
THE COLLEGIUM CONUNDRUM: ASSESSING JUDICIAL APPOINTMENTS ACROSS JURISDICTIONS

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ABSTRACT

The system of checks and balances, and that of separation of powers, is integral to any democratic institution. While the Judiciary, through the exercise of its powers, acts as a ‘check’ on the operations of the Legislature and the Executive, its realm of control lies outside the purview of the other two wings of the government, especially in terms of appointment of judges. India is the only country in the world where the judiciary appoints and transfers the judges, with no Executive interference. Such a system is deeply problematic, since it creates a judicial aristocracy, favouring those who have connections to prominent legal families. The Executive’s proposed NJAC, too, comes with its own drawbacks, seeming not to consider judicial primacy, read into the Basic Structure Doctrine by the courts. The growing tension between the Executive and the Judiciary to strike a balance in this process highlights the need for a solution that grants the independence of the judiciary, while also maintaining the system of checks and balances, to prevent what Justice Chalameshwar called “judicial appointments turning into judicial disappointments.”

I. Introduction

The drafters of the Indian Constitution wanted to create a lasting document that ensured equity, prevented authoritarianism, and maintained a delicate balance between the three wings of democracy the Executive, the Legislature, and the Judiciary.¹ However, a rising point of constitutional contention rests in the Judiciary's rather distinct method of promoting and transferring judges: the collegium system. The system, unique to India,² grants the authority to nominate, appoint, promote, and transfer judges of the High Court and the Supreme Court, to the Chief Justice and a forum of four senior-most judges of the Supreme Court.³

Both the Drafters of the Constitution, and the Constitution itself remain silent on the system, its existence guaranteed by a series of cases spanning between 1982 - 1998, commonly known as the Three Judges Cases. While the Supreme Court, in the First Judges Case, stated that the word 'consultation' in Article 124(which mentioned that judges to the Supreme court shall be appointed by the assent of the President, upon consultation with the Chief Justice),⁴ does not equate to concurrence, in light of the 44th Amendment, the process of consultation was deemed mandatory.⁵ This precedent was later overturned in the Second⁶ and Third Judges⁷ case which equated consultation with concurrence and held that the Chief Justice of India (CJI) is best authority to assess a candidate's potential for the role.⁸ The Court ruled that the Constitution does not grant the government absolute discretion in judicial appointments. The role of the Executive is limited to only supervision. This very reasoning led to the birth of the collegium system, which significantly curtailed political influence in appointments.⁹

The point of contention that now exists between the two wings, ie, the Executive and the Judiciary, is hinged on the lack of maintaining a system of checks and balances, as prescribed by the Drafters. With respect to Article 124 (draft article 103), Members like Shibban Lal Saxena and B. Pocker argued vehemently to maintain the independence of the Judiciary,

¹ *Constituent Assembly of India Debate*, 19 December 1946 <<https://www.constitutionofindia.net/debates/19-dec-1946/>> accessed 4th May 2025

² Vansh Bhatnagar, 'Revisiting the Collegium System' (2021) *Jus Corpus Law Journal*

³ Rishika Singh and Akanksha Tiwari, 'The Debate Around NJAC and Collegium System' (2018) 3 *Supremo Amicus*

⁴ Constitution of India, art 124 (2)

⁵ *S.P. Gupta v Union of India* AIR [1982] SC 149

⁶ *Supreme Court Advocates-on-Record Association v Union of India* [1994] AIR SC 268

⁷ *In Re Presidential Reference* [1999] AIR SC 1

⁸ *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268

⁹ *ibid.*

proposing a system of appointment similar to the collegium, arguing that it is important to protect the Judiciary from Executive interference, to maintain a system that garners public trust.¹⁰ However, Members like B.R. Ambedkar, while against the system of having the Executive alone decide the appointment of judges, questioned the impartiality of the Chief Justice while carrying out such a role, arguing, “...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 to the Chief Justice which we are not prepared to vest in the President or the Government of the day.”¹¹ The Assembly ultimately chose a middle ground, wherein, the Executive and Judiciary jointly exercised their authority in appointing judges, thereby upholding the system of checks and balances.¹² However, the situation remains starkly different after the Third Judges Case, where the Judiciary, in its own independent capacity, exercised exclusive control over judicial appointments. The President’s role was reduced to a mere formality either compelled to provide their assent to the recommendations or passively delay them through the exercise of a pocket veto.

This paper seeks to understand whether judicial independence in the appointment and transfer of judges is essential, or can a collaborative process involving the Judiciary and Executive offer a constitutionally sound and equitable alternative? It explores the flaws, not just within the current collegium, but within the proposed National Judicial Appointments Committee (NJAC) as well, analysing the practices within other countries, concluding with a proposal for a new system of appointment, one that seeks to strike a balance between the two wings.

II. Assessing the Collegium

The collegium system has been the subject of numerous critiques and criticisms over the past few decades. The system is characterised by its lack of transparency.¹³ The CJI, along with the forum not only nominate the candidates, but deliberate on a final proposal to be sent to the President for her assent. This entire process is shrouded in secrecy, all happening in a room, to which only the 5 members of the collegium are granted entry. The public acts as the stakeholder to all the reforms and interpretations of the law initiated by the Judiciary, they are the most

¹⁰ *Constituent Assembly of India Debate*, vol 8, 24 May 1949, 90 [CAD 8.90.15]

¹¹ *Constituent Assembly of India Debate*, vol 8, 24 May 1949, 158 [CAD 8.90.158]

¹² *Constituent Assembly of India Debate*, vol 8, 24 May 1949, 170 [CAD 8.90.170]

¹³ Vansh Bhatnagar, ‘Revisiting the Collegium System’ (2021) *Jus Corpus Law Journal*.

impacted by any verdict, since it directly influences their rights. Having a system of appointment of judges, arguably, the most important component of any judiciary, where the public has no knowledge as to *why* a candidate was nominated seems dysfunctional as it leads to the people questioning the very integrity of the democratic institution. Even with the SC website offering some clarity as to the candidates nominated, ambiguity remains as the public is kept in the dark regarding the reason for such appointment.¹⁴

While the proponents of the system argue that judges have the necessary knowledge and experience to identify suitable candidates for appointments to the Supreme Court and High Courts (which the executive lacks) this, unfortunately, does not align with our current reality.¹⁵ The opacity of the system, further prompts the prospective candidates to enter the good books of the collegium. The system is notorious for its nepotistic tendencies, nominating those favored by the forum, children/relatives of prominent judges and senior councils, while ignoring candidates who have made a significant, tangible impact in the Judiciary.¹⁶ As per a 2015 report, nearly 33% of the judges from the Supreme Court belong to prominent legal families, promoting a form of judicial aristocracy.¹⁷

Those in favor of the collegium argue that it diminishes the possibility of any political/ideologically-driven appointment, which is a very utopian expectation to have of such a system.¹⁸ India's judicial appointments system heavily favours those with connections to powerful legal families, often ignoring merit and potential. An example is Saurabh Kirpal, whose nomination to the Supreme Court has been deferred three times allegedly due to him being an LGBTQ Rights activist despite his qualification and being the son of former Chief Justice B.N. Kirpal.¹⁹ This system tends to favour individuals who align with the collegium's social and ideological background, making diversity a foreign concept. Of the 33 current Supreme Court judges, only two are women, a disappointingly low number. While 2021 witnessed the elevation of three women, no women were appointed in the subsequent years, despite statements from Chief Justice²⁰ D.Y. Chandrachud advocating for gender diversity, and

¹⁴ Aparna Chandra, William Hubbard & Sital Kalantry, 'From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court' (2018) 51(3) 273.

¹⁵ Anushka Bansal, 'Collegium System in India' (2023) 5(1) *Indian J.L. & Legal Rsch.* 1.

¹⁶ Vansh Bhatnagar, 'Revisiting the Collegium System' (2021) *Jus Corpus Law Journal*.

¹⁷ Soibam Rocky Singh, '50% HC judges related to senior judicial members: Report' (*Hindustan Times*, 19 June 2015)

¹⁸ Anushka Bansal, 'Collegium System in India' (2023) 5(1) *Indian J.L. & Legal Rsch.* 1.

¹⁹ Sambhav Chhabra, 'Collegium System through the Lens of the Basic Structure Doctrine' (2024) 4 *Jus Corpus L.J.* 590.

²⁰ Aparna Chandra, William Hubbard & Sital Kalantry, 'From Executive Appointment to the Collegium System:

the inclusion of women within the judiciary.²¹ Regional and caste-based disparities are also glaring. Judges from smaller or politically marginalized states like Jharkhand and Odisha remain underrepresented, finding it difficult to reach the Higher Court system due to a lack of connectivity.²² One could argue that this goes against the basic principle of federalism, wherein bigger, more affluent states have been given greater representation and stronger connectivity to the Apex court, while smaller, marginalised states are left isolated. The Northeast is largely represented by judges from the Gauhati High Court, with no known judges from Scheduled Tribe or other Northeastern communities.²³ These underrepresented states are home to a significant share of India's ST population, yet their rare representation at the Court has largely been through Caste-Hindu judges. Dalit representation has declined too, with only two Dalit judges appointed since 2019 and just one Scheduled Tribe judge in the Court's history.²⁴ As Justice Krishna Iyer remarked in 1980, the Supreme Court remains "mainly Brahmin and upper class."²⁵ The public, as former CJI Chandrachud remarked, will only trust the judiciary and the judicial system when they see a reflection of themselves on the bench.²⁶

III. Executive Interference: The National Judicial Appointments Commission

The Executive, in 2014, relying on a strict textual interpretation of the Constitution, specifically Article 124,²⁷ argued that the Constituent Assembly deliberately chose *not* to have the word 'concurrence' in the text of the provision. Furthermore, arguments made by B.R. Ambedkar, and the collective decision made by the assembly strongly hinted at the impossibility of judicial independence in the process of appointment, having the Executive act as a 'check' to ensure that the process takes place seamlessly, creating a more trustworthy form of a judicial institution.²⁸ On the basis of the argument, the Executive gave its assent to the National Judicial Appointment Commission Act,²⁹ or the NJAC. The 99th Amendment of the Constitution

The Impact on Diversity in the Indian Supreme Court' (2018) 51(3) 273.

²¹ Hindustan Times, 'CJI Chandrachud On Women In Judiciary, Colonial Era Justice, Netflix And Cricket | HTLS 2023' (YouTube, 4 November 2023)

²² Abhinav Chandrachud, *Supreme Whispers: Conversations with Judges of the Supreme Court of India, 1980-1989* (Penguin Random House India 2018).

²³ Aparna Chandra, William Hubbard & Sital Kalantry, 'From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court' (2018) 51(3) 273.

²⁴ *ibid.*

²⁵ Abhinav Chandrachud, *Supreme Whispers: Conversations with Judges of the Supreme Court of India, 1980-1989* (Penguin Random House India 2018).

²⁶ Abhishek Anand, 'Supreme Court Collegium Emphasizes Diversity in Appointing Judges, Says Chief Justice Chandrachud' (*Hindustan Times*, 22 August 2023)

²⁷ Constitution of India, art 124 (2).

²⁸ *Constituent Assembly of India Debate*, vol 8, 24 May 1949, 158 [CAD 8.90.158].

²⁹ National Judicial Appointments Commission Act 2014.

replaced the text of Article 124 with the words “every Judge of the Supreme Court shall be appointed by the President, by the warrant under his hand and seal on the recommendation of the National Judicial Appointment Commission.”³⁰ The NJAC was to be composed of the CJI, two other senior Judges of the Supreme Court, the Union Minister of Law and Justice, and finally, two eminent jurists nominated by the Prime Minister, the CJI, and the Leader of Opposition, one of whom must belong to SC/ST/OBC or any other minority community.³¹

However, the Judiciary in the Fourth Judges Case declared the NJAC to be void.³² The court read judicial independence and autonomy into the basic structure of the Constitution, claiming that the NJAC encroached into the functioning of the Judiciary, undermining their decision making process, making it unconstitutional.³³ The court contended that the NJAC reduced the presence of the Judiciary in the decision making process, which could lead to decisions that do not reflect the Judiciary's views and priorities.³⁴ Furthermore, the presence of the Union Law Minister, along with 2 jurists appointed by the Legislature seemed anti-democratic, as it could lead to an increase in political appointments of judges.³⁵ It further noted that Section 6(6) of the Act³⁶ effectively granted a veto power to any two members of the Commission, excluding the judges. Such a veto provision is problematic, as it opens the door to appointments being blocked for reasons that have nothing to do with the merit or suitability of the candidate, instead, being based on potential political bias.³⁷ The Act, therefore, was deemed to be poorly drafted and lacked a framework to ensure that members could contribute their views independently and objectively.³⁸ The Court therefore upheld the collegium system as the only viable means of appointing Judges to the higher judiciary.

Indian legal history has borne witness to two significant instances of Executive interference in Judicial appointments during Indira Gandhi's tenure, which has made the Judiciary reluctant to lose its control over the process, viewing self-regulation as a safer alternative. In 1973, after the infamous Kesavananda Bharati Judgement,³⁹ Justice A.N. Ray superseded 3 senior most

³⁰ Constitution of India, art 124 (2).

³¹ Constitution of India, art 124A.

³² *Supreme Court Advocates-on-Record Association v Union of India* [2015] 13 SCR 1.

³³ *Supreme Court Advocates-on-Record Association v Union of India* [2015] 13 SCR 1.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ National Judicial Appointments Commission Act 2014, s 6(6).

³⁷ *Supreme Court Advocates-on-Record Association v Union of India* [2015] 13 SCR 1.

³⁸ *ibid.*

³⁹ *Kesavananda Bharati Sripadagalvaru v State of Kerala* [1973] 4 SCC 225.

judges, who had passed a verdict against the government, to become the CJI.⁴⁰ Justice Ray had consistently supported the government's stance, including in the Bank Nationalisation cases, making his elevation appear politically motivated.⁴¹ This was later followed by the denial of elevation to Justice H.R. Khanna, despite him being the next in line to become the CJI, following his 'controversial' dissent in the ADM Jabalpur Case,⁴² against the suspension of Article 21 during emergency.⁴³ As a result, the judiciary lost the faith of the general public, it was widely viewed as the institution that promoted the Emergency, a dark period in independent India's history. It politicized judicial appointments and transfers, turning them into tools of executive control, coercing and exercising undue influence over the judges to pass a verdict in favour of the government. Politically-motivated appointments are particularly dangerous to the institution of democracy. The government is answerable to the people, who look to the Judiciary for redressal against the wrongs committed by the government. If the Judiciary, a supposedly independent body, is under the control of the Executive, the public is left with virtually no recourse against the laws passed by those in power, it would lead to the Executive exercising unprecedented control, with no one to supervise their actions.

IV. Global Perspective on Judicial Appointments

Under Article II Section 2 of the United States Constitution, judges are to be nominated by the President, since they have the mandate of the people.⁴⁴ Once nominated, the Senate Judiciary Committee examines the potential and suitability of the candidate.⁴⁵ The entire Senate then votes on the nomination, requiring a simple majority to confirm the same.⁴⁶ Such a system is, however, disadvantaged by political intervention, as evidenced by the infamous *Roe v. Wade*⁴⁷ judgement. The UK follows the system of Judicial Appointment Commission, the JAC, since 2006. The Commission is tasked with recommending Judicial appointments to the Lord Chancellor, whose power to reject these recommendations is limited. While judges are included on the Commission, they do not form the majority. Both, the Appointive System, and the JAC,

⁴⁰ T.R. Andhyarujina, 'A Committed Judiciary: Indira Gandhi and Judicial Appointments' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Delhi, Oxford Academic 2019; online edn, 2018).

⁴¹ *ibid.*

⁴² *A.D.M. Jabalpur v Shivakant Shukla* [1976] AIR 1207.

⁴³ T.R. Andhyarujina, 'A Committed Judiciary: Indira Gandhi and Judicial Appointments' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Delhi, Oxford Academic 2019; online edn, 2018).

⁴⁴ The United States Constitution, art II (2).

⁴⁵ G. Alan Tarr, 'Designing an Appointive System: The Key Issues' (2007) 34 Fordham Urb LJ 291

⁴⁶ *ibid.*

⁴⁷ *Roe v Wade* [1973] 410 U.S. 113.

are not suitable in the Indian context, since the country is marred by the Emergency. Neither the public, nor the Judiciary is willing to put its unlimited faith into the hands of the Executive after the debilitating incidents following the 1970's Emergency. The system followed by both countries gives limited power to the Judiciary in determining its own appointment, a stance that the Indian Judiciary has vehemently opposed, time and again.

Mexico is currently in the news for its unique form of Judicial appointments. This system of “popularly electing” Judges threatens the existence of the doctrine of separation of powers within the country. Earlier, Judges in Mexico were appointed through a process involving institutional vetting and Executive nomination, designed in a manner that prevented the Executive from overreaching its powers, encroaching into the Judiciary's domain.⁴⁸ The new system, effective from September 15, 2024, aims to replace all sitting judges nearly 7,000 with new ones chosen through popular vote.⁴⁹ This politicizes the Judiciary, as Judges must now engage in campaigning and appeal to the electorate, making them susceptible to majoritarian pressures and party influence. Critics argue this undermines judicial independence and weakens the Judiciary's ability to act as a check on Executive and Legislative overreach. Holding the Mexican government accountable in such a system would be next to impossible, given that the Judiciary now acts as the puppet to the Executive's every command. This system goes against the very ethos of the system of checks and balances that is to be maintained by democratic institutions, holding one wing accountable when they are wrong.

The system in South Africa is particularly unique. The South African Constitution provides for the appointment of judges by the President, on the basis of the recommendation provided by the Judicial Service Commission (JSC).⁵⁰ The JSC is bound to act according to Section 174(1) of the Constitution,⁵¹ which stipulates that the JSC must assess the qualification and eligibility of the candidate before appointing them. Furthermore, it adds that “the judiciary [must] reflect broadly [on] the racial and gender composition of South Africa” before considering nominating an individual.⁵² The JSC added that the purpose for the focus on diversity on the bench isn't solely to increase the number of black men or women within the court system, but to ensure

⁴⁸ Baker Institute, ‘Unpacking the Rhetoric Behind Mexico's Judicial Reform’ (Baker Institute, 26 March 2025) <<https://www.bakerinstitute.org/research/unpacking-rhetoric-behind-mexicos-judicial-reform?s=03>> accessed on 3 May 2025

⁴⁹ *ibid.*

⁵⁰ Penelope E. Andrews, 'The South African Judicial Appointments Process' (2006) 44 Osgoode Hall LJ 565

⁵¹ The Constitution of South Africa.

⁵² The Constitution of South Africa, s 174

that the principles of equality and social justice that form the very essence of their Constitution, is upheld by those in charge of interpreting the document, ie, to reflect what the Constitution preaches.⁵³ The implementation of such a system in India could help address the chronic lack of diversity on the bench, making the court system less daunting for the common people to approach. However, given that the Judiciary is reluctant (to put it mildly) to give up its control over the appointment process, the setting up of an independent body like the JSC might exacerbate the conflict among the two wings. Furthermore, broaching the topic of affirmative action in India is especially difficult, given how controversial reservations are within the country. To truly convince a majority of the stakeholders into accepting such a reform will indeed be an incredibly time consuming process.

V. Conclusion

Judicial primacy and independence are undoubtedly a key factor in terms of deciding the appointment and transfer of judges. Given India's history with authoritarianism, and the deep seated fear of a biased and partial judiciary, it is prudent for the system of appointment to include the perspective of the Judiciary. However, absolute control in such a process is counterproductive to the institution of democracy that functions for its people. The people are the true stakeholders for any and all judicial precedents set, since it is their rights that are being interpreted. In such a situation, the perspective of the general public, too, must be given priority. Therefore, to maintain a balance not only between judicial independence and democratic accountability but also to uphold a system of checks and balances the following reform is proposed.

The proposed committee will consist of a total of 5 members, guaranteeing judicial majority. The committee shall include the CJI, two senior-most judges of the Supreme Court, one of whom must be a woman, a Senior Advocate, along with the Union Law Minister who serves both as a check on judicial discretion and as a representative of the public voice. In this system, the candidates submit their application to be reviewed by the committee. Candidates will submit applications that are then anonymized to eliminate unintentional biases during the evaluation process. Identifying information such as the candidates names and the name of their parent court will be concealed to mitigate the risk of nepotism or favoritism. Furthermore, there shall be a representation of (at least) one judge on the Supreme Court bench from each state of

⁵³ Penelope E. Andrews, 'The South African Judicial Appointments Process' (2006) 44 Osgoode Hall LJ 565

the country, to ensure diversity and prevent homogeneity. The forum should ideally meet twice a year to deliberate on applications regarding the transfer and appointment of the judges. A majority ($\frac{3}{5}$) of the votes must be in favor of the candidates application, to be sent to the President for her assent.