

Research article on the Principle of Institutional Integrity authored by Dr  
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## **The Principle of Institutional Integrity: Bolstering Constitutionalism in Public Office Appointments in India**

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Government is synonymous with power. The art of limiting power, cutting out autocracy and protecting democracy and fundamental rights is Constitutionalism. Whereas a written constitution sets out the powers and limits, circumscription of powers, as necessitated, is carried out by judiciary as well. 'While expounding the constitution, powers and limitations are implied from necessity or constitutional scheme'.<sup>1</sup> Legislature cannot delegate essential legislative functions to the executive<sup>2</sup> and Parliament cannot by amending power destroy basic features of the Constitution<sup>3</sup> are prominent implied limits laid down by the Supreme Court. Power of judicial review has made judiciary play a crucial role in anchoring and bolstering constitutionalism.

SC has declared public employment opportunity as national wealth<sup>4</sup>. Further equality in public employment<sup>5</sup> has been exalted to the position of basic feature<sup>6</sup> of the Constitution. Although there may not be express guarantee of the principle of competition, merit, integrity and transparency in appointments to public office everywhere, it is everybody's case that these should be the prime considerations every time in respect of every public office. Whether the cumulative effect or the scheme of the law can be construed to protect the public offices is intriguing.

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<sup>1</sup> Justice Sikri, Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461 para 282

<sup>2</sup> In re Delhi Laws Act 1912, AIR 1951 SC 332

<sup>3</sup> Supra n 1

<sup>4</sup> Nagaland Senior Government Employees Association v State of Nagaland, (2010) 7 SCC 643

<sup>5</sup> Article 16(1) affirms equality; Article 16(2) disapproves discrimination on listed grounds.

<sup>6</sup> Indra Sawhney v UOI, AIR 1993 SC 477

The principle of institutional integrity (PII) has been invoked in Australia and applied to invalidate legislative provisions that undermined the institutional integrity of the court<sup>7</sup>; the provisions that conferred powers which were non judicial or incompatible with the judicial character of the court as an institution were held to contravene Chapter III of the Commonwealth Constitution<sup>8</sup> and were struck down.<sup>9</sup> Interestingly, in India, for PII, institution may be high constitutional or statutory institution not necessarily court. PII requires that the appointments to crucial offices for those institutions should be carefully made so that the institutional integrity is preserved. SC has in quite a few cases dislodged the attempts of the government to effect appointments that drew flak for defeating the purpose of the law and for damaging the public trust in the institution.

This article examines PII, believed to be first invoked in the CVC case,<sup>10</sup> in the backdrop of the various judgments of the higher judiciary in India with a view to evaluate the contribution of the principle in bolstering constitutionalism in the matter of appointments to public offices.

### **Emergence of the PII**

A public interest litigation (PIL) seeking a writ of *Quo Warranto* against the appointment of Mr Thomas as the Central Vigilance Commissioner paved the way for a concrete emergence of the PII. The appointment to the high office despite the pending criminal proceedings under Prevention of Corruption Act, 1988 and recommendations for disciplinary proceedings against him and objection of the Leader of Opposition on this count was held illegal *vis a vis* Central Vigilance Commission Act, 2003 and quashed as *non-est* in law *vis a vis* proviso to S.4(1) in Centre for PIL v UOI (hereinafter the CVC case).<sup>11</sup> CVC, the integrity institution and an anti-corruption mechanism was seen similar in its functions to Election Commission & Comptroller and Auditor General of India. The court studied the CVC Act extensively and observed that Central Vigilance Commissioner is required under the Act to take oath to uphold the sovereignty and integrity of the country and perform his functions without fear or favour and the appointing authority or the recommending authority should keep in mind the independence

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<sup>7</sup> Chris Steyler and Iain Field, The 'Institutional Integrity' Principle: Where are we now, and where are we headed? [www.austlii.edu.au/journals/2.pdf](http://www.austlii.edu.au/journals/2.pdf) <https://research.bond.edu.au>

<sup>8</sup> The chapter deals with the judicial power of the Commonwealth

<sup>9</sup> See, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, *Totani v South Australia* (2010) 242 CLR 1, *Wainohu v New South Wales* (2011) 278 ALR 1, *Momcilovic v The Queen* (2011) 280 ALR 221.

<sup>10</sup> *Centre for PIL v UOI*, AIR 2011 SC 1267

<sup>11</sup> *Supra* n 10

and impartiality of the institution as envisaged in the law. The court recorded its finding that the authorities have failed to look at the matter from the larger perspective of institutional integrity.

Declaring the decision making process as flawed, the SC laid down guidelines that in cases of differences of opinion amongst the Members of the High Powered Committee, reasons for dissent and disagreement with the dissent shall be recorded to enable judicial review. The zone of consideration to empanel in terms of S. 3(3) ought to go beyond civil servants to ensure that outstanding persons with impeccable integrity are empanelled. The court did not express that its judgment rests on any principle. The SC in abundantly clear terms had ruled that the committee should bear in mind the institutional competency and be under a duty not to recommend a candidate if the institutional competency and functioning are to be adversely affected by such selection.<sup>12</sup> Boldly it said that the committee has to take into consideration what is good for the institution and not what is good for the candidate.<sup>13</sup>

### **PII not followed**

In Manoj Narula v Union of India<sup>14</sup> the SC refused to direct Prime Minister and the Chief Ministers to avoid choosing persons as Ministers who have criminal antecedents especially those facing charges of serious offences. The court felt that such direction would tantamount to crossing the boundaries of judicial review by adding a disqualification when there are express constitutional provisions in the matter. The judges opined that constitutional trust has been reposed on the PM and CM in this regard.

Relying upon the PII laid down in the CVC case, the appointment of the Comptroller and Auditor General of India (CAG) was challenged in N. Gopalaswamy v UOI<sup>15</sup>. Petitioners alleged that the appointee had no knowledge in audit and accounts and further there was conflict of interest as he had been actively in certain defence procurements earlier which had been indicted by former CAG. It was prayed that the appointment be set aside and a direction be issued commanding the UOI to frame a transparent selection procedure based on definite criteria and to constitute a broad based non-partisan selection committee which after applications and

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<sup>12</sup> Para 36

<sup>13</sup> Para 43

<sup>14</sup> (2014) 9 SCC 1

<sup>15</sup> MANU/DE/1861/2014

nominations would recommend the most suitable person for the appointment of CAG. The Delhi HC ruled that the Constituent Assembly wanted flexibility and discretion for the government in the appointment of CAG and that unlike CVC there was no procedure laid down. Forty years of unblemished career with no criminal or disciplinary proceedings pending were considered to distinguish the case from that of CVC case. The court concluded that there was neither violation of PII nor any arbitrariness in the appointment and dismissed the writ petition. It felt that advertisement for a high constitutional post like CAG will lead to lobbying.<sup>16</sup>

There is a PIL pending before the SC challenging the absence of a law backing the appointment process of Election Commission of India (ECI).<sup>17</sup> Considering the importance of an independent ECI in the world's largest democracy, the decision in the case will invoke great interest in the light of the principle of institutional integrity.

### **PII followed**

In Rajasthan High Court, the appointment of an advocate as Additional Advocate General of the State was sought to be declared *non est* and *void ab initio*. The matter came before the court in Sunil Samdaria v S N Choudhary.<sup>18</sup> One Dr. Abhinav Sharma was appointed as Additional Advocate General; he had criminal cases with serious charges and disciplinary proceedings in the State Bar Council also pending against him. Whereas the appointment was on consultation with the Advocate General, these significant facts were not put before him. The appointment was quashed by the High Court. The court expressed that it found the approach of the government extremely disturbing as it grossly compromised with PII and the appointment was a brazen act of official arbitrariness. The court bewailed that the state government had no concern about the important public office.<sup>19</sup>

SC has in several cases held that appointment of public prosecutors should be fair and regulated to ensure rule of law as they are an important limb of the judicial process.<sup>20</sup>

In State of Punjab v Salil Sabhlok<sup>21</sup> SC ruled that State should select only persons with integrity & competence for appointment as chairman of the Public Service Commission because

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<sup>16</sup> Id para 40

<sup>17</sup> SC agrees to hear PIL against appointment process to Election Commission, <https://www.livemint.com>

<sup>18</sup> MANU/RH/0634/2015

<sup>19</sup> Id para 52, 53

<sup>20</sup> P v Johri Mal, (2004) 4 SCC 714, Punjab v Brijeshwar Singh Chahal, (2016) 6 SCC 1

the discretion under Art 316 of the Constitution is impliedly limited by the purpose for which the discretion is vested and the purposes are discernible from the functions of PSC enumerated in Art 320. The Court said that the two most important requirements in such appointment are that he/she should be beyond reproach & the appointment should inspire confidence among people in the institution.<sup>22</sup> In the instant case the appointment was set aside & the Court pointed out the need for a legislation to eliminate arbitrary appointments.<sup>23</sup>

Ashok Kumar Yadav v State of Haryana<sup>24</sup>, and Ref Dr Ram Ashray Yadav, Chairman, Bihar PSC<sup>25</sup> are earlier cases where SC strongly impressed upon the government to care in the matter of appointments to PSCs so that faith in the institution is not lost. Formative stages of PII can be seen in these. In Salil Sabhlok, the court held the selection bad for invalid exercise of power without considering the implied relevant factors. PII was drawn closer to the doctrine of Wednesbury reasonableness to review administrative action.

In TKS Elangovan v State of TN<sup>26</sup> the appointment of the members of the Tamil Nadu Public Service Commission was challenged. The 11 appointments made in just two days without proper procedure and scrutiny were set aside relying on Salil Sabhlok.<sup>27</sup> The court held that only persons with integrity and competence should be appointed. The discretion under Art 316 is guided by the purpose of appointments opined the court.

Relying on CVC judgment, question of PII was raised while challenging the appointment of a district environment engineer who was facing grave criminal charges of corruption as Chairperson of TNPCB. In Dr K Karthikeyan v V Anbhazhagan<sup>28</sup> quashing of the appointment was upheld. In Commissioner of Police v Mehar Singh, holding that the police force is a disciplined force shouldering great responsibility, the court refused to interfere in the decision not to confirm the appointment of a provisionally selected candidate due to his criminal

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<sup>21</sup> (2013) 5 SCC 1

<sup>22</sup> Id p.52

<sup>23</sup> See also, R/o Dr. Ram Ashray Yadav Chairman, Bihar PSC (2000) 4 SCC 309; Ram Kumar Kashyap v UOI, AIR 2010 SC 1151 & In re Meher Singh Saini, Chairman HPSC (2010) 13 SCC 586

<sup>24</sup> AIR 1987 SC 454

<sup>25</sup> Supra n. 23

<sup>26</sup> 2017 (1) CTC 113

<sup>27</sup> Supra n 18

<sup>28</sup> MANU/TN/0905/2015

antecedents even though he had been acquitted. The court said that a candidate for police should have impeccable character or else he will not fit in the force.<sup>29</sup>

In Techi Tagi Tara v Rajendra Singh Bhandari<sup>30</sup> guidelines issued by the National Green Tribunal in the matter of appointments of chairman and members for the PCBs to block political favouritism and ensure that their functional ability is not compromised were found to be beyond the jurisdiction of NGT. However following Salil Sabhlok the SC held that discretion in appointments in breach of implied restrictions are bad in law and held the rule to be equally applicable in appointment to statutory body like SPCB. Court held that suitable professionals and experts have to be appointed carefully because environment protection is vital for all. The court said that any impropriety in the appointments can be challenged by any pro bono publico in constitutional courts.

### **Precursor of the CVC case**

In N Kannadasan v Ajoy Khose<sup>31</sup> the question of appointment to the office of the President, State Consumer Disputes Redressal Commission of a person who was not confirmed as additional judge of the Madras High Court was raised in the High Court of Madras. The HC quashed the appointment on the ground that the CJ should have considered the opinion of the SC Collegium on the unsuitability of the appellant who was appointed. The SC upheld the HC order quashing the appointment. In CVC case SC has relied on its ruling in this case.

In Vineet Narain v UOI<sup>32</sup> SC exercised its special powers under Art 142 and issued four pages directions regarding selection, responsibility and accountability of CVC. Further the court called for legislation to insulate CBI in order to ensure strong and competent prosecution machinery as these are matters of public interest and urgency. CVC Act, 2003 was enacted pursuant to this judgment.

Much before the CVC case, SC considered the nature of the institution, its functions, the public confidence in it and the international human rights dimensions to determine the suitability of police personnel for being appointed in the National Human Rights Commission. In Peoples Union for Civil Liberties v UOI<sup>33</sup> SC disapproved the appointment of a police officer- a retired CBI Director as a member of NHRC on the ground that the appointment would not be consistent

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<sup>29</sup> (2013) 7 SCC 685

<sup>30</sup> 2017 (10) SCJ 384

<sup>31</sup> (2009) 7 SCC 1

<sup>32</sup> (1998) 1 SCC 226

<sup>33</sup> AIR 2000 SC 2419

with the true intendment of the Protection of Human Rights Act, 1993. The public faith and confidence in the institution has to be promoted and strengthened.

### **PII invoked to disapprove statutory provisions- constitutional basis**

Sections 12 (5), (6) and 15 (5) & (6) of the Right to Information Act were challenged as unconstitutional for failing to keep in mind the powers, functions and jurisdiction of the State Chief Information Commissioner and the Information Commissioners. The appointment of the information commissioners for the Central Information Commission was questioned before the SC in Namit Sharma v UOI<sup>34</sup> on the ground that the provisions did not provide qualifications, definite criteria, or even consultation with judiciary. Extremely vague and general terminology like social service and mass media being indefinite and undefined, can be abused it was contended. Administration of justice by such Commissions or Tribunals which are vested with wide adjudicatory and penal powers may be prejudicially affected. Such provisions were challenged as complete violation of the fundamental rights guaranteed under Article 14, 16 and 19(1)(g) of the Constitution and of the fundamental constitutional values. It was contended that mandatorily persons with judicial experience should hold these posts because fundamental right to equality guaranteed by the Constitution enshrines in itself the person's right to be adjudged by a forum which exercises judicial power in an impartial and independent manner consistent with the recognized principles of adjudication. It was vehemently pressed that absence of any mechanism for proper scrutiny and consultation with the judiciary in order to render effective performance of functions by the office holders is against the basic scheme of our Constitution, the basic structure of the Constitution and the independence of judiciary.

The court observed that there was an absolute necessity for the legislature to reword or amend the Sections 12(5), 12(6) and 15(5), 15(6) of the Act and expressed hope that these would be suitably amended. The SC saw the commission as a quasi judicial body and as an important cog and part of the court attached system of administration of justice. It ruled that the first appellate authority preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law. It further ruled that the Information Commissions shall have judicial members possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A lawyer with atleast 20 years practice at

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<sup>34</sup> (2013) 1 SCC 745



law as on the date of advertisement may also be eligible. The competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India. Fair and transparent method of recommending the names for appointment to the competent authority should be adopted. This judgment was to have effect only prospectively.

Pointing out CVC judgment the court observed that all concerned are expected to keep in mind that the institution is more important than the individual. The commissions are exercising functions like court and the officials have to be those of legal acumen and expertise.<sup>35</sup> PII is undoubtedly the basis of this judgment which (i) disapproves the provisions that do not inspire confidence in ensuring right persons in the office to carry out the high functions appointed under the statute and (ii) does not have any qualms laying down the qualifications and ruling that only CJ of the HC or a Judge of the SC can be appointed as CIC. The invocation of the constitutional provisions and values in challenging the statutory provisions will go a long way to fortify the PII.

### **Appointment of Lokayukta confirmed relying on PII**

In State of Gujarat v R A Mehta<sup>36</sup> the appointment of Lokayukta under Gujarat Lokayukta Act, 1986 was challenged by the government. Where the consultation process required CM, Leader of Opposition & the Chief Justice to select, the SC held that the opinion of the CJ had the primacy & the objection of the government was not binding. Calling for a purposive interpretation of the statute to suppress the mischief of corruption & advance the object, the Court opined that leaving the finality of choice of the Lokayukta to the Council of Ministers would be disastrous & render the statute otiose. The court observed that the political party in power cannot be allowed to appoint a pliant Lokayukta.<sup>37</sup> The nature of office and the purpose of safeguarding its integrity have been the basis to uphold the appointment although PII was not expressly named therein.

### **PII and National Judicial Appointments Commission (NJAC)**

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<sup>35</sup> Id at p 802-3

<sup>36</sup> AIR 2013 SC 693

<sup>37</sup> Id at p.721

Constitution (99<sup>th</sup> Amendment) Act, 2014 and the NJAC Act, 2014 brought in the NJAC to have the responsibility of appointments and transfers of judges of the higher judiciary and thereby replace the collegiums wherein the CJI and senior judges hold the responsibility. NJAC had the CJI, two senior most judges, the union law minister and two nominated eminent persons as representing the general public. Two members could have a veto power over judicial members; neither quorum nor the strength required for valid decision making was laid down. The amendment and the Act were assailed principally on the ground that they undermine the independence of the judiciary which is a basic feature of the Constitution and an essential requisite of a democratic republic. By 4:1 majority SC quashed the NJAC Act and the 99<sup>th</sup> amendment as unconstitutional on the ground that independence and integrity of the judiciary is of highest importance not only for the judges but to the citizens. It was held imperative to exclude executive in the matter of appointments of the judges because it is the largest individual litigant before the higher judiciary. Separation of powers and independence of judiciary are basic features and therefore judiciary has to be shielded from any possible executive and legislative interference.<sup>38</sup> A 622 pages judgment although does not expressly refer to or rely on PII, the tone and tenor of it clearly spells out ‘protecting the independent functioning of the judiciary’ as its basis.

Registrar General, HC of Madras v R Gandhi<sup>39</sup> raised the need to include eligible persons from different castes in the recommendation for appointment as judges of the HC. SC held that social background and legal background of the recommendees are factors to be considered along with intellect, character, integrity, patience, temper and resilience.

The decisions demonstrate the power of PII to limit executive and legislative action mandating the government to be mindful of the nature and functions of the institution, its core competence, independence and impartiality while appointing personnel for an institution of public nature. The institution should answer its description under the law. Fit persons should operate the institution.

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<sup>38</sup> SC Advocates on Record Association v UOI, (2016) 5 SCC 1

<sup>39</sup> (2014) 11 SCC 547

Selection and appointment should inspire public confidence. Political aggrandizement is not permissible. PII is anchored in the constitutional values of equality, guarantee against arbitrariness and judicial review.