

Who Controls the Bench? Judicial Independence, the Collegium–NJAC Debate and the Quest for a Constitutional Model of Judicial Appointments in India

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ABSTRACT

The autonomy of the judiciary serves not only to safeguard the constitution but also to be a fundamental pillar of democracy. Questions about the judiciary's independence arise from the development of the collegium system and annulment of the National Judicial Appointment Commission. The history of India indicates that neither complete executive authority nor judicial supremacy provides a satisfactory model for appointments.

This paper conducts a thorough analysis of the development of the collegium system for judge appointments, detailing each stage, and examines the judiciary's repeal of the Commission. Additionally, it investigates the criticisms associated with both the collegium system and the NJAC. Furthermore, it engages in an extensive comparative examination of the processes for appointing judges in the US and the UK. Based on this comparative analysis, critics offer recommendations to mitigate concerns about judicial appointments in India.

Keywords: Collegium System, Independence of Judiciary, National Judicial Appointment Commission.

1. Introduction

After discussing with the High Court judges, the District Judges are appointed by the state's Governor.³ In practice, recruitment generally involves three stages: an initial screening test, a written Mains exam, and a personal interview/viva-voce. This approach is considered more open and merit-based than the Collegium System used for appointing judges to the Apex and higher courts. The Indian Constitution does not clearly outline a specific procedure for appointing judges to these courts, allowing for various interpretations. While the Judiciary's interpretation of constitutional articles is well-established, the Collegium System faces significant criticism, especially regarding the equilibrium between judicial accountability, independence, and transparency. The Appointment Model of another jurisdiction provides a transparent model with checks and balances. Based on the analysis of these models, a balance model of appointment is proposed for future reforms.

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³ The Constitution of India, art. 233.

2. The Constitutional Article and the Judiciary's View

Article 124(2) outlines that *“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 the purpose and shall hold office until he attains the age of sixty-five years”*⁴

Article 217(1) Outlines that *“Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and [shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty two years”*⁵

The manner in which appointments are made in India has undergone a significant transformation through judicial interpretation. The Apex court, through a sequence of rulings known as the Three Judges Cases, altered the authority over appointments.

First Judges Case

The Apex court, through a panel of seven judges, stated that "consultation" as referenced in articles 124(2) and 217(1) does not imply agreement. It was determined that the executive holds a primary role in the appointment process.⁶

Second Judges Case

The Bench annulled the ruling in the case referenced above and established that the Chief Justice of India (master of the roster) must take a leading role in the appointment procedure. The Court stated that consultation implies agreement, and this ruling led to the development of the collegium system, highlighting that the collective views of senior judges hold more weight in the appointment procedure than those of individual judges.⁷

Third Judges Case

The reference is made under Article 143 to the meaning of the word "consultation". The 1993 case decision was reasserted by the nine-Judge Bench of the apex Court. With reference to appointments and transfers, the court specified nine guidelines.

The essential dialogue with multiple justice is required, and the sole belief of the master of the roster is not sufficient. Also, the master of the roster recommends appointing the person as a justice of the apex court and relocation of a higher court justice, although for higher court justice appointment, only three justices from the apex court are involved, and in the case of the apex court appointment, five justices are involved, together with the master of the roster. This also reflects the increase in the number of persons: in the earlier case of 1993, only three justices were required, and now five are required.

The persuasive reason for bypassing the person from the order of seniority does not matter, but it is essential to give a constructive reason for the person recommended

The master of the roster required that the belief of the justice consulted must be taken in expressly, so as to communicate to the government. In case the master of the roster did not follow the procedure and guidelines of this case, the decision of the master of the roster is not obligatory on the government.⁸

⁴ *Supra* note 3, art. 124(2).

⁵ *Supra* note 3, art. 217(1).

⁶ *S.P. Gupta vs. Union of India*, (1981) SCC 87.

⁷ *Supreme Court Advocates-on-Record Association v. Union of India* (1993) 4 SCC 441.

⁸ *In re Presidential Reference*, AIR 1999 SC 1.

Current way of appointment

The appointment is made by the process that involves:

1. The Collegium recommending names to the Law Ministry,
2. The recommendation forwarded by the Law Ministry to the Prime Minister,
3. Then the file is forwarded to the president by the Prime Minister to appoint a judge,
4. If the government returns the recommendation once and the Collegium reiterates it, the President is bound to accept it.⁹

National Judicial Appointment Commission 2015 and Its Struck Down

The Parliament presented the ninety-ninth amendment with the view to supersede the Collegium system. No. of articles amended and inserted by the amendment. With the introduction of this amendment, a major change was made to Article 124(2): the phrase “*after consultation with such judges of the Supreme Court*” was replaced with a “*recommendation by the National Judicial Appointments Commission*”.¹⁰

Article 124A outlines the commission's composition: the head of the commission and two persons belong to the judiciary, one person from the executive, and the other two persons are termed “*eminent persons*”.

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Article 124B outlines the Functions of the Commission: The Commission is responsible for proposing candidates for the roles of apex and higher Court Judges. It also advises on the selection and relocation of the Chief Justice for the higher court. The individuals put forward must demonstrate “*ability and integrity*.”¹²

Fourth Judges Case (2015)

The Apex Court abrogated the amendment, which presented the Commission, holding it void and unconstitutional. The court stated the following grounds for striking down the amendment.¹³

1. Article 124A failed to maintain the judiciary's primacy in the appointment. The clauses of (a) and (b) failed to provide an adequate representation. This violated the settled theory of “*independence of the judiciary*”.
2. Further, Article 124A(1)(c) designates the Law Minister as a Member, violates the settled theory of “*independence of the judiciary*”, as well as “*separation of powers*”, hence ultra vires.
3. Furthermore, the inclusion of “*eminent persons*” in the commission, as outlined in Article 124A(1)(d), was deemed beyond the constitutional authority for several reasons. This inclusion was found to breach the “*basic structure*” of the Constitution. The court, during the year 1973, held “*that the amending power under Article 368 of the Constitution was subject to an implied limitation*”.¹⁴ The Court ruled that Article 368 does not enable Parliament to turn the fundamental structure of the Constitution
4. Without Article 124A, the commission had no relevance or independent existence; hence, it was declared unenforceable and invalid.

The system of appointments introduced in 1993 and 1998 has faced criticism from various persons, including judges from higher courts.

⁹ Collegium System, available at <https://www.drishtiias.com/daily-updates/daily-news-analysis/collegium-system-6> (last visited on July 27, 2026).

¹⁰ The Constitution of India, art. 124(2) amend by the 99th Constitutional Amendment Act, 2014.

¹¹ *Ibid.*, art. 124(A).

¹² *Ibid.*, art. 124B.

¹³ *Supreme Court Advocates-on-Record Association vs. Union of India* (2015) 5 SCC 1.

¹⁴ *Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973) 4 SCC 225

Critique of Present Collegium and NJAC

In the collegium system, no specific criteria are specified for examining a person for the post of an Apex and higher court Judge, which further widens the scope for favouritism and nepotism.¹⁵

The meaning attributed to the article in the third judge's case significantly diverges from what the article itself implies. If the constitution's framers had meant to establish a collegium, they would have explicitly stated it in the constitution. Therefore, if this was not their intention, the Apex court's interpretation is incorrect.¹⁶ In the Forth Judges case, Justice Chelameswar Said that “*the present collegium system lacks transparency, accountability and objectivity*”.¹⁷

Further, in the letter dated July 1, Justice Rang Nath to the Prime Minister, said: “*The appointment of judges takes place behind closed doors and over cups of tea... and favouritism is the only relevant factor for appointments*”.¹⁸

In the procedure of appointment of judges, who get appointed, on what basis and when the collegium meets is kept under wraps¹⁹. Decisions are taken in closed doors, and the public has no knowledge when the collegium meets and how decision taken by them.²⁰

In India, the three branches function with partial independence as they monitor and balance one another, ensuring that no single branch wields too much authority. However, the present collegium gives vast power to the judiciary in appointments²¹. The NJAC was Introduced To maintain the balance, and the amendment brings hope for transparency in the appointment of judges.²² However, it faced criticism due to insufficient representation of the judiciary, breaches of the fundamental structure, and the lack of defined criteria for the “prominent citizens” mentioned.²³

Checks and balances are essential for a democratic country. The appointment process must ensure transparency, without nepotism or favouritism, and uphold the Judiciary’s independence, for which a new model is needed.

Proposal or Suggestion for Appointment

The US Constitution: The judicial selection follows the principle of checks and balances, as Article II outlines the president's power: “*he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States*”.²⁴ Although this also criticises the ground that the president will nominate a judge who tends to have an ideology that matches his political Party²⁵. But over the years, the US has improved the appointment process by letting the President to nominate judges on the basis of

¹⁵ *Supra* note 9.

¹⁶ S. Rai and N. Arora, Judicial Appointments in India — A Critical Analysis, *SCC Online* (July 29, 2026), https://www.sconline.com/blog/post/2017/05/23/judicial-appointments-in-india-a-critical-analysis/#_ftn12

¹⁷ *Supra* note 13.

¹⁸ “Nepotism, casteism: Judge pans judicial appointments in letter to PM Modi,” *Hindustan Times*, July, 03 2019, available at <https://www.hindustantimes.com/india-news/judge-writes-to-pm-modi-over-appointments/story-PSVAIh3Xz2WMP9h71GPGBL.html> (July 30, 2026).

¹⁹ *Ibid.*

²⁰ *Supra* note 9.

²¹ *Supra* note 9.

²² *Supra* note 18.

²³ *Supra* note 16.

²⁴ The Constitution of the United States, art. II.

²⁵ Vahibaya Khali, “COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENTS WITH REFERENCE TO USA, AUSTRALIA AND INDIA” 10(10) *International Journal of Advanced Research* 1129 (2022).

consultation with senators²⁶. Thereafter, the nominated candidates proceed to the Senate Judiciary Committee for voting, where the candidates are questioned in a public hearing regarding their Character, Ideology, and qualifications. The candidate received the majority of votes from the Senate, officially appointed as a judge by the president who hold the life long tenure.²⁷

In the United Kingdom, the appointment procedure is handled by the Judicial Appointments Commission, which was formed during 2006 under the Constitutional Reform Act 2005. The main Function of this commission is to select the candidate on the basis of merit and to ensure transparency and fairness. The JAC advertises the vacancy, and the candidate then submits an application. Thereafter, the JAC shortlists the candidates and interviews them to evaluate legal competence, character, and experience. Further, the name is proposed to the Lord Chancellor, who has limited discretion, and upon acceptance, he recommends the candidate to the Monarch for appointment. This procedure aims to curtail the political influence and build public trust²⁸.

This paper proposes that judicial appointments must secure checks and balances with the “independence of the judiciary”. The Model must have executive participation that does not oust the “independence of the judiciary,” as in the US. Further, the Meritorious Candidate must be selected, as in the UK Model, keeping in mind the Diversity of India during the appointment and questioned in an open public hearing and not in a closed-door mechanism, to ensure fairness and transparency and for this legislature should introduce the *Bharatiya Judicial Appointment Commission*, which consists of seven people: the Chief Justice of India as head, three of the most senior judges of the apex court, the leader of the opposition, the law minister, and one expert/distinguished jurist. This structure of the commission secures judicial primacy.

The expert/distinguished jurist appointed by the other committee consists of the same members as the suggested court in the Anoop Barwal case 2023 for the Election Commission. The expert/distinguished jurist may be a retired Apex court judge, the senior-most advocate of the Apex court or a distinguished academic jurist having an outstanding contribution in the field of law.

The following process will be followed for the appointment:

1. The commission notifies the vacancy publicly, and the eligible candidate will apply. After receiving the application, the commission shortlisted the candidate on the basis of merit, their contribution to the legal field, expertise, the reasons given in the argument in the case of an advocate, the reasons given in the judgment in the case of a serving member of the judiciary, and so on.
2. The commission will fix a schedule for an open public hearing of the candidate. The commission will ask questions related to ideology, legal philosophy, why they should be chosen to serve, background, and any other relevant questions deemed necessary. This open public hearing will be telecast live.
3. After the open public hearing, the commission votes, and the candidate receiving the most votes will be selected and proceed to the president for appointment

This is important to curb “uncle syndromes,” as the judiciary is often accused of nepotism, lack of transparency and accountability, and this method also helps address these concerns.

²⁶ A. Sikri and A. Lahoti “Debating the Collegium System: A Comparative Analysis” *Manupatra* (July 30, 2026), <https://articles.manupatra.com/article-details/Debating-the-Collegium-System-A-Comparative-Analysis>.

²⁷ Shikha Tiwary, “A COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT PROCESSES: INDIA AND BEYOND”, Volume VII Issue IV *Indian Journal of Law and Legal Research* 8611 (2025).

²⁸ Ibid.