record Association vs. Union of India, AIR 1994 SC 268; Third Judges case: *In re: Special Reference*, AIR 1999 SC 1; PRS.

Various high level commissions have recommended the establishing of an independent body to make appointments to the higher judiciary.³ They have differed on the extent of the role of the judiciary and executive in making such appointments.

Table 2: Comparison of various recommendations on the composition of a proposed appointments body

Recommendatory Body	Suggested composition
JAC Bill, 2013	CJI (Chairman), Two senior-most SC judges, Union Law Minister and two eminent persons. Eminent persons to be appointed by a collegium comprising PM, CJI and Leader of Opposition in Lok Sabha.
National Advisory Council (2005)	Vice-President (Chairman), Prime Minister (or his nominee), Union Law Minister, CJI, Speaker of Lok Sabha, Leader of Opposition from both Houses of Parliament. (Includes CM and CJ of HC for HC appointments)
NCRWC (2002)	CJI (Chairman), two senior most SC judges, Union Law Minister, one eminent person.
Law Commission (1987)	CJI (Chairman), 3 senior most SC judges, immediate predecessor of the CJI, three senior most CJs of HCs, Law Minister, Attorney General of India, Law academic. (Includes CJ of HC and Chief Minister for HC appointments)

Note: Law Commission, in its 2008 and 2009 reports, suggested that Government should seek a reconsideration of the judgments in the Three Judges cases. They also suggested that, alternatively, Parliament should pass a law restoring the primacy of the CJI, while ensuring that the executive played a role in making judicial appointments.⁴

Sources: 121st Report of the Law Commission, 1987; Report of the National Commission to Review the Working of the Constitution (NCRWC), 2002; A Consultation Paper on Superior Judiciary, NCRWC, 2001; A National Judicial Commission-Report for discussion in the National Advisory Council, 2005; PRS.

Composition of the JAC not included in the Constitution

The composition of the Judicial Appointments Commission has not been included in the proposed Constitution (120th Amendment) Bill, 2013 but left for Parliament to determine by law. This implies that the composition of the JAC may be modified by amending this law, by a simple majority in each House of Parliament.

This differs from the current system. Any change in the process of appointment of Judges to the SC or HC requires a constitutional amendment (two-thirds majority in each House of Parliament, and ratification by half the state legislatures). The Standing Committee examining the JAC Bill has recommended that to safeguard the independence of the judiciary, the structure and functions of the JAC should be included in the Constitution.⁵

Recommendations of the Standing Committee

In addition to recommending that the composition and functions of the JAC be included in the Constitution (see above mentioned issue), the Standing Committee examining the JAC Bill has made some other recommendations in relation to the JAC Bill, 2013.⁵ These include:

- There should be three eminent persons, instead of two. At least one of the three members should be an SC, ST, OBC, woman, or minority, preferably by rotation.

- The Bill should lay down the broad parameters for short listing of candidates for selection as HC judges.
- The JAC must make regulations related to transfer of judges, in supersession with the Memoranda of Procedure prepared by the Department of Justice. Further, the Judge of the High Court, in charge of administration, should be from a different state.
- Eligible members of the Bar should be given an opportunity to be considered for appointment, by way of public notifications and advertisements, as is the practice in the United Kingdom.
- The JAC will be overburdened to handle appointments of around 800 judges of 24 high courts in the country. To assist the JAC, the setting up of state level appointment commissions must be considered. They may consist of the Chief Minister, the Chief Justice of HC and the Leader of Opposition.
- The All India Judicial Service must be created at the earliest, to attract talent to the subordinate judiciary.

Appointments process in different countries

Countries follow varied methods for making appointments of judges to the higher judiciary. The method of appointment of judges to the highest court, in some jurisdictions, has been outlined in Table 3.

Table 3: Appointment of judges to the highest court in different jurisdictions

Country	Method of Appointment to the highest court
UK	SC judges are appointed by a five-person selection commission. It consists of the SC President, his deputy, and one member each appointed by the JACs of England, Scotland and Northern Ireland. ⁶ (The JACs comprise lay persons, members of the judiciary and the Bar and make appointments of judges of lower courts.)
Canada	A selection panel comprising five MPs (from the government and the opposition) reviews list of nominees and submit 3 names to the Prime Minister. ⁷ Appointments are made by the Governor in Council. ⁸
USA	Supreme Court Justices are nominated by the President and confirmed by the United States Senate. ⁹
Germany	Half the members of the Federal Constitutional Court are elected by the executive and half by the legislature. ¹⁰

Sources: Constitutional Reform Act, 2005; Canada Supreme Court Act, 1985; Constitution of the United States of America; Basic Law for the Federal Republic of Germany; PRS.

Notes

1. This Brief has been written on the basis of the Constitution (120th Amendment) Bill, 2013, which was passed in the Rajya Sabha on September 5, 2013 and the Judicial Appointments Commission Bill, 2013 which was introduced in the Rajya Sabha on August 29, 2013.
2. S.P. Gupta vs. Union of India, AIR 1982, SC 149; S.C. Advocates on Record Association vs. Union of India, AIR 1994 SC 268; *In re: Special Reference*, AIR 1999 SC 1.
3. Judges Inquiry Bill, 2006, 21st Report, Standing Committee, Rajya Sabha; 'A New forum for Judicial Appointments', 121st Report, Law Commission (1987); Report of the National Commission to Review the Working of the Constitution, Chapter 7, 'Appointment, Transfer and Removal of Judges', 2002; A Consultation Paper on Superior Judiciary, National Commission to Review the Working of the Constitution, 2001; 'A National Judicial Commission- Judicial Appointments and Oversight, Report for discussion in the National Advisory Council, 2005, Vaidya Gullapalli and Jayaprakash Narayan.
4. Proposal for Reconsideration of Judges cases I, II, and III, Report No. 214, Law Commission of India, 2008; Reforms in the Judiciary- Some Suggestions, Report No. 230, Law Commission of India, 2009.
5. The Judicial Appointments' Commission, 2013, 64th Report, Standing Committee, Rajya Sabha.
6. Schedule 8, Constitutional Reform Act, 2005.
7. Statement by the Prime Minister of Canada on the retirement of Justice Morris Fish, <http://www.pm.gc.ca/eng/news/2013/04/23/statement-prime-minister-canada-retirement-justice-morris-fish>.
8. Section 4(2), Supreme Court Act (RSC, 1985).
9. Article II, Section 2, The Constitution of the United States of America.
10. Article 94 (1), Basic Law for the Federal Republic of Germany.

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