

Judicial Appointments in India: Power, Politics and Institutional Balance

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"There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself."

-Dr. B.R. Ambedkar¹

Abstract

The appointment of judges to the higher judiciary in India has remained a significant constitutional and institutional issue, involving a delicate balance between judicial independence, executive authority, transparency, accountability, and democratic legitimacy. This paper critically examines the evolution of judicial appointments in India, tracing the constitutional framework under Articles 124 and 217 from the consultative model envisaged by the Constitution makers to the emergence and consolidation of the Collegium System through the Second and Third Judges Cases. It further analyses major historical developments, including the supersession of judges in the 1970s, the Emergency period, executive interference in judicial transfers and appointments, and the resulting transformation in the relationship between the judiciary and executive. The study critically evaluates the Collegium System, particularly concerns relating to transparency, accountability, institutional oversight, perceived nepotism, and the concentration of appointment authority within the judiciary. It also examines the establishment and subsequent constitutional invalidation of the National Judicial Appointments Commission (NJAC), highlighting concerns relating to executive influence and judicial independence. A comparative analysis of judicial appointment mechanisms in England, Canada, and the United States is undertaken to identify alternative approaches for balancing merit, independence, accountability, and executive participation. Based on this analysis, the paper proposes a Judicial Commission comprising judicial, executive, legal, and regional representatives, with an institutional design intended to prevent the concentration of power and eliminate individual veto authority. The proposed framework seeks to establish a transparent, merit-based, representative, and non-partisan mechanism while preserving the constitutional independence of the judiciary. The paper concludes that India requires an appointment mechanism that harmonizes judicial independence with institutional accountability and public confidence, thereby strengthening the constitutional balance among the organs of the State.

Keywords: Judicial Appointments; Indian Judiciary; Collegium System; National Judicial Appointments Commission; NJAC; Judicial Independence; Judicial Accountability; Judicial Reform; Executive-Judiciary Relations; Constitutional Governance; Separation of Powers; Judicial Commission; Institutional Balance; Higher Judiciary; Comparative Judicial Appointments.

¹Advocate Khoj, "Report No. 80, Dr. Ambedkar in the C.A. Debates" Vol.8, pp.257-260 (24th May, 1948).

1. INTRODUCTION

The Indian history is replete with instances of judiciary coming to rescue the public whenever executive exceeded its power or acted contrary to the interest of public. This determination of the judiciary to stand firm against the political odds is a result of its independent nature. The non-partisan character of judiciary has nurtured public trust and confidence in courts among general public. As rightly quoted by Dr. B. R. Ambedkar, the independence of judiciary is quintessential for the proper and smooth functioning of a democratic society. For the same, it is indispensable to keep judiciary free from executive pressure. Though Article 50 of the Constitution explicitly provides that the state should endeavor to separate judiciary from executive in matters of public services². However, there is no ambiguity in terms of Constitution that provides upper hand to executive in terms of judicial appointments. Appointments to the higher judiciary, including the Supreme Court and High Courts, are governed by Articles 124 and 217 of the Indian Constitution³. The first two decades of our independence have witnessed peaceful appointment of judges without any major controversy on the public front. The judicial appointments were made by the executive after consultation with the judiciary. However, the issues arose in 1973 when the three senior judges of Supreme Court were ignored and Justice AN Roy, a junior judge was appointed as Chief Justice of India for some vested political interests⁴. This breached the convention established over the period of time wherein the senior most judge of Supreme Court used to be appointed as Chief Justice of India. Since then, the things have never been stable, and significant upheavals have occurred.

Further, in 1993, a tectonic shift occurred, the judiciary became the primary player in judicial appointments, reducing the executive's role. This shift led to the establishment of the Collegium System, comprising the Chief Justice of India and the two senior-most judges, who would send their recommendations to the President under the aforementioned Articles⁵. The Collegium's strength was increased to five in 1998⁶. The system, however, has been controversial, as the practice of 'judges appointing judges' has raised concerns about potential bias and lack of independence. To address this, in 2014, the legislature introduced the Ninety Ninth Constitutional Amendment, establishing the National Judicial Appointment Commission (NJAC), which included both members of the executive and the judiciary, to replace the Collegium system⁷. However, due to the underrepresentation of the judiciary compared to the executive, the Supreme Court declared the amendment unconstitutional⁸.

The recent times have witnessed a tussle between the executive and the judiciary, wherein the recommendations made by the Collegium system are not approved by the President, and the appointment process is left in abeyance. The appointment system has again ignited debate following the recovery of illegal cash from the premises linked to a judge, raising questions about the judicial accountability and transparency in appointment mechanism. The objective of this paper is to delve into the politics surrounding judicial appointments in India and propose a solution to end this controversy.

² The Constitution of India, 1950, art.50.

³ The Constitution of India, 1950, art.124 and 217.

⁴ J.N. Pandey, *Constitutional Law of India* 557 (Central Law Agency, Allahabad, 57th edn. 2020).

⁵ *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441.

⁶ *Special Reference No. 1 of 1998, In re*, (1998) 7 SCC 739.

⁷ The Constitution (Ninety-Ninth Amendment) Act, 2014, Act No. 22 of 2014.

⁸ *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC.

2. JOURNEY OF JUDICIAL APPOINTMENTS IN INDIA

2.1 Judicial Appointments: Intent of the Constitution Makers

There had been intense debate on the draft Article 103 (now article 124) pertaining to judicial appointments⁹. It was proposed by Shri Krishna Chandra Sharma that the consultation requirement should be removed, so as to provide complete authority to President in matters of appointment to higher judiciary¹⁰. The appointment of Chief Justice should be made subject to two-third majority in a joint session of Parliament was recommended by Shri Shibban Lal Saxena¹¹. However, this suggestion was sternly criticized on the ground that it would make judicial appointments politically driven. Similarly, the proposal of Shri K.T. Shah to make consultation with Council of States mandatory was also opposed as being too political¹². Further, Shri B. Pocker Saheb Bahadur put forward that the concurrence of sitting chief justice be made condition requisite for judicial appointments¹³. Many endorsed this suggestion and some even suggested that the concurrence of Chief justice should be required for all judicial appointments. Eventually, this too was rejected.

In all this discourse, Dr. B.R. Ambedkar, Chairman of Drafting Committee, backed the draft Article 103 asserting that the provision appropriately protected judicial independence by restricting the influence of both the executive and legislature. He drew attention of the Constituent Assembly on two models of judicial appointments- the British Model and the American Model¹⁴. The British Model confers absolute powers to the executive whereas the American model entails concurrence of the Senate. According to Dr. Ambedkar, none of these models would suit India as both cases could lead to political influences and prove dangerous to Indian society. Therefore, he advocated for a middle path, wherein consultation with Chief Justice was made indispensable and at the same time no unrestricted power had been vested in President or the Legislature. Regarding the veto power of the Chief Justice, Dr. Ambedkar expressed skepticism, arguing that it could lead to biases and flaws, as the Chief Justice, like any other person, is susceptible to imperfections¹⁵.

Consequently, Article 124 was included in its original form with no constitutional authority being vested with absolute power as it goes against the very spirit of rule of law. Article 124 Clause 2 in its original form provided, *"Every judge of Supreme Court shall be appointed by President by warrant under his hand and seal after consultation with such of judges of Supreme Court or High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains age of sixty-five years. Provided that in case of appointment of a Judge other than the Chief Justice, the Chief justice of India shall always be consulted."*¹⁶

⁹ The Constitution of India, 1950, art.124; reads as 124 (2) "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for that purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:"

¹⁰ Constitutional Assembly debates Volume 8 on 24 May, 1949 available at <https://www.constitutionofindia.net/debates/24-may-1949/#8.90.15>

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Supra* note 10.

¹⁶ The Constitution of India, 1950, art 124.

Thus, the Constitution makers provided for a consultative mechanism between the executive and the judiciary for the purpose of judicial appointments.

2.2 Early Judicial Appointments and Adherence to Constitution

The initial two decades following the enforcement of the Constitution witnessed smooth appointment procedure wherein the process enshrined under Article 124 was effectively followed. Apparently, there were no controversies, the appointments were made through consultations between President and Chief Justice. The advice of Chief Justice was given due consideration. With the passage of time, the convention developed wherein the seniormost judge of Supreme Court was appointed as the Chief Justice of India¹⁷. However, the convention was secretly flouted at various occasions.

In 1955, President Jawaharlal Nehru is said to have recommended Judge BK Mukherjee or Justice MC Chagla for the post of Chief Justice of India as against Justice MP Sastri, who would have otherwise been appropriate choice as per the seniority convention¹⁸. Further, there were rumors about caste consideration in High Court appointments¹⁹. Barring these trifling stances of discourses, by and large the Supreme Court showed respect to the decisions of the Parliament and President respected the advice tendered by Chief Justice. Thus, this period could be regarded as a golden era in which all three branches of government respected each other's decisions.

2.3 Breaking of Convention: Justice A. N. Ray's Appointment

One of the major incidents that created upheaval in the appointment mechanism is appointment of Justice A. N. Ray as the Chief Justice of India in 1973 superseding three senior judges. It is this instance that sowed the seeds of future conflict and distrust²⁰. The appointment of Justice A.N. Ray was not a standalone incident but was a result of growing animosity between the government and the judiciary which got initiated after the decision of Supreme Court tendered *Golak Nath case*²¹, wherein the judiciary stood against the government and held that amendment of fundamental rights does not fall within the powers of Parliament. Further, the judgments like *RC Cooper v. Union of India*²² and *HH Maharajadhiraja Madhavrao Scindia v Union of India*²³, in which the Supreme Court invalidated key aspects of the government's policies on bank nationalization and the abolition of privy purses, respectively, making both cases significant constitutional challenges to the government's policy agenda.

The controversy rose to crescendo in *Keshavnanda Bharati Case*²⁴, wherein court while allowing constitutional amendments came out with a 'basic structure doctrine' and thereby restricted the Parliament's power to alter basic essential features of the Indian Constitution. The appointment of Justice A.N. Ray was made on April 25, 1973 exactly one day after the Keshavnanda Bharati judgment was delivered by a 13-judge constitutional bench by 7:6 verdict with Justice A.N. Ray among one of the six dissenting judges and Justice Shelat, Justice Hegde and Justice Grover who were superseded were on the side of majority²⁵

¹⁷ Justice R. Banumathi, *Judiciary, Judges and the Administration of Justice* (Thomson Reuters, 1st Edition 2020).

¹⁸ M Setalvad, *My Life: Law and Other Things* (2014); MC Chagla, *Roses in December* (2018).

¹⁹ Law Commission of India, "Report No. 14 Reform of Judicial Administration" (1958).

²⁰ Press Trust of India, "Emergency Era Chief Justice Had 2 Hours To Accept Top Post, Reveals Book," *NDTV*, July 16, 2018 available at <https://www.ndtv.com/india-news/emergency-era-chief-justice-a-n-ray-had-2-hours-to-accept-top-post-reveals-book-1884185> (last visited on August 12, 2026).

²¹ *Golak Nath v Union of India* AIR 1967 SC 1.

²² *RC Cooper v Union of India* AIR 1970 SC 564.

²³ *HH Maharajadhiraja Madhavrao Scindia v Union of India* AIR 1971 SC 530.

²⁴ AIR 1973 SC 1461

²⁵ George H Gadbois, "Two hours given to Justice AN Ray to decide on CJI post?" *The Economic Times*, July 16, 2018

(against the government). Though this move of the government was prima-facie discreet but government openly justified it in the Parliament, wherein the government came forth with the new criteria for the appointment of judges on the basis of 'social philosophy'²⁶. This was seen as a direct attack on the independence of judges, with the stage set for further controversies over judicial appointments.

2.4 Emergency Period: Impact on Judicial Independence

Another such event that further fueled the hostility was the appointment of Justice Beg as the Chief Justice superseding Justice Khanna²⁷. The appointment of Justice Beg was a kind of reward given by executive for supporting government. Justice Khanna gave a dissenting opinion in *ADM Jabalpur v. Shivkant Shukla*²⁸, wherein Supreme Court by a 4:1 verdict validated the cessation of the right to invoke the jurisdiction of court for the transgression of fundamental rights during the Emergency. In the pertinent case, the court even provided the blanket freedom to the executive to detain without trial. Justice Khanna, however, gave the dissenting opinion and for this act he was superseded. Justice Beg supported the government and consequentially the government returned the favor and made him Chief Justice violating the seniority convention²⁹. Not only this, but the government also transferred the High Court judges who went against it³⁰. In response, a case was filed by one of the judges who had been transferred under the mass transfer orders. The Supreme Court reversed the order and held that the transfer of judges could only be carried out after full and free consultation with the Chief Justice of India³¹.

2.5 Union Law Minister's Letter and Growing Tensions

In 1981, the government tried to extend its arms in the judicial appointments and transfers. The then Union Law Minister sent a letter to the Governors and Chief Ministers mentioning a new rule wherein one third of the judges in a particular state's High Court should be from beyond the borders of that State. The letter also required additional judges to consent to being appointed as permanent judges of other High Courts and to specify their preferences for potential postings³². This was perceived as an attack on independence of judiciary in matters of judicial appointments by legal fraternity and the petitions were filed challenging the above-mentioned letter.

2.6 First Judges' Case: The Executive's Primacy in Appointment

Aggrieved by the arbitrary transfers and appointments, a petition was filed by S.P. Gupta, an advocate from Allahabad High Court, challenging the appointment of three additional judges as permanent judges of the same High Court, as well as the contents of the letter. In this case known as the *First Judges' Case*, it was contended that primacy should be given to the Chief Justice's opinion in matters of judicial appointments. Yet, the argument didn't go well with the court. The 7 judge Bench delivered the judgment on 30th December, 1981 with a 4:3 majority and ruled that the term consultation in article 217 does not

²⁶ *Ibid.*

²⁷ India Today, "Supersede Controversy: Appointment of Chief Justice of India", India Today, May 1, 2015, available at <https://www.indiatoday.in/magazine/indiascope/story/19770228-supersede-controversy-appointment-of-chief-justice-of-india-818734-2015-03-09> (last visited on August 12, 2026).

²⁸ *ADM Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521.

²⁹ Arghya Senugupta, *Independence and Accountability of Indian Higher Judiciary* 65 (Cambridge University Press, 2019).

³⁰ *Ibid.*

³¹ *Union of India v. Sankalchand Sheth*, (1977) 4 SCC 193.

³² *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.

equate to 'concurrence'. It also held that the opinion of Chief Justice is not binding. Thus, executive was given an upper hand. This position remained intact for the next 12 years³³.

2.7 Second Judges' Case: Recognition of Judicial Primacy and establishment of Collegium System

The *First Judges Case*' was challenged in *Subhash Sharma v. Union of India*³⁴, in which the three-judge bench suggested that the majority view tendered in the former case should be decided by larger bench. Following this, Chief Justice constituted the nine-judge bench to determine the correctness of the decision.

In the pertinent case, formally known as *Supreme Court Advocates-on-Record Association v. Union of India*³⁵, nine judge bench overruled the 1982 judgment and by a 7:2 majority ruled that Chief Justice should play a key role in judicial appointments. The court held that 'consultation means 'concurrence' and introduced the 'COLLEGIUM SYSTEM' wherein mutual recommendation of Chief Justice of India and two senior most judges of Supreme Court would be sent to the President. Justice Y.V. Chandrachud acknowledged that the then existing system on judicial appointments was obsolete and was required to be done away with. He too favored the collegium-based recommendation as against decisions made in secrecy of an individual's office³⁶. The court gave the following guidelines regarding collegium system:

1. Under Article 124(2), the consultation process for judicial appointments involves the Chief Justice of India (CJI) as the head of the judiciary. The CJI's opinion is not individualized but collective, formed with input from the CJI, the two senior-most Supreme Court judges, and a senior judge from the state.
2. For appointments under Article 217(1), the Chief Justice of the High Court would initiate the process, consult the two senior-most High Court judges and include their views in his recommendation. The CJI would then review this recommendation, and consider the views of the two senior-most Supreme Court judges and a senior judge familiar with the High Court's affairs.
3. The opinion of the CJI, as outlined above, is decisive. The President cannot make an appointment under Articles 124(2) or 217(1) unless it aligns with the CJI's opinion.
4. The CJI should be appointed based on merit, not seniority alone.
5. Supreme Court appointments will be made based on merit.
6. The Executive may reject a judicial recommendation if the individual is deemed unsuitable, based on valid reasons and evidence presented to the Chief Justice of India. However, if the Chief Justice of India, along with the unanimous agreement of other judicial consulters', reaffirms the recommendation after careful consideration, the Executive is obligated to follow it.

Thus, *Second Judges Case* overruled the *First Judges Case* and put judiciary in the front seat for judicial appointments.

2.8 Memorandum of Procedure

As per the guidelines issued by the Supreme Court in *Second Judges Case*, the Ministry of Law and Justice came forth with a detailed procedure for the appointment of judges in Higher Judiciary in 1999. This detailed guide is referred to as Memorandum of Procedure³⁷.

2.8.1 Memorandum of Procedure in relation to appointment of Judges of Supreme Court

2.8.1.1 Appointment of Chief Justice of India

³³ *Ibid.*

³⁴ *Subhash Sharma and Others v. Union of India*, 1991 AIR 631.

³⁵ *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441.

³⁶ *Id.* at para 107 & 108.

³⁷ Department of Justice, "Memorandum of Procedure of Appointment of Judges" (1999).

Senior most judge of the Supreme Court who is considered to be fit to hold the office should be appointed as the Chief Justice of India. The recommendation would be sought from the outgoing Chief Justice of India for the appointment of the next Chief Justice by the Union Minister of Law, Justice and Company Affairs³⁸. In case a doubt arises in the matter as to fitness of the senior most judge to hold office, then the consultation will take place as per Article 124(2) of the Constitution. Once the recommendation is sought, the Union Minister of Law, Justice and Company Affairs would put up the same before Prime Minister who will then advise the President for the appointment³⁹.

2.8.1.2 Appointment of Judges of Supreme Court

Whenever position of Supreme Court judge is expected to be vacant, the proposal to fill it is initiated by the Chief Justice of India and he consults the four senior most puisne Supreme Court judges. In case the successor Chief Justice does not get included, then he is to be added to the said collegium. The Chief Justice is also required to consult the senior-most judge in the Supreme Court who comes from the High Court from where the candidate recommended comes. The opinion of the Collegium members as well as the senior-most judge in Supreme Court from the concerned High Court will be reduced to writing and will form a part of record to be sent to Government of India. The Union Minister of Law, Justice and Company would send the recommendation to the Prime Minister who will then advise the President in the appointment matter⁴⁰.

2.8.2 Appointment of Judges of High Court

2.8.2.1 Appointment of Chief Justice of the High Court

The proposal for appointment of Chief Justice to a High Court is initiated by the Chief Justice of India, ensuring that the procedure gets completed at least a month before the vacancy occurs. For the appointment, the Chief Justice of India in consultation with the two senior-most Supreme Court judges recommends the name of a puisne judge from High Court or another. For the same, Chief Justice of India also seeks the opinion of senior-most Supreme Court Judge familiar with the relevant High Court⁴¹. Then, the proposal and the consulted opinions are sent by Chief justice of India to the Union Minister of Law, Justice and Company Affairs. The views of the relevant state government will be taken by the President and the proposal would be submitted to the Prime Minister who will advise the President. Once approved, Department of Justice announces the appointment in the Official Gazette⁴².

2.8.2.2 Appointment of Judges of High Court

When a judicial vacancy is expected, the Chief Justice of the High Court must send his recommendation to the Chief Minister at least six months prior to the vacancy, after consulting the two senior-most judges of the concerned High Court⁴³. The proposal, along with case statistics, judgments, and attendance details is sent as part of the record. The documents are then forwarded to the Governor. The Governor must forward the proposal to the Union Minister within six weeks. If the Chief Minister recommends the name, the Chief Justice reviews it and forwards the documents to governor⁴⁴.

The Union Minister reviews the proposal and forwards it to the Chief Justice of India, who, after consulting with the two senior-most judges of the Supreme Court, sends a final recommendation to the

³⁸ Department of Justice, "Memorandum of Procedure of Appointment of Supreme Court Judges" (1999).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Department of Justice, "Memorandum of Procedure of Appointment of High Court Judges" (1999).

⁴² *Ibid.*

⁴³ *Supra* note 41.

⁴⁴ *Ibid.*

Union Minister. The Union Minister then submits the recommendation to the Prime Minister for Presidential approval⁴⁵.

After approval, the Chief Justice of the High Court is informed by the Secretary to the Government of India. Once the required documentation is completed, the appointment is officially notified in the Gazette.

2.9 Third Judges Case (1998)

Though the *Second Judges case* judgment specifically dealt with the collegium system and its working, to get more clarity the President under Article 143 knocked the doors of Supreme Court for its advice on whether the consultation under Article 217 and 222 refers to consultation of plurality of judges or to the sole opinion of Chief Justice. The Apex Court while upholding the decision of *Second Judges Case* laid down the following guidelines⁴⁶:-

1. The Chief Justice of India must consult four senior most judges of Supreme Court when recommending the appointment of judges of Supreme Court or transfer of Judges of High Court.
2. Chief Justice cannot act alone. Consultation with other judges is required.
3. For appointment of Judges of High Court, consultation with two senior most judges will suffice. Also, the Chief Justice must consult the other judges who are familiar with the affairs of the High Court.
4. The views of the consulted judges must be reduced to writing and needs to be sent to Government of India along with Chief Justice's own opinion.
5. If the Chief Justice doesn't follow the consultation procedure then the recommendation is not binding on the Government of India.
6. Further, there is no need for the justification on seniority by the Supreme Court rather the Chief Justice must give positive reasons for their recommendations.

2.10 Establishment of NJAC

There was a growing demand for a more transparent commission, comprising both judicial and executive members, to handle judicial appointments and transfers. To address this, the Ninety-Ninth Constitutional Amendment was enacted in 2014, introducing Articles 124A, 124B, and 124C. The President assented to the Amendment on 31st December 2014, and it came into force on 13th April 2015⁴⁷.

2.11 NJAC and its constitutional provisions

National judicial Appointment Commission didn't come all of a sudden but its seeds were constantly watered by reports of different committees. With the object to make judicial appointments more transparent, the various committees had time and again suggested setting up of commission for judicial appointments. The adhoc committee was the first such committee that proposed this system as early as in 1949⁴⁸, this was followed by the report tendered by 121st Law Commission in 1987⁴⁹ and suggestions put forth by Venkatachaliah Commission in 2000⁵⁰.

⁴⁵ Ibid.

⁴⁶ Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739.

⁴⁷ The Constitution (Ninety-Ninth Amendment) Act, 2014, No. 1, Acts of Parliament, 2015 (India).

⁴⁸ Constituent Assembly Debates on May 24, 1949 available at: <https://www.constitutionofindia.net/debates/24-may-1949/#8.90.15> (last visited on August 11, 2026).

⁴⁹ Law Commission of India, "Report No. 121 A New Forum for Judicial Appointments" (Chapter 5, 1987).

⁵⁰ Department of Legal Affairs, "REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION" (Volume 2, Chapter 7, 31st March, 2002).

Drawing upon these recommendations, the National Judicial Appointments Commission (NJAC) Bills of 2013 and 2014 were tabled in the Parliament⁵¹, resulting in the enactment of the National Judicial Appointments Commission Act, 2014⁵² and the Ninety-Ninth Constitutional Amendment Act, 2014⁵³. The amendment inserted Articles 124A, 124B, and 124C into the Constitution, formally establishing the NJAC to replace the collegium system for appointing judges to the Supreme Court and High Courts⁵⁴.

Article 124A contains provisions pertaining to the composition of NJAC. It states that NJAC would comprise the Chief Justice of India, two seniormost Supreme Court judges, Union Minister of Law and Justice and two eminent persons nominated by committee comprising the Prime Minister, the Chief Justice of India and Leader of Opposition in the Lower House⁵⁵. Article 124B mentions the role of NJAC, encompassing recommending names for the appointment of Chief Justice of India, Supreme court and High Court Justices as well as judges based on seniority, merit and other stipulated criteria⁵⁶. Further, Article 124C equips Parliament with the power to make law demystifying the appointment mechanism for the judiciary⁵⁷. In furtherance of the powers conferred by Article 124C, the Parliament came out with the National Judicial Appointments Commission Act, 2014. A prominent provision under section 5 and 6 of the abovementioned statute provides that the Commission could not put forth the name of a candidate if the name is objected to by two or more members⁵⁸.

2.12 Striking down of NJAC

In the case of *Supreme Court Advocates-on-Record Association*⁵⁹, the Constitution Bench, by a majority of 4:1, ruled that Article 124A of the Constitution undermines judicial independence, particularly due to the inclusion of Clause (c) in Article 124A(1). This clause makes the Union Minister for Law and Justice an ex-officio member of the National Judicial Appointments Commission (NJAC), which could introduce political influence in the appointment and transfer of judges. The Bench held that this contravenes the principles of separation of powers and judicial independence, which are part of the Constitution's basic structure, and therefore declared it unconstitutional. Additionally, the majority of the Judges found that Subclause (d) of Article 124A(1), which calls for two "eminent persons" to be included in the NJAC, was also problematic. Since the term "eminent persons" is not defined, this provision was deemed to be ultra vires, as it too impinges on judicial independence⁶⁰. Consequently, the Constitutional Amendment (99th Amendment) Act, 2014 as well as NJAC Act, 2014, was ruled to be unconstitutional and was struck down in its entirety.

In the said judgment, Justice Kehar mentioned that term 'consultation' in Article 124, 217 and 222 must be interpreted so as to give primacy to the opinion of Chief Justice of India and the collegium as held in the *Second and Third Judges Case*. Further, Justice Madam B. Lokur held that if the collegium unanimously

⁵¹ Dr. Anurag Deep and Shambhavi Mishra, "Judicial Appointments in India and The NJAC Judgement: Formal Victory or the Real Defeat" 3 *Jamia Law Journal* 49 (2018).

⁵² The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014).

⁵³ The Constitution (Ninety-ninth Amendment) Act, 2014 (Act 16 of 2014).

⁵⁴ Sanjit Kumar Naskar, *A Critical Analysis of Judicial Appointments in India (with respect to Higher Judiciary)* (Bluerose Publisher, 2023).

⁵⁵ The Constitution of India, art 124A (now repealed).

⁵⁶ The Constitution of India, art 124B (now repealed).

⁵⁷ The Constitution of India, art 124C (now repealed).

⁵⁸ The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014), s. 5,6.

⁵⁹ *Supreme Court Advocates-on-Record Association v. Union of India* (2016) 5 SCC 1.

⁶⁰ *Id.* at para 239.

recommends a person, despite any concerns, the executive should respect that collective judgment, as the CJI, as the head of the judiciary, holds primacy in such decisions⁶¹.

2.13 Need to bring changes in MoP

In 2015, after striking down NJAC, the Supreme Court directed the government to create a new Memorandum of Procedure (MoP) to make the collegium's proceedings more transparent. However, this led to a year-long deadlock between the executive and judiciary over certain clauses. Recently, the government submitted suggestions to amend the MoP for appointing judges to the High Courts and Supreme Court⁶², and the matter is now under consideration by the Supreme Court

3. CRITICAL ANALYSIS OF COLLEGIUM SYSTEM AND NJAC

3.1 Collegium System

3.1.1 Drawbacks of the Collegium System

"India is the only country where judges select themselves, determine their own transfers and also discipline themselves⁶³"

- K.P.S Gill, former DGP

The system of judges appointing judges behind the closed doors has time and again invited criticism from various corners. The system is criticized for being non-transparent, lacking adequate checks and balances as well as failing to provide proper institutional oversight. There have been allegations of favoritism and nepotism. Since the system limits the role of executive, there are concerns about institutional balance. Even, the system's dark sides found its way in the report submitted by Law Commission of India in 2008⁶⁴. The Law Commission recommended that there was a need to revisit the existent judicial appointment system and bring necessary reforms so as to restore the balance between judiciary and executive⁶⁵. Even the Supreme Court recently has in 2025 published details regarding 221 candidates recommended for High Court appointments between November 2022 and April 2025, including their relationships with sitting or retired judges⁶⁶.

3.1.2 Instance of Wrong Appointment and Law Commission's Criticism

One of the illustrative instances of the shortcomings of the current appointment system is the appointment of Justice Soumitra Sen to the Calcutta High Court in 2003, despite allegations of financial misconduct. The judge was later impeached by the Rajya Sabha in 2011 for misconduct and resigned before the Lok Sabha considered the impeachment motion⁶⁷. The recent incident wherein illegal

⁶¹ *Id.* at para 568, 569.

⁶² Government of India Ministry of Law and Justice, "Rajya Sabha Unstarred Question No.1873 Answered on 22.12.2022" available at, <https://sansad.in/getFile/annex/258/AU1873.pdf?source=pqars>.

⁶³ Kalraj Mishra, "NJAC was the people's will" *The Indian Express* (December 9, 2021) available at, <https://indianexpress.com/article/opinion/columns/njac-was-the-peoples-will-2537184/>.

⁶⁴ Law Commission of India, "Proposal for reconsideration of Judges cases I, II and III – S.P. Gupta v. Union of India," Report No. 214, 2008, available at https://lawcommissionofindia.nic.in/cat_supreme_court_and_high_court/Report214.pdf?utm_source=chatgpt.com (last visited on August 12, 2026).

⁶⁵ *Ibid.*

⁶⁶ Nishant Ranjan, "Behind the Composition of Collegium Picks", *Hindustan Times*, May 7, 2025, available at <https://www.hindustantimes.com/india-news/behind-the-composition-of-collegium-picks-101746557601375.html> (last visited on August 12, 2026).

⁶⁷ Rajya Sabha Secretariat, "Motion for Removal of Mr. Justice Soumitra Sen, Judge Calcutta High Court" (New Delhi, October, 2011) available at, https://cms.rajyasabha.nic.in/documents/1631111946243.11_Soumitra_Sen_Judge.pdf

cash was recovered from the official residence of Justice Varma⁶⁸ has further raised questions about the transparency of judicial appointments, mechanisms for screening candidates, and accountability of sitting judges. It also brought attention to whether the existing system provides sufficient institutional safeguards to address allegations of misconduct involving members of the higher judiciary.

3.2 National Judicial Appointment Commission (NJAC)

3.2.1 Veto Power and Executive Influence

The provisions of section 5 and 6(6) provided that the recommendation could not be forwarded if any two members of the collegium objected to it⁶⁹. This gave ample veto power to the two eminent persons, who might not be necessarily from judicial background thus paving way for non-legal considerations to affect appointment mechanism. In addition to this, in a total six-member commission only three were judicial members. Thus, the commission provided executive an upper hand in judicial appointments.

3.2.2 Impact on Federalism

The NJAC reduced the role of the States in the appointment of High Court judges. The Governor's constitutional role was significantly reduced, while State Law Ministers had no direct representation in the Commission⁷⁰. Although the NJAC Act required the Commission to consider the views of the Governor and Chief Minister, their role was largely consultative.

4. JUDICIAL APPOINTMENTS IN ENGLAND, USA AND CANADA

4.1 Judicial Appointment System in England

In England, Judicial Appointments Commission and Supreme Court Selection Commission are responsible for judicial appointments.

4.1.1 Judicial Appointments Commission

Most of the judicial positions barring the Supreme Court in England and Wales are filled on the recommendation of Judicial Appointments Commission, an autonomous body established in 2006⁷¹. The Commission comprises 15 members, encompassing judges, lay members and advocates. The chair being headed by a layperson⁷². The composition ensures balance between judicial expertise and public participation and reduces chances of political influence.

The appointment mechanism is merit based and the process includes advertising applications, shortlisting candidates, assessing them and statutory consultations⁷³. The recommendations of the Commission are forwarded to the Lord Chancellor, who has the power to accept, reject or request reconsidering the names put forth⁷⁴.

4.1.2 Ad-hoc Selection Commission

⁶⁸ Vaibhav Ojha, 'BREAKING | Supreme Court Rejects Justice Yashwant Varma's Plea Against Cash Recovery Probe and Removal Recommendation', LawChakra, August 7, 2025, available at: <https://lawchakra.in/supreme-court/justice-yashwant-varma-cash/> (last visited on August 11, 2026).

⁶⁹ The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014), s. 5,6.

⁷⁰ Shreya Khandelwal & Tatsat Pati, 'Critical Analysis of National Judicial Appointments Commission and Related Case Laws', 3(3) Indian Journal of Legal and Academic Research (2023), available at: <https://ijalr.in/volume-3-issue-3-2023/critical-analysis-of-national-judicial-appointments-commission-and-related-case-laws-shreya-khandelwal-tatsat-pati/> (last visited on August 11, 2026).

⁷¹ Shimon Shetreet and Sophie Turenne, "Judges on Trial: The Independence and Accountability of the English Judiciary" 108 (Cambridge University Press, 2nd Edition); The Constitutional Reform Act, 2005

⁷² Mona Shukla, "Judicial Accountability Welfare and Globalisation" 68 (Regal Publications, New Delhi, 2010).

⁷³ The Supreme Court UK, "Judicial Appointment Commission" available at <https://www.supremecourt.uk/about/appointments-of-justices.html> (last visited on August 11, 2026).

⁷⁴ Ibid.

The appointment to the judicial positions in the Supreme Court of United Kingdom takes place in accordance with framework laid down in the Constitutional Reform Act, 2005⁷⁵. Supreme Court Selection Commission is an independent commission consisting of senior judges as well as representatives of judicial appointment bodies from various parts of England. There is a mandate that at-least two members should be from non-legal background. The selection takes place on the basis of merit⁷⁶.

For appointing the judges, initially the commission advertises the vacancies, assesses the candidates and then submits the recommendation to the Lord Chancellor⁷⁷. As in the previous case, once the recommendations are forwarded, Lord Chancellor can reject, accept or ask for reconsideration. Then, the information is communicated to the King by the Prime Minister, the King then makes the formal appointment⁷⁸.

It is noteworthy to mention that the system does not give Parliament the direct role and thus keeps political influence at an arms' length.

4.2 Judicial Appointments in Canada

In Canada an independent and neutral Advisory Board is primarily vested with the duty to recommend names for Supreme Court appointments. This Advisory Board has been established in 2016 and is since then discharging the functions⁷⁹. The Board comprises 8 members, including lawyers, a retired judge, legal scholar as well as non-legal members ensuring diversity in the system⁸⁰. After assessing the candidates, the Board furnishes the list of three to five shortlisted candidates to the Prime Minister. The Prime Minister then consults the Chief Justice, provincial and territorial authorities as well as parliamentary committees and accordingly confirms the final appointment⁸¹.

As far as federal judges and superior judges are concerned, they are federally appointed. The formal appointment is made by the Governor General, acting on the advice of the federal government⁸². Thus, the Canadian system cumulates independent assessment, transparency as well as executive responsibility.

4.3 Judicial Appointment System in the USA

4.3.1 Federal Judges

Article II of the American Constitution provides that the federal judges, including Supreme Court Justices, will be nominated by the President and then the Senate confirms or rejects the same⁸³. This function of senate is termed as 'advise or confirm'⁸⁴.

⁷⁵ The Constitutional Reform Act 2005.

⁷⁶ *Ibid.*

⁷⁷ Shimon Shetreet and Sophie Turenne, "Judges on Trial: The Independence and Accountability of the English Judiciary" 108 (Cambridge University Press, 2nd Edition).

⁷⁸ *Ibid.*

⁷⁹ Centre for Constitutional Studies, "Supreme Court Appointment Process and the Prime Minister of the Day" available at, <https://www.constitutionalstudies.ca/2019/06/supreme-court-appointment-process-and-the-prime-minister-of-the-day/?print=print> (last visited on August 11, 2026).

⁸⁰ *Ibid.*

⁸¹ Office of the Commissioner for Federal Judicial Affairs Canada, "The Independent Advisory Board for Supreme Court of Canada Judicial Appointments" available at, <https://www.fja-cmf.gc.ca/scc-csc/2023/establishment-creation-eng.html>

⁸² Department of Justice Canada, "The Judicial Structure", Government of Canada, available at <https://www.justice.gc.ca/eng/csj-sjc/just/07.html> (last visited on August 12, 2026).

⁸³ Lyle Therese A Hilotin-Lee, "How are Judges Selected?" available at, <https://www.findlaw.com/litigation/legal-system/how-are-judges-selected.html> (last visited on August 11, 2026).

⁸⁴ *Ibid.*

The nominated members have to go through the hearings before Senate Judiciary Committee prior to the voting in Senate. The judges so appointed hold office for life unless impeached⁸⁵.

4.3.2 State Judges

Judicial selection varies among the states and includes legislative selection, partisan or non-partisan elections, gubernatorial appointments and judicial nominating commissions. Some states combine appointment with subsequent retention elections⁸⁶.

Thus, the UK, Canada and USA adopt different approaches, but each attempt to balance judicial independence, merit, executive participation and accountability in judicial appointments.

5. RECOMMENDATIONS

Keeping in view the advantages and disadvantages of the prevalent collegium system and constitutionally invalid National Judicial Appointment Commission, the article submits that there is a need to do away with the collegium system and bring in a commission more transparent, reliable and non-partisan. The following system is proposed for India.

5.1 Judicial Commission (JAC)

A judicial commission comprising 20 members from across different regions of the country can well suit the demographic framework of India. The members would be selected from different regions so as to ensure representations from various corners.

5.2.2 Composition of the Commission

The Commission shall consist of 20 members from the following fields and regions:

1. The Chief Justice of India, as the ex-officio member.
2. 2 members who are judges from the North Region.
3. 2 members who are judges from the South Region.
4. 2 members who are judges from the East Region.
5. 2 members who are judges from the West Region.
6. 1 member who is the President of the Bar Council of India.
7. 2 members who are practicing advocates in the High Courts of India, each with at least 15 years of experience.
8. The Union Law Minister, as its ex-officio member.
9. The Leader of the Opposition in the Lok Sabha.
10. Two members nominated by the Central Government, selected from among those with expertise in the field of law.
11. 4 members nominated by the Governors of the states within their respective regions (North, South, East, West), after consultation with each other.

The regional composition is as follows:

1. *North Region*: Jammu and Kashmir, Himachal Pradesh, Punjab, Uttarakhand, Haryana, Uttar Pradesh.
2. *South Region*: Tamil Nadu, Kerala, Karnataka, Andhra Pradesh, Telangana.
3. *West Region*: Rajasthan, Gujarat, Madhya Pradesh, Maharashtra.

⁸⁵ *Ibid.*

⁸⁶ LC Berkson, "Judicial Selection in United States- A Special Report" *Judicature* (Volume 64, Issue 4, October, 1980) available at, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/judicial-selection-united-states-special-report> (last visited on August 11, 2026).

4. *East Region:* Chhattisgarh, Odisha, Jharkhand, Bihar, West Bengal, Sikkim, Assam, Meghalaya, Tripura, Arunachal Pradesh, Nagaland.

5.2.3 Manner of Appointment of Members

From the legal background, judges who are interested to be the part of the Appointment Commission may submit their applications to the Chief Justice of India. The Chief Justice of India, after consulting with the two senior-most judges of the Supreme Court, will then appoint 8 candidates, 2 from each region, as members of the Commission.

As far as practicing advocates are concerned, they need to submit their applications to the Bar Council of India for consideration, who after assessing the candidates on merit will nominate two members to the commission.

The four members nominated by governor will find their way to the Commission. They need not be from legal background. The entire appointment procedure will be carried out with due consideration of both the merit and experience of the candidates.

5.2.4 Manner of Appointment of Judges

Whenever the vacancy arises, the commission will recommend the name of the candidate after consultation among its members. The majority view within the Commission will prevail. The name of the shortlisted candidate would be then forwarded to the President who would then either accept the recommendation or send it back to the commission with the request to re-consider the matter. If the commission again forwards the same name, then the President becomes bound to accept the same and appoint the candidate as the judge. In case of appointment of Chief Justice of India seniormost judge should be appointed. As far as High Court judges are concerned, the Chief Justice of concerned High Court and in case of appointment of Chief Justice of High Court of a state, the governor of the respective state needs to be consulted. Thus, this system would balance executive authority. and judicial accountability. The proposed model doesn't confer any veto power to any member. Thus, making a balance between judiciary and executive.

6. CONCLUSION

India, the world's largest democracy, survives on three pillars- executive, legislature and judiciary. The other models can be influenced and controlled by the power of purse and authority but this is not the case with the judiciary as the public reposes trust in it. The independence of judiciary is primarily responsible for the same. However, certain instances, wherein collegium system working behind the closed doors, have attracted criticism and have tarnished the image of judiciary. To clear the mess created by the collegium system, the Parliament brought National Judicial Appointment Commission through a constitutional amendment. However, owing to the dominance of executive in its composition and mounting speculation of political considerations in the appointment framework, the amendment was declared unconstitutional. At this juncture, collegium system continues to play prominent role in appointment mechanism. The present times have seen many frictional instances wherein executive and judiciary are constantly at loggerheads. The names forwarded by the collegium are not accepted by the President or the President, acting on the advice of Council of Ministers, sits on the recommended names and keeps on delaying the things. The study, after analyzing the pros and cons of collegium system and NJAC as well as examining the selection system in Canada, USA and England has proposed setting up of a commission wherein both executive and judiciary equally participates, with no member enjoying veto power. As India moves forward, it is crucial to find a balanced approach that preserves the judiciary's independence while enhancing accountability. Achieving this balance is essential not only to maintain public trust but also to

ensure that the judiciary can continue to act as a check on the power of the state, thereby safeguarding the democratic values enshrined in the Constitution.

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