
THE COLLEGIUM SYSTEM AND THE INDIAN JUDICIARY: A CRITICAL ANALYSIS OF OPACITY, ACCOUNTABILITY, AND THE PATH TO CONSTITUTIONAL REFORM

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ABSTRACT

The Collegium system, though born of a constitutionally defensible imperative to safeguard judicial independence against executive overreach, has over three decades evolved into an institution that is difficult to justify on democratic grounds. This paper argues that the Collegium's central defect is not merely administrative opacity, but a deeper structural failure: it has concentrated the power of self-perpetuation within the higher judiciary without any of the institutional safeguards that ordinarily accompany such power in a constitutional democracy. Through a critical examination of the four Judges Cases, Articles 124(2) and 217(1) of the Constitution, the persistent failure of the Memorandum of Procedure (MoP), and empirical data on judicial diversity and vacancies released in May 2025, this paper demonstrates that the Collegium has not merely fallen short of transparency it has actively resisted it. The paper further argues that the Supreme Court's invalidation of the National Judicial Appointments Commission (NJAC), while constitutionally defensible in its outcome, was doctrinally incomplete in its remedy: it restored the old system without curing its diagnosed pathologies. Drawing on comparative models from the United Kingdom, South Africa, Germany, and Canada, and cautionary lessons from Poland, Hungary, and Turkey, this paper proposes a statutory, constitutionally insulated Judicial Appointments Commission that preserves judicial primacy while institutionalising structured transparency, enforceable timelines, and diversity mandates. The central contention is this: judicial independence is not a licence for unaccountability, and a judiciary that appoints itself in secret cannot credibly claim to be the guardian of constitutional values it does not itself practise.

Keywords: Collegium System, Judicial Independence, NJAC, Basic Structure Doctrine, Transparency, Judicial Accountability, Memorandum of Procedure, Constitutional Reform, Judicial Appointments Commission, Nemo Judex in Causa Sua.

I. INTRODUCTION

One of the most prized and constitutionally vital values of democracy is the separation of the judiciary from the executive and the legislative. When a citizen appears before a court his sentence shall be given in virtue of the law and of his own conscience, and not in consequence of the taste of the executive, the force of the legislative body, or of the calculations of the powerful. This principle is realized not just through a constitutional text but even in the basic structure of the Constitution, as communicated by this Court in *Kesavananda Bharati v State of Kerala*, which was reiterated and expanded upon over the past 60 years in the jurisprudence of the country. There is no discussion of judicial independence in the context of the Indian Constitution; it is not something that can be negotiated out of the constitution, bargained away, or given up in any other manner.

It is to judicial independence that importance that the way in which judges are appointed needs the most careful examination. A judiciary made up of those appointed in an opaque manner, with no open guidelines or published criteria for selection, without reasoned decisions, without accountability to any other body, cannot reasonably, let alone without serious contradiction, be the institution that is supposed to hold other power centres to account for their transparency, reasoned decision making and constitutional fidelity. What justifies the Collegium's insulation from executive interference also must apply to the system itself, it must be institutionally honest.

The Collegium system, as it is now, wasn't even conceived by the Constitution. It was built by the Supreme Court for the Supreme Court, in a process of decisions handed down by judges with an institutional stake in the result. This does not reflect on the integrity or motives of the judges who made the Judges Cases; those precedents were well-documented and real, serious, and troubling. The Emergency era, the replacement of three senior judges with a compliant Chief Justice, the exiling of judges who had 'violated' the government, and the creation of what was being made up to be a 'committed judiciary' were not 'hypothetical' dangers, rather they were real, lived, constitutional catastrophes.

But the rule that no institution shall be the final, unreviewable judge of its own composition – *nemo iudex in causa sua* does not really fit the Collegium. The system has not only not been able to keep pace with the valid critiques but, in many important ways, actively opposed the transparency and accountability which the court requires from all public institutions in India.

In this paper, that resistance is subjected to critical examination, not in order to take away the power of the judges, but to affirm that the power of the judges is not a negative force, but a positive one, and that independence and accountability are two sides of the same coin.

In this paper, we follow the outline as below. Part II outlines the historic and constitutional evolution of the Collegium system, and the history of the appointment power in the four Judges Cases. The structural problems of the Collegium are examined critically in a systematic manner, using empirical data published in 2025, in Part III. Chapter 4, Part IV, deals with the failure of the Memorandum of Procedure. Comparative international models are examined in Part V. Part VI reflects on the NJAC judgment taking a decade's hindsight. Part VII proposes a framework for constitutional reform. Part VIII concludes. II. The Collegium System: Constitutional Text, Judicial Construction, and the Accumulation of Power

A. The Constitutional Text and Its Deliberate Ambiguity

Articles 124(2) and 217(1) of the Constitution of India govern the appointment of judges to the Supreme Court and the High Courts respectively. Both provisions require the President to appoint judges 'after consultation with' specified constitutional functionaries, including the Chief Justice of India. The framers of the Constitution, acutely conscious of the debates within the Constituent Assembly and the competing pulls of executive efficiency and judicial autonomy, deliberately chose the word 'consultation' rather than 'concurrence' or 'approval.' This terminological choice preserved interpretive flexibility while signalling an expectation of deliberation between the branches.

For over three decades following the commencement of the Constitution, this textual ambiguity was resolved in favour of executive primacy. In *S P Gupta v Union of India* (the First Judges Case), the Supreme Court held that 'consultation' did not mean 'concurrence,' and that the President acting on the advice of the Cabinet retained the final word on judicial appointments. This reading was historically contestable and practically dangerous: it left the composition of the judiciary at the mercy of a government that had demonstrated, during the Emergency, a disturbing willingness to exploit appointment and transfer powers as instruments of institutional subjugation.

B. The Second and Third Judges Cases: From Consultation to Collegium

It was against this backdrop of demonstrated executive abuse that the Supreme Court, in

Supreme Court Advocates-on-Record Association v Union of India (the Second Judges Case, 1993), overruled the First Judges Case by a nine-judge bench. The Court held that 'consultation' must be interpreted as 'concurrence' that the opinion of the Chief Justice of India, expressed through a process of collective deliberation with other senior judges, was binding upon the executive. The constitutional anxiety that motivated this interpretive revolution was genuine. What is less justifiable, however, is the means chosen: the Court did not merely interpret the Constitution, it effectively rewrote it, substituting judicial primacy for executive primacy through the instrument of constitutional interpretation rather than constitutional amendment. The Collegium system has therefore never been subjected to democratic deliberation or legislative approval.

The Third Judges Case

(1998) consolidated and formalised the Collegium's architecture. It fixed the composition as the Chief Justice of India and the four most senior puisne judges of the Supreme Court for apex court appointments, and established a parallel three-member Collegium for High Court recommendations. Procedural conventions regarding unanimity, consultation with judges of the relevant High Court, and the communication of recommendations in writing were introduced to lend the system a degree of regularity. These conventions, however, remained non-statutory, non-binding, and largely non-transparent.

C. The NJAC Judgment: Constitutionally Defensible, Remedially Incomplete

Parliament's attempt to recalibrate the constitutional balance produced the Constitution (Ninety-Ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014.

The NJAC was a mixed body comprising the Chief Justice of India, the two most senior judges of the Supreme Court, the Union Minister for Law and Justice, and two eminent persons. In the Fourth Judges Case

(2015), the Supreme Court struck down both instruments by a 4:1 majority. The majority held that the inclusion of the Law Minister and the 'eminent persons' whose appointment was itself susceptible to political influence undermined judicial independence, a feature of the Constitution's basic structure.

The majority's constitutional reasoning flows naturally from *Kesavananda Bharati* and *Minerva Mills*.

However, its remedial step is constitutionally unsatisfying. The Court restored the Collegium system, a system that Justice Chelameshwar, in a courageous dissent, described as 'anything but transparent' and 'consistently opaque.'

The majority acknowledged the Collegium's structural deficiencies, directed the finalisation of a revised Memorandum of Procedure, and proceeded to do nothing structurally to address those deficiencies. The NJAC judgment decided what the Collegium must be protected from; it said almost nothing about what obligations it must satisfy in return. Independence was affirmed; accountability was indefinitely deferred.

III. A CRITICAL ANALYSIS OF THE COLLEGIUM'S STRUCTURAL DEFICIENCIES

A. Opacity as a Constitutional Problem, Not Merely an Administrative One

The most fundamental criticism of the Collegium system is its opacity, but intellectual precision demands clarity about what this means constitutionally. The argument is not that the public is merely curious and deserves to be satisfied. The argument is that a constitutional body exercising public power over appointments of exceptional public importance is, like all such bodies, bound by the principle that power must be exercised according to discernible standards, and that those affected and the public at large are entitled to reasons for consequential decisions.

The Collegium publishes neither the criteria it applies to assess merit, nor the reasons for accepting or rejecting candidates. A lawyer of twenty years' standing, recommended by a High Court Collegium and then silently rejected by the Supreme Court Collegium, has no means of knowing why. There is no written record, no reasoned order, and no forum in which the decision can be meaningfully challenged. The Right to Information Act does not penetrate the Collegium's deliberations in any meaningful way, notwithstanding the Supreme Court's holding in *Subhash Chandra Agarwal* that the Office of the Chief Justice constitutes a public authority.

The asymmetry this creates is constitutionally striking. A government servant denied

promotion is entitled to reasons. A student denied admission to a university may challenge the decision. A person denied a regulatory licence may seek judicial review. But a candidate for appointment to the highest courts of the land – an appointment of profound constitutional responsibility – possesses no equivalent entitlement. The judiciary, which has developed the most sophisticated doctrine of reasoned decision-making and natural justice in the world, has exempted itself from its application. This is not merely inconsistent; it is constitutionally incoherent.

The empirical evidence has now made this critique concrete. On 5 May 2025, the Supreme Court – in an unprecedented initiative under outgoing Chief Justice Sanjiv Khanna – published a tabular list of High Court recommendations made by the Collegium between November 2022 and May 2025.

The data is instructive, but its limitations are equally instructive. The list identifies candidates by name, source, and social category. It does not explain why 185 of 406 recommendations from High Court Collegiums were still 'awaiting approval' by the Supreme Court Collegium. It does not explain what criteria governed evaluation. A process that discloses its results while concealing its reasoning is not transparent; it is merely legible. Legibility without accountability is not a constitutional virtue.

B. The Diversity Deficit: Numbers That Demand Constitutional Explanation

The 2025 data reveals a diversity deficit that is not merely regrettable but constitutionally significant. Of the 221 names approved by the Supreme Court Collegium for High Court appointments between November 2022 and May 2025:

Category	Appointments	Percentage	National Population Share
Scheduled Castes	8	3.6%	~16.6%
Scheduled Tribes	7	3.2%	~8.6%
Other Backward Classes	32	14.5%	~41.0%
Women	<22	<10.0%	~48.5%

These figures demand explanation. The standard defence that judicial appointments should be based solely on merit, rendering demographic representation irrelevant proves too much. First, the Collegium has never published its criteria for assessing 'merit,' making it impossible to evaluate whether the selection process is genuinely merit-based or whether unstated criteria are operating. Second, a process without published criteria and without accountability has no reliable mechanism for distinguishing genuine legal excellence from social familiarity and professional proximity. Third, and most fundamentally, the legitimacy of a court in a democracy depends not only on its technical legal competence but on its representational credibility. A court that decides cases involving the rights of women, of Dalits, of tribal communities, and of minorities composed almost entirely of upper-caste men from metropolitan legal families faces a legitimacy deficit that no degree of judicial craftsmanship can fully overcome.

C. Institutional Capture and the 'Uncle Judge Syndrome'

The phrase 'Uncle Judge Syndrome' has entered common legal parlance as a colloquial description of the apparent concentration of judicial appointments among individuals connected to existing members of the judiciary. The constitutional significance of this phenomenon, however, extends well beyond the language of popular critique. Properly understood, it reveals a structural vulnerability inherent in any closed self-perpetuating appointment system: the risk of internal institutional capture.

The 2025 data confirmed that at least 12 of the judges appointed between 2022 and 2025 had close relatives fathers, brothers, or in-laws who were sitting or retired judges of the superior courts.

In any other public institution, a recruitment process exhibiting this degree of familial clustering would invite immediate and serious scrutiny. The judiciary cannot reasonably expect exemption from analogous questions simply because the individuals appointed may be persons of genuine legal ability.

The concept of institutional capture provides the appropriate analytical framework. The Collegium was specifically designed to prevent external capture by political actors and in this it has largely succeeded. However, institutions may also experience internal capture: a process by which decision-making becomes concentrated within a relatively homogeneous

professional and social network, whose shared experiences and relationships shape outcomes in ways that systematically disadvantage those outside the network. A system of judicial self-appointment, operating through informal consultation, personal assessment, and unpublished criteria, is structurally susceptible to precisely this risk. The constitutional concern is not with individual impropriety but with systemic design.

D. The Vacancy Crisis: Opacity Has a Human Cost

The consequences of the Collegium system's dysfunction are not abstract. As of December 2024, there were 331 vacancies in India's High Courts against a sanctioned strength of 1,122 judges a vacancy rate of approximately 30%.

This is not a trivial administrative shortfall. Each vacancy represents cases delayed by months or years, litigants denied timely justice, and an overworked bench unable to discharge its constitutional responsibilities adequately. With over 50 million cases pending across India's courts, the vacancy crisis is simultaneously a judicial crisis and a rights crisis.

The vacancy problem has multiple causes, but the Collegium's opacity is materially among them. The absence of a transparent and time-bound process means that recommendations can languish at every stage of the pipeline at the High Court Collegium, at the Supreme Court Collegium, and with the Union Government without any obligation on any actor to explain the delay or any mechanism to enforce resolution. The May 2025 data revealed that 29 names approved by the Supreme Court Collegium remained pending before the Union Government for formal appointment, several for extended periods, without explanation. This is constitutionally unacceptable.

E. The Accountability Problem: Self-Regulation Without Safeguards

The Second Administrative Reforms Commission observed that India may be unique among constitutional democracies in having a judicial body with the final, unreviewable say in its own composition.

This observation goes to the structure of constitutional accountability itself. Self-regulation is not always impermissible. Professional bodies regulate themselves in many jurisdictions. But self-regulation is constitutionally defensible only where accompanied by transparent criteria, some form of external procedural oversight, and robust internal accountability mechanisms.

The Collegium has none of these. Its deliberations are entirely internal. Its criteria are entirely internal. Its review mechanism the power to reconsider is entirely internal. This is not judicial independence. It is judicial insularity. The values that underlie A K Kraipak that decision-makers should not benefit from their own decisions, and that the appearance of impartiality matters as much as its reality apply, as a constitutional principle, to every exercise of public power. The Collegium is not exempt.

IV. THE MEMORANDUM OF PROCEDURE: A REMEDY AGREED UPON AND ABANDONED

The NJAC judgment of 2015, for all its limitations, produced one constructive directive: the Court acknowledged the Collegium's need for reform and directed the Union Government and the Supreme Court to collaboratively finalise a revised Memorandum of Procedure.

The MoP was to establish clear criteria for appointments, set timelines, and provide a mechanism for the Government to raise and resolve objections transparently.

A decade later and extending into 2026 the revised MoP has not been finalised. The reasons illuminate the structural pathology with surgical precision. The MoP requires agreement between judiciary and executive. The executive has sought to include security clearance criteria and criteria going to the candidate's 'commitment to constitutional values' language the judiciary has, with justification, resisted as a vehicle for political screening. The judiciary, for its part, has been reluctant to accept any criteria that would constrain its discretion in identifiable ways. The result is a remedial instrument that exists in draft form, discussed in judgments and correspondence, but never operationalised.

The MoP's failure is not merely an administrative disappointment. It is evidence of a deeper constitutional pathology: the system's inability to compel its own institutions to accept the obligations that transparency and accountability require. An independent legislature would have the power to enact a statutory framework for judicial appointments. An independent judiciary has, through the NJAC judgment, substantially foreclosed that possibility. The consequence is a constitutional stalemate in which the only institution with the practical power to cure the Collegium's defects is the Collegium itself and the Collegium has, for three decades, declined to exercise that power in any meaningful structural sense. A mechanism that is both self-appointing and self-reforming is, by design, unlikely to reform.

V. COMPARATIVE PERSPECTIVES: INDEPENDENCE AND ACCOUNTABILITY ARE NOT INCOMPATIBLE

A comparative survey of judicial appointment systems across constitutional democracies reveals a consistent and important finding: judicial independence and institutional accountability are not in conflict. Every major democracy that has developed a credible, trusted, and genuinely independent judiciary has done so through a system that combines judicial leadership with external oversight, published criteria, and some form of public accountability. The premise advanced by the Collegium's most ardent defenders that any exposure to external scrutiny necessarily compromises judicial independence is not supported by comparative constitutional experience.

A. The United Kingdom: Statutory Independence Through Open Competition

The United Kingdom's Judicial Appointments Commission, established under the Constitutional Reform Act 2005, offers the clearest model of how judicial primacy and institutional transparency can be reconciled. The JAC conducts merit-based selection through open competitions, publishes its selection criteria and competency frameworks, and provides detailed public diversity reports. Its decisions are subject to independent review. The Lord Chancellor retains a limited power to reject recommendations, but must provide written reasons, and this power has been exercised sparingly. The critical lesson from the UK experience is that published, challengeable criteria did not reduce judicial independence they enhanced public confidence in it. It is opacity, not openness, that ultimately undermines institutional legitimacy.

B. South Africa: Public Accountability Through Deliberative Hearings

South Africa's Judicial Service Commission, established under Section 178 of the 1996 Constitution, goes furthest in the direction of public accountability. The JSC conducts public hearings at which judicial candidates are questioned by commissioners representing the judiciary, the legal profession, Parliament, and civil society. The proceedings are broadcast, and the Commission's reasoning is publicly available. The South African model has not been without criticism concerns exist about the potential for political pressure and that experience cautions against uncritical transplantation. The appropriate response to risks of political influence, however, is not opacity but robust structural safeguards. The JSC demonstrates that

public accountability in judicial appointments is constitutionally viable.

C. Germany: Cross-Party Consensus as a Structural Guarantee

Germany's Federal Constitutional Court offers perhaps the most intellectually challenging comparative example. Under Article 94 of the Basic Law, judges of the Federal Constitutional Court are elected by the Bundestag and the Bundesrat in equal halves, each requiring a two-thirds supermajority. This is a politically structured process and yet the Federal Constitutional Court is among the most independent, rigorous, and intellectually distinguished constitutional courts in the world. The supermajority requirement forces cross-party consensus, producing appointments of genuine scholarly and judicial eminence rather than partisan placemen. The German experience fundamentally disrupts the assumption that any legislative or external involvement in judicial appointments is inherently fatal to judicial independence. The architecture of the process rather than the mere presence or absence of external actors is what determines the quality and legitimacy of the outcome.

D. Cautionary Lessons: Poland, Hungary, and Turkey

Comparative analysis must also examine failure. The experiences of Poland, Hungary, and Turkey jurisdictions that have, through successive legislative reforms, progressively weakened the institutional autonomy of their judiciaries illustrate with sobering clarity what is at stake when appointment mechanisms become instruments of political control.

In each jurisdiction, the erosion of judicial independence did not occur through a single dramatic intervention. Rather, it was achieved incrementally through changes to appointment bodies, administrative structures, disciplinary mechanisms, and tenure arrangements, each individually defensible on procedural grounds, but cumulatively transformative in their effect on the balance of constitutional power. The lesson for Indian constitutional discourse is twofold: first, the dangers of political capture of the judiciary are real and contemporary, not historical relics; and second, institutional independence is fragile and can be weakened through reforms presented in the language of accountability and efficiency. Any model proposed for India must be evaluated not only for its immediate institutional design but for its long-term structural implications.

VI. REVISITING THE NJAC JUDGMENT: CONSTITUTIONALLY RIGHT, INSTITUTIONALLY INCOMPLETE

The NJAC judgment represents one of the most consequential and most contested constitutional decisions of the modern era. A decade after it was rendered, it is appropriate to evaluate it with the precision that consequential judgments demand: acknowledging both what it correctly identified and what it left dangerously unresolved.

The majority was constitutionally correct in identifying judicial independence as a component of the basic structure, and in concluding that institutional arrangements creating opportunities for executive domination of the appointments process would imperil that independence. The historical record of executive overreach in India is not hypothetical; it is documented and consequential. The constitutional anxieties that motivated the Judges Cases were genuine, and the majority was not wrong to take them seriously.

The difficulty lies not in the identification of the constitutional principle but in its application. The majority proceeded from a premise that comparative constitutional experience cannot sustain: that judicial independence and external participation in appointments are inherently incompatible. The possibility that accountability mechanisms might coexist with and indeed reinforce judicial independence received comparatively limited engagement. As a result, the Court identified the dangers of political capture with admirable precision, while devoting considerably less attention to the constitutional dangers of unchecked institutional self-regulation.

The judgment also creates what may be described as a constitutional paradox. The institution responsible for determining the legality of a reform to the judicial appointments process was simultaneously the institution whose powers were most directly affected by the outcome. While constitutional courts routinely decide cases touching their institutional interests, the situation generates questions of constitutional legitimacy that the majority addressed only obliquely. The principle underlying *A K Kraipak* that the appearance of impartiality matters as much as its reality is not suspended merely because the decision-maker is itself a constitutional court.

Justice Chelameshwar's dissent remains the most constitutionally important aspect of the judgment. His observation that the Collegium system is 'anything but transparent' and 'consistently opaque' went unanswered by the majority. The NJAC judgment succeeded in

protecting one constitutional value while deferring meaningful engagement with another. That deferral extending now over a decade has produced the legitimacy deficit this paper has documented. The constitutional challenge before India is therefore not whether to revive the NJAC in its original form. It is whether an appointments framework can be designed that preserves the core insight of the majority – judicial independence must be protected from executive domination – while answering the dissent's unanswerable critique with structural honesty.

VII. TOWARDS A CONSTITUTIONALLY SUSTAINABLE FRAMEWORK FOR REFORM

The reform of the Collegium system must navigate three constitutional constraints established by the Judges Cases: first, that judicial primacy in appointments forms part of the basic structure; second, that executive domination of the appointments process has historically been used to compromise judicial independence; and third, that any reform must be capable of surviving constitutional challenge. These constraints are real. They are not, however, insuperable. They rule out a repetition of the original NJAC model. They do not rule out reform.

A. A Statutory Judicial Appointments Commission with Constitutional Insulation

This paper proposes the establishment, by parliamentary statute, of a Judicial Appointments Commission (JAC). Its constitutional insulation would rest on three structural features: the judiciary would retain a decisive majority on the Commission; all partisan political appointees including the Law Minister would be excluded; and the Commission's recommendations would be binding on the President in precisely the same manner as Collegium recommendations presently are. This structure is designed to survive the NJAC judgment's primary constitutional objection while addressing the Collegium's primary constitutional defect.

The proposed Commission would comprise seven members: the Chief Justice of India as Chairperson; three senior judges of the Supreme Court; one retired Chief Justice of a High Court nominated by the Bar Council of India; one eminent legal scholar nominated by the collective of National Law University Vice-Chancellors; and one civil society representative nominated by the National Human Rights Commission. Five of seven members would be from or nominated by judicial and legal institutions. No partisan political actor would hold a

position. The Commission's recommendations would be binding on the President, as Collegium recommendations currently are.

B. Mandatory Disclosure: Published Criteria and Reasoned Decisions

The Commission would be required, by statute, to publish: the criteria and competency framework it applies in assessing candidates; a written statement of reasons for each appointment and each rejection; its diversity targets and the degree to which each appointment cycle meets or falls short of those targets; and an annual report, tabled before Parliament, on the state of the appointments process, vacancy positions, and compliance with established criteria. None of these requirements would vest in the executive or the legislature any power to veto individual appointments. They would simply require the Commission to explain, transparently and publicly, how it exercises a power of exceptional constitutional significance.

Reasoned decision-making is not a threat to judicial independence. It is the foundational constitutional norm that the judiciary itself imposes upon every other public institution in India. A court that does not explain its judgments is not a court. An appointments body that does not explain its decisions is not an accountable institution. The requirement of reasons serves multiple constitutional functions simultaneously: it enhances transparency, discourages arbitrariness, facilitates accountability, strengthens public confidence, and transforms institutional trust from an act of faith into a conclusion supportable by evidence.

C. Enforceable Timelines and a Statutory Memorandum of Procedure

The revised MoP, which has languished in draft form since 2015, must be given statutory force. Parliament should enact a Judicial Appointments (Procedure) Act prescribing maximum periods at each stage of the process: a defined period within which the Supreme Court Collegium or Commission must process High Court Collegium recommendations; a defined period within which the Union Government must formalise appointment following receipt of Commission recommendations; and a deemed-approval mechanism, under judicial oversight, activated where unreasonable delay by either party triggers automatic referral to a designated Constitutional Bench.

If the executive declines to notify an appointment, it must file a written objection within thirty days, supported by specific documented evidence. If the Commission reiterates its

recommendation unanimously, the appointment is deemed confirmed, and failure to notify within a further fifteen-day window triggers constitutional referral. This mechanism preserves the executive's constitutional role while eliminating the weaponisation of delay.

D. Structural Diversity Obligations

The enabling statute should incorporate structured diversity requirements. The Commission would be required, at each appointment cycle, to proactively identify, evaluate, and formally consider candidates from historically underrepresented communities including Scheduled Castes, Scheduled Tribes, women, and other marginalised groups. Where diversity targets are not met, the Commission must provide a published reasoned justification. This proposal does not dilute the merit standard; it strengthens it by ensuring that merit is assessed across a genuinely representative field. The Collegium's documented record 3.6% Scheduled Caste representation, fewer than 10% women, and significant familial concentration demonstrates that without structural intervention, 'merit' too easily functions as a proxy for social familiarity and professional proximity.

VIII. INDEPENDENCE, LEGITIMACY, AND THE COUNTER-MAJORITARIAN DIFFICULTY

The broader constitutional significance of this debate extends beyond the mechanics of judicial appointments. It reaches the question of what grounds the authority of constitutional courts in a democracy and under what conditions that authority may be said to be at risk.

Alexander Bickel famously described the tension inherent in judicial review as the 'counter-majoritarian difficulty': unelected judges, exercising life tenure, possess authority to invalidate decisions made by democratically elected institutions. The traditional constitutional response that courts derive legitimacy not from popular mandate but from their role as guardians of constitutional values against majoritarian excess remains compelling. In India, this justification has acquired particular force through the basic structure doctrine, public interest litigation, and the Court's expansive rights-based adjudication.

The Collegium debate adds a dimension that Bickel's formulation did not fully anticipate: not merely the counter-majoritarian nature of judicial review, but the counter-majoritarian character of judicial self-reproduction. The question is no longer only why unelected judges

should possess constitutional authority. It is also why unelected judges should possess substantial, largely unreviewable authority over who future judges will be.

This question does not have a comfortable answer within the current institutional framework. Legitimacy in constitutional democracy cannot be sustained indefinitely through institutional assertion alone. It requires that public power be exercised through procedures capable of demonstration, explanation, and rational evaluation. Courts derive authority from public confidence in their impartiality, integrity, and commitment to constitutional values. That confidence is reinforced when institutional processes are transparent, reasoned, and open to scrutiny. It is eroded when processes are opaque, self-referential, and resistant to accountability. The Collegium, as presently constituted, risks the latter.

This observation is particularly important given the breadth of judicial authority in contemporary India. The Supreme Court adjudicates questions concerning elections, federalism, constitutional amendments, executive accountability, environmental governance, and fundamental rights. The broader the scope of judicial authority becomes, the stronger the justification required for the processes through which those who exercise that authority are selected. A judiciary entrusted with enforcing constitutional values upon every other public institution must itself practise those values including transparency, accountability, and reasoned decision-making in the conduct of its own affairs.

IX. CONCLUSION

The Collegium system was constructed to solve a real and serious constitutional problem: the subjugation of judicial appointments to executive will. The history of the Emergency period, the supersession of judges, and the manipulation of transfers and appointments as instruments of political pressure were not theoretical dangers. They were constitutional catastrophes. The Second Judges Case was, in significant part, a corrective to documented executive abuse, and the basic instinct that animates the Collegium that judges must be protected from political appointment is constitutionally sound and historically vindicated.

But a constitutionally sound instinct does not validate every institutional consequence that follows from it. The Collegium, as it has developed over three decades, has become something its defenders struggle to justify on principle: a body that demands transparency from every institution it reviews while exempting itself from transparency; that enforces reasoned

decision-making as a constitutional requirement for administrative authorities while producing unreasoned decisions of its own; and that treats accountability as a threat to independence rather than as its indispensable constitutional complement.

The empirical evidence released in 2025 documenting a 30% vacancy rate in High Courts, Scheduled Caste representation at 3.6% of judicial appointments against a population share of 16.6%, fewer than 10% women among appointees, and significant familial concentration within the appointed bench is not merely a collection of administrative statistics. It is a portrait of institutional failure. Taken together, these figures represent a legitimacy deficit that no invocation of judicial independence, however constitutionally resonant, can indefinitely defer.

The NJAC judgment's majority was right that judicial independence is a feature of the basic structure and must be protected from executive domination. But the majority was constitutionally incomplete, because it offered no answer to the dissent's unanswerable observation that the Collegium is 'consistently opaque.' The restoration of the Collegium without structural reform was not a constitutional vindication it was a constitutional deferral. That deferral has now lasted over a decade, and the costs in vacancies, in representational failure, in declining public confidence are visible and documented.

The reforms proposed in this paper are constitutionally conservative in design. They preserve judicial primacy. They exclude partisan political control. They build on the basic architecture that the Judges Cases established. What they add is the one element that is presently and conspicuously absent: accountability. They require the appointments process to be governed by published criteria, to explain its decisions, to account for its diversity record, and to operate within enforceable timelines. None of these requirements diminishes judicial independence. Each of them makes that independence more credible, more visible, and more constitutionally defensible.

Judicial independence, properly understood, does not require insulation from accountability. It requires insulation from improper influence. These are not the same thing, and conflating them has been the central intellectual error of the Collegium's defenders. A judiciary that is independent and transparent is more powerful, more credible, and more worthy of the constitutional trust placed in it than a judiciary that is independent and opaque. Accountability reinforces legitimacy; it does not undermine it.

The Indian Supreme Court has, over its history, built a body of constitutional jurisprudence that is among the richest and most influential in the world. It has held governments to account, protected fundamental rights against legislative overreach, and articulated principles of constitutional governance that have shaped judicial thinking far beyond India's borders. It is fully capable of holding itself to the same standard. The question is whether it is willing to do so.

"The Court must not only be right; it must be seen to be right. And it can only be seen to be right if it is willing to be seen at all."

That is the reform imperative. It is also, ultimately, a constitutional obligation. The enduring challenge for Indian constitutionalism is not how to protect the judiciary from accountability, but how to ensure that accountability strengthens, rather than weakens, judicial independence. A constitutional democracy requires courts that are independent enough to resist political pressure and accountable enough to command public confidence. The legitimacy of the judiciary and, in many respects, the legitimacy of constitutional governance itself depends upon achieving that balance.

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ENDNOTES:

1. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225. A thirteen-judge bench held by a 7:6 majority that Parliament's power to amend the Constitution under Article 368 does not extend to altering its 'basic structure.' Judicial independence was identified as a core element of that structure.

2. *S P Gupta v Union of India* AIR 1982 SC 149 (First Judges Case). The majority held that 'consultation' in Articles 124(2) and 217(1) did not mean 'concurrence,' and that the executive retained primacy in judicial appointments.

3. *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 (Second Judges Case). A nine-judge bench overruled the First Judges Case and held that the Chief Justice of India must be given primacy in the appointment process, with 'consultation' reinterpreted as 'concurrence.'

4. *In re Special Reference No 1 of 1998* (1998) 7 SCC 739 (Third Judges Case). The Presidential Reference was answered by a nine-judge bench, which formally institutionalised the term 'Collegium' and expanded its composition to the Chief Justice and the four most senior judges of the Supreme Court.

5. *Supreme Court Advocates-on-Record Association v Union of India* (2015) 11 SCC 1 (Fourth Judges Case / NJAC Judgment). A five-judge Constitution Bench struck down the 99th Constitutional Amendment Act and the NJAC Act by a 4:1 majority. Justice Chelameshwar delivered the sole dissent.

6. The Constitution (Ninety-Ninth Amendment) Act, 2014; National Judicial Appointments Commission Act, 2014. The NJAC comprised the Chief Justice of India, the two most senior Supreme Court judges, the Union Minister for Law and Justice, and two eminent persons nominated by a committee of the Prime Minister, the Leader of the Opposition, and the Chief Justice.
7. Justice J Chelameshwar's dissent in the NJAC Judgment: 'The working of the collegium system has been anything but transparent. And the system has been consistently opaque and there is no accountability.' (2015) 11 SCC 1 at paragraph 285.
8. Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962). Bickel coined the phrase 'counter-majoritarian difficulty' to describe the tension between judicial review and democratic governance in constitutional systems.
9. *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625. The Supreme Court struck down clauses (4) and (5) of Article 368 inserted by the 42nd Amendment, reaffirming that judicial review and fundamental rights are inviolable components of the basic structure.
10. *A K Kraipak v Union of India* (1970) AIR 1970 SC 150. The Supreme Court held that bias, whether actual or apprehended, vitiates administrative action. The principle that no person should be a judge in their own cause *nemo judex in causa sua* was applied broadly to all exercises of public power.
11. Supreme Court of India, 'Details of Proposals Approved by the Supreme Court Collegium for Appointment as Judges of High Courts' (Press Release, 5 May 2025). The tabular data covered appointments from November 2022 to May 2025 under Chief Justices D Y Chandrachud and Sanjiv Khanna.
12. *ibid.* Of the 221 candidates approved by the Supreme Court Collegium between November 2022 and May 2025: 8 (3.6%) were from Scheduled Castes; 7 (3.2%) from Scheduled Tribes; 32 (14.5%) from OBCs; and fewer than 10% were women. These figures represent a stark divergence from national demographic proportions (SC: 16.6%; ST: 8.6%).
13. *ibid.* The data further revealed that at least 12 judges appointed between 2022 and 2025 had close relatives – fathers, brothers, or in-laws – who were sitting or retired judges of the superior courts.

14. Department of Justice, Government of India, 'Vacancy Position of Judges in High Courts' (December 2024). As of that date, 331 vacancies existed against a sanctioned strength of 1,122 judges in the High Courts a vacancy rate of approximately 30%.

15. Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal (2019) 3 SCC 756. A Constitution Bench held that the Office of the Chief Justice of India is a 'public authority' under the Right to Information Act, 2005, subject to privacy and independence qualifications.

16. Government of India, Second Administrative Reforms Commission, 'Ethics in Governance' (Fourth Report, January 2007), Chapter 6. The Commission observed that the Collegium system concentrates appointment authority within the judiciary without adequate external procedural checks.

17. Memorandum of Procedure for Appointment of Supreme Court and High Court Judges. The MoP was last substantially discussed in 2016–17. The Supreme Court in the NJAC Judgment directed the Union Government and the Supreme Court to finalise a revised MoP. As of 2026, no finalised MoP has been formally notified.

18. Constitutional Reform Act 2005 (UK). The Judicial Appointments Commission was established to conduct merit-based selection through open competitions, publish its competency frameworks, and produce detailed public diversity reports. The Lord Chancellor retains a limited power to reject recommendations, exercisable only with written reasons.

19. Constitution of South Africa, 1996, Section 178. The Judicial Service Commission comprises 25 members, including the Chief Justice, judges, legal practitioners, parliamentary representatives, and presidential nominees. All shortlisting and hearings are conducted in public and are broadcast.

20. Grundgesetz (Basic Law) for the Federal Republic of Germany, Article 94. Judges of the Federal Constitutional Court are elected in equal halves by the Bundestag and the Bundesrat, each requiring a two-thirds supermajority, necessitating broad cross-party consensus.

21. Law Commission of India, 230th Report, 'Reforms in the Judiciary: Some Suggestions' (2009). The Commission recommended the establishment of a National Judicial Commission with a mandate to lay down objective criteria for appointments, including representational

considerations.

22. Tribunals Reforms Act, 2021. On 19 November 2025, the Supreme Court struck down key provisions of the Act holding that executive control over tribunal appointments, tenure, and service conditions violated constitutional principles of judicial independence and separation of powers.