The Collegium Vs The Njac: Navigating Judicial Independence Amidst Judicial Appointments

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| Fahad Nahvi
| Yagnesh Sharma

Discussion Paper

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Discussion Paper

The Collegium Vs The Njac: Navigating Judicial Independence Amidst Judicial Appointments

| Fahad Nahvi
| Yagnesh Sharma

ABSTRACT

This paper covers the evolution of the Indian Judicial Selection System from colonial times to the present-day collegium system. It examines the relevant discussions and case laws that have influenced this evolution. It analyses the 99th Amendment of the Constitution, which proposed a commission for judicial appointments but was ultimately struck down by the Supreme Court. The current collegium system is also discussed, including its issues and drawbacks. Furthermore, the paper analyses appointment systems in common law nations to identify a mechanism that strikes a delicate balance between the independence of the judiciary and the efficacy of the appointment process.

Keywords: Collegium, National Judicial Appointments Commission, judicial independence, judicial appointments

INTRODUCTION

The appointment of judges in India has undergone significant changes since the drafting of the Indian Constitution. Initially, the President held the power of appointment, with consultation from the Chief Justice of India. However, a series of judicial opinions in 1981 declared that the Executive branch had the power to appoint judges, with recommendations from the Chief Justice (Chandrachud, 2020). However, these recommendations were not legally binding. This changed in the 1990s when the Supreme Court ruled that the recommendations of the judicial collegium were binding upon the Executive, resulting in the current appointment process.

However, the process of selecting judges for the Supreme Court of India has been ambiguous, with the appointment criteria remaining largely unknown (Chandrachud, 2020). The Indian Constitution outlines 3 categories of eligible individuals for the position– high court judges of five years standing, high court lawyers of 10 years standing, and distinguished jurists. However, it provides little guidance on the required qualities and qualifications for the role (The Constitution of India, 1950a). Therefore, informal norms have evolved over the past seven decades, alongside constitutional rules, to determine the eligibility for Supreme Court judges (Chandrachud, 2020). These informal eligibility criteria include an age threshold of 55 years, prior experience as a high court senior judge or chief justice, and geographic and demographic diversity, including religion, caste, and gender (ibid.).

At the inaugural session of the Supreme Court of India on 28 January 1950, then Chief Justice Harilal J. Kania pronounced that political considerations should not factor into judicial appointments. Despite this, the process has been subject to scrutiny and debate in recent years as the executive and judiciary vie for control over the composition of the Court (Sunday News Special Correspondent, 1950).

The ambiguity around the selection process and the incomplete information on candidates make consensus-building within the collegium and judicial appointments dubious (Ruma Pal, 2011, as cited in Chandrachud, 2020). Moreover, a perceived disparity exists between the formal eligibility criteria prescribed by the Constitution and the informal criteria used in selecting and appointing judges (ibid.).

These concerns highlight a tension between the need for judicial independence and the efficacy of the appointment process. This tension has become more pronounced recently due to controversies over alleged retaliations by retiring Chief Justices and accusations of lobbying for appointments (Suresh, 2013; Chandrachud, 2020).

This paper examines the evolution of the Indian Judicial Selection System by tracing the shift from executive appointments to the current collegium system. It also analyses the 99th Amendment of the Constitution, which provided for a commission for judicial appointments before being struck down by the Supreme Court. Furthermore, it addresses issues plaguing the current collegium system. Lastly, the paper looks at appointment systems in other common law nations to identify a suitable mechanism for India.

SITUATING THE INDIAN JUDICIARY IN ITS HISTORY

The establishment of the Federal Court during colonial rule marked the beginning of a judicial system characterised by informal criteria in appointing judges. Though not explicitly stated in any constitutional document, these criteria dictated that one of the three judges on the Federal Court be British, one Hindu, and one Muslim (Chandrachud, 2020). This practice set the tone for future informal quotas based on regional, caste, gender, and religious affiliations in the Supreme Court (ibid.).

The Government of India Act, enacted on 2 August 1935, established a Federal Court in India consisting of a Chief Justice of India and no more than 6 puisne judges (Chandrachud, 2020; Government of India Act, 1935). The number of judges could be increased if the federal legislature petitioned the Governor General (Chandrachud, 2020). The Act also stipulated that Federal Court judges would retire at 65, while high court judges were required to retire at 60 (ibid.).

Section 200 of the Act outlined the qualifications required to serve as a judge on the Federal Court of India (Government of India Act, 1935). These included having served as a judge on a High Court in British India or a Federated State for at least 5 years, being a barrister of England or Northern Ireland with at least 10 years of experience, or being a member of the Faculty of Advocates in Scotland with at least 10 years of standing (ibid.). Alternatively, candidates could qualify if they had been a pleader on a High Court in British India or a Federated State for at least 10 years or on two or more such courts in succession (ibid.).

The Act eliminated the distinction between British-trained barristers and Indian-trained pleaders, allowing both to be appointed to the Federal Court or high court after a decade of practice (Chandrachud, 2020). Furthermore, either could be appointed as the Chief Justice of India or of a high court (ibid.). Nonetheless, the Act failed to provide a mechanism to appoint “distinguished jurists” to the court, such as legal scholars or law professors without prior experience as judges or practitioners (ibid.).

Section 200(3) contains a caveat that mandates specific prerequisites for assuming the position of Chief Justice of India. Firstly, an individual shall not qualify for the position unless they are, or were initially appointed to a judicial post as, a barrister, member of the Faculty of Advocates, or pleader (Government of India Act, 1935). Secondly, the references to 10 years were substituted by 15 years corresponding to the abovementioned qualifications required to serve as the Chief Justice of India (ibid.).

Before independence, the Federal Court consisted of one British Chief Justice and 2 puisne judges, one Hindu and one Muslim, despite the absence of any religious or racial quotas in the Government of India Act, 1935 (ibid.). The court had 8 judges between 1937 and 1947, with a maximum of 3 judges at any given time (ibid.). There was no established practice of appointing the most senior judge as Chief Justice upon the retirement of the incumbent.

Harilal J. Kania assumed the position of Chief Justice of India (in the Federal Court) a day before India's independence (Chandrachud, 2020). Following independence, all court members were appointed from within the judiciary rather than from the legal or political spheres (ibid.). The Muslim representation in the court decreased, with only 1 out of 6 judges being Muslim, compared to the previous 1 out of 3 (ibid.).

VISION OF THE CONSTITUENT ASSEMBLY OF INDIA

As the Federal Court of India continued to receive new appointments, India's Constituent Assembly was engaged in extensive debates over the country's new Constitution. On 30 April 1947, the Union Constitution Committee was formed to prepare a report on the principles for the new Constitution (Constitution of India, 1947a). An ad hoc committee was established to offer its opinion on the powers of the proposed Supreme Court (Chandrachud, 2020).

The ad hoc committee recommended the creation of a court with 2 division benches, each comprising 5 judges, and suggested 2 alternative methods for judicial appointments (ibid.). The first method called for appointment by the President of India in consultation with the Chief Justice and confirmation by a panel of 11 members, composed of high court chief justices, members of the Central Legislature, and law officers of the union (ibid.). The second method proposed a panel to recommend 3 names for appointment to the Supreme Court, out of which the President would consult with the Chief Justice and appoint a judge (ibid.).

B.N. Rau, the Constitutional Adviser to the Constituent Assembly, largely adopted the first alternative, substituting the panel with the non-partisan Council of State (ibid.). Supreme Court judges were to be appointed by the president with the approval of at least two-thirds of the members of a non-partisan Council of State (ibid.). The Council of State was to comprise ex-officio members, such as the Chief Justice of the Supreme Court and the Advocate General, as well as former presidents, prime ministers, Supreme Court chief justices, and other members appointed by the President (ibid.).

Rau also suggested that High Court judges be appointed similarly to Supreme Court judges, with a two-thirds majority of the Council of State (ibid.). The Union Constitution Committee accepted the ad hoc committee's recommendations for appointing Supreme Court judges, except the provision that the president must consult the Chief Justice and other Supreme Court and High Courts judges as needed for appointments (ibid.).

In August 1947, the Constituent Assembly formed a Drafting Committee to draft a new Constitution for India (Constitution of India, 1947b). By October 1947, the first draft of the Constitution was presented to the Assembly, which included provisions for the federal judiciary in Articles 87–109 (Chandrachud, 2020). The Supreme Court of India was to be established with 10 judges and one

Chief Justice, and judges were to be appointed based on Section 200 of the Government of India Act, 1935, with a retirement age of 65 (ibid.). Eligibility criteria for judges included 5 years of experience as a high court judge or 10 years as a licensed lawyer, with law professors excluded (ibid.).

Significantly, the first draft also introduced a new process for appointing Supreme Court judges. Based on Clause 18 of the Union Constitution Committee's report, the president was to consult with current Supreme Court and high court judges, as well as the Chief Justice of India — except for appointing the Chief Justice of India — before making appointments (ibid.). This consultation process was not included in the Government of India Act 1935.

The second draft of the Constitution was introduced by B.R. Ambedkar, Chairman of the Drafting Committee, on 4 November 1948 (Constitution of India, 1948). On 24 May 1949, the Constituent Assembly discussed provisions related to appointing the federal judiciary in the draft Constitution (Constitution of India, 1949).

During the drafting of the Indian Constitution, various proposals were made for appointing judges to the Supreme Court. First, it was suggested that the Chief Justice's concurrence should be mandatory (ibid.). The second suggestion was parliamentary confirmation by a two-thirds vote (ibid.). Another proposal suggested the consultation of the Council of States in the appointment process (ibid.). However, B.R. Ambedkar rejected each of these suggestions. According to him, leaving the appointments entirely to the President's discretion was "dangerous" (ibid.). Conversely, requiring every appointment to receive legislative concurrence was also not ideal (ibid.). Ambedkar also expressed concerns about granting the Chief Justice absolute veto power over appointments, citing the Chief Justice's personal biases and limitations (ibid.).

During the discussions on the draft Constitution of India, H.V. Kamath suggested amending it to allow for appointing a "distinguished jurist" as a Supreme Court judge, which was supported by others (ibid.). However, there was little discussion on other criteria for appointing judges, such as regional representation, gender, religion, caste, or qualifications (Chandrachud, 2020). On 3 November 1949, the revised draft Constitution was submitted to the President of the Assembly and was enacted on 26 November 1949 (Chandrachud, 2020).

Article 124(1) established the Supreme Court of India, consisting of a Chief Justice and up to seven judges (The Constitution of India, 1950b). Judges were to be appointed by the President after consulting with judges of the Supreme Court and High Courts as deemed necessary (ibid.). The Chief Justice had to be consulted before appointing other judges, and judges had to retire at age 65 (ibid.). Eligibility for appointment to the Supreme Court required being a citizen of India and a judge or advocate of a high court for 5 and 10 years, respectively, or a "distinguished jurist" (ibid.). The Constitution did not specify the type of judges to be appointed, but they were required to be of the 'highest integrity' and 'first-rate' (Chandrachud, 2020).

SELECTION PROCEDURE OF THE SUPREME COURT OF INDIA POST INDEPENDENCE

Established on 26 January 1950, the Supreme Court of India had Harilal J. Kania as its first Chief Justice (Narayan, 2018). Following his death, concerns arose that the government intended to disregard the seniority norm and supersede Patanjali Sastri as Chief Justice (ibid.). However, all the judges threatened to resign if Sastri were not appointed, and he became the next Chief Justice of India (Chandrachud, 2020). This established the "unwritten law" that the senior-most judge on the Supreme Court would be appointed as the Chief Justice (ibid.).

In 1958, the Law Commission of India submitted a report highlighting issues in the selection and appointment of judges to the Supreme Court (Setalvad, 1958). It criticised communal and regional considerations and executive influence in appointing judges (ibid.). The Commission recommended that judges be appointed for at least 10 years, and the Chief Justice of India serve for a minimum of 5 to 7 years (ibid.). It also criticised the seniority norm which prevented judges from serving sufficient time in the Court and suggested selecting chief justices of India from amongst chief justices of high courts or distinguished members of the bar, and not necessarily the senior-most puisne Judges of High Courts of outstanding merit (ibid.).

From 1964 to 1973, the rule of seniority was generally followed in selecting the next six Chief Justices of India, despite persistent talk of superseding two senior judges (Chandrachud, 2020). While the executive had the power to appoint judges to the Supreme Court, in practice, appointments were typically made with the consent of the Chief Justice of India (ibid.). However, this understanding between the executive and judiciary was soon to change.

The relationship between the judiciary and the executive began to deteriorate due to conflicts arising from property rights (ibid.). The shift in the Court's stance from positivist to activist can be traced through four cases between 1950 and 1973 that explain this estrangement. The first two cases, Sri Sankari Prasad Singh Deo v. Union of India and Sajjan Singh v. Rajasthan, were unanimously in favour of the government. However, doubts were expressed over the reasoning in the latter case (ibid.). I.C. Golak Nath v. Punjab saw an outright conflict between the judiciary and the executive, with the Court ruling by a narrow majority of 6-5 to reserve the power to investigate the legality of constitutional amendments for itself (ibid.). The Golak Nath decision was pronounced a week after the 1967 elections, in which the Congress party suffered a sizable loss of seats, its weakest majority until then (ibid.).

In 1969, a split occurred in the Congress party, and Indira Gandhi called for national elections in 1971, using her famous 'Garibi Hatao' (End Poverty) slogan (The Times of India, 1970; The Times of India, 1971). The Congress (Requisitionists) won a two-thirds majority, a necessity to amend the Constitution (Chandrachud, 2020). One of the party's manifesto planks during the 1971 election was

to make radical changes to the Constitution (ibid.).

The fourth case was the Kesavananda Bharati v. State of Kerala case, which upheld the validity of the 24th, 25th, 26th and 29th constitutional amendments. It also exposed a sharp division within the Court regarding judicial review and the power of courts to test the constitutionality of statutes (ibid.). In a narrow ruling of seven to six, the Court affirmed that the Constitution possessed an "un-amendable" or entrenched "basic structure" (ibid.). The government's response to this ruling was to announce the appointment of A.N. Ray as the next Chief Justice of India, despite being the fourth most senior judge, thus bypassing the longstanding seniority norm (The Times of India, 1973a). The three judges who had been superseded and eventually resigned had frequently ruled against the government (Chandrachud, 2020; The Times of India, 1973b). The government cited the Law Commission's 14th report to justify its decision (Chandrachud, 2020).

The Emergency Years

In 1975, the President of India proclaimed a state of Emergency under powers conferred by Article 352 of the Constitution. During the Emergency, Fundamental Rights guaranteed by the Constitution, including the right to life and liberty, could be extinguished (The Times of India, 1975; Chandrachud, 2020). The president suspended the right to move the courts to enforce Fundamental Rights (Chandrachud, 2020).

The Indian government made politically motivated arrests, leading to 676 political opponents being imprisoned, and caused some to flee or go into hiding (The Times of India, 1975, Chandrachud, 2020). The detention orders were challenged in court, and high courts ruled in favour of Indira Gandhi's political opponents. As a response, the government transferred 16 high court judges without their consent and leaked a list of 56 judges who were either transferred or proposed to transfer, to unsettle the judiciary (Chandrachud, 2020).

The government justified the transfers of judges, which appeared to be politically motivated, as a means to promote national integration (ibid.). However, transfers rarely occurred without the judge's consent for the past 26 years (ibid.). In 1976, Judge Sankal Chand Himatlal Sheth challenged his transfer to the Andhra Pradesh High Court (Subramanium, 2018). Meanwhile, state governments filed appeals challenging high court decisions that had released political enemies of the government (Chandrachud, 2020). The Supreme Court's decision in ADM Jabalpur v. Shivakant Shukla, known as the "Habeas Corpus case", held that the writ of habeas corpus would not be available to the arbitrarily arrested and detained individuals during the Emergency (Ganguli, 2018). Only one judge, Justice H.R. Khanna, dissented and held that the state did not have the power to deprive a person of their life or liberty without the authority of law (ibid.).

On 28 April 1976, the Habeas Corpus case was decided (Chandrachud, 2020). Nearly a year later, on 18 January, Indira Gandhi called for elections. Eleven days after that, Khanna, the next most senior judge on the court, was passed over for the position of Chief Justice of India when A.N. Ray

retired on 29 January 1977 (Chandrachud, 2020). Instead, M.H. Beg, next in the line of seniority, was appointed (Ganguli, 2018). The government argued that Khanna's term in office would have been too short had he been appointed, but this reasoning was flawed since other Chief Justices of the Supreme Court of India had served shorter terms (Chandrachud, 2020).

Justice Sheth Case

After 21 months of Emergency rule, the Congress party lost power at the centre for the first time in the history of independent India, securing only 154 out of 542 seats in the Lok Sabha (Chandrachud, 2020). In contrast, the Janata Party, formed by the merger of four opposition parties[1], won over 290 seats, securing approximately 54% of the house's strength (ibid.). Following the change of power, a constitutional bench of the Supreme Court of India was convened in 1977 to decide the case of Sankal Chand Himatlal Sheth, a Gujarat judge who had been transferred to the Andhra Pradesh High Court during the Emergency (Union of India v. Sankal Chand Himatlal Sheth, 1977).

The case addressed three key questions:

(a) Is a high court judge's consent needed for transfer to another court?
(b) Does Article 222, which mandates the President of India to "consult" with the Chief Justice of India before transfers, require the Chief Justice's advice to be binding?
(c) What are the grounds for transferring a judge to another court? (ibid.)

The Court pronounced its decision on 19 September 1977 (ibid.). Three judges held that a judge's consent was not required to transfer him from one high court to another (ibid.). The second question was answered in the negative unanimously (ibid.). The Court held that the President was not bound by the Chief Justice of India's advice when consulting before a transfer (ibid.). However, it was held that consultation constituted an essential safeguard against arbitrary transfers and had to be meaningful (ibid.).

The Court also ruled that if the President ignored the Chief Justice of India's advice, the Court could investigate whether "extraneous circumstances" had influenced the decision (ibid.). If so, there would be a "high legal risk of invalidation" (ibid.). On the third question, the Court unanimously agreed that transfers could only be made in the public interest and could not be punitive (ibid.). Justice Y. V. Chandrachud differentiated between two types of punitive transfers, holding that a transfer made to punish a judge for deciding against the government was impermissible. However, a judge could be transferred for misconduct (ibid.).

Constitutional scholar H.M. Seervai notes that the Sankal Chand Sheth case established important safeguards against arbitrary transfer (Chandrachud, 2020). These safeguards include "full, fair and complete discussion" or consultation and the risk of invalidation if the president ignores the decision of the Chief Justice of India (ibid.).

1 The Janata Party was formed by merger of Bharatiya Lok Dal, Congress (Organization) , Socialist Party, and Jana Sanga.

The First Judges Case: Lead up to the Case and the Decision

The Law Commission of India submitted a report to the government on the appointment of judges on 10 August 1979, recommending that Supreme Court judges be of the highest calibre (Law Commission of India, 1979). A key recommendation was that the Chief Justice of India consult the three most senior judges on the Court before recommending to the president to appoint Supreme Court judges (ibid.). The recommendations for Supreme Court judges included an age limit of 54-60 years, with 60 being the maximum age limit to guarantee a minimum term of 5 years in office (ibid.). Furthermore, the seniority norm was proposed to be observed while appointing the Chief Justice of India (ibid.). However, this norm could be bypassed only if the majority of judges in the Supreme Court agreed to do so. The commission also suggested that regional representation on the Supreme Court be tied to merit and that the best person from the region be selected for appointment (ibid.).

Indira Gandhi's Congress was back in power after winning the 1980 elections with a two-thirds majority (Chandrachud, 2020). In January 1981, the President of India transferred two Chief Justices of high courts as part of the government's new policy that the chief justice of a high court would not serve on the same court on which he served as a puisne judge (Chandrachud, 2020). A circular letter from the law minister, Shiv Shankar, was also sent to the chief justices of each state outlining the government's new judges' transfer policy, which aimed to seek consent from additional judges and persons to be appointed or transferred to another high court (ibid.).

This policy was intended to undo the guidelines issued by the Supreme Court in the Sankal Chand Sheth case and was mentioned by Indira Gandhi in her hint of a "large-scale reshuffling of administrative and judicial services" to undo appointments made during 1977-79 (ibid.). The government claimed that this new transfer policy was in line with the recommendation of the States Reorganisation Commission (ibid.).

Lawyers on behalf of the judiciary filed writ petitions in various cities, including Bombay, Delhi, Madras, Allahabad, and Patna, contesting the government's policy, ad-hoc extensions given to additional judges, and transfers of certain judges, especially Chief Justices of High Courts across India (Narayan, 2018; Chandrachud, 2020). A bench presided over the proceedings of the S.P. Gupta v. President of India case, famously known as the first Judges case.

The first Judges case dealt with three major questions:

(a) Whether transfers of judges could only be made in the "public interest" and if punitive transfers for misconduct were outside the scope of public interest;
(b) Whether the Chief Justice of India's opinion carried primacy over other constitutional functionaries[2] in appointing High Court judges; and
(c) Whether the President of India was obliged to follow the advice of the Chief Justice of India regarding judicial appointments (S.P. Gupta vs President Of India And Ors, 1982).

2 Constitutional Functionaries include Chief Justice of India, the Governor of the concerned state, and the Chief Justice of the High Court under Article 217 of The Constitution of India.

The court responded affirmatively to the first question, holding that only transfers made in the public interest were permissible and that punitive transfers, regardless of whether they were intended to discipline misconduct or courage, were not within the scope of public interest (ibid.).

In a 5-2 majority, the court responded negatively to the second question, stating that the Chief Justice's opinion did not carry primacy over other constitutional functionaries when appointing High Court judges (ibid.). The President of India must consult all constitutional functionaries, and the decision was left to the President in case of any disagreement (ibid.).

The court unanimously responded negatively to the third question, declaring that the President of India was not obligated to follow the Chief Justice of India's advice and that consultation did not amount to concurrence (ibid.).

Justice Bhagwati provided a detailed outline of the concept of consultation, which included consultation with the Chief Justice of India, the Chief Justice of the High Court, and other necessary judges (ibid.). He emphasised that this consultation should be thorough and efficient, with the President providing all relevant information and proposed actions (ibid.). The Chief Justice was expected to gather necessary information, deliberate on the data, and offer counsel to the President in the interest of public good (ibid.).

Despite the Court's rejection of the primacy of the Chief Justice's opinion, it was acknowledged that it carried significant weight compared to other constitutional functionaries (ibid.). Justice Bhagwati suggested that a broader collegium should recommend appointments to the higher judiciary to the President, expressing dissatisfaction with the consultation process limited to the Chief Justice of India (ibid.).

In the first Judges case, Justices Bhagwati and Desai also expressed their views on the criteria to be considered while selecting and appointing judges, emphasising not only professional competence but also values such as honesty, integrity, and faith in constitutional objectives (S.P. Gupta vs President Of India And Ors, 1982). However, the case was perceived as a setback to judicial independence as the opinion of the Chief Justice of India was not binding on the President, indicating that consultation did not equate to concurrence (Chandrachud, 2018).

Second Judges Case: Lead up to the Case and Formation of the Collegium System

In the 1980s, after the first Judges case, Justices Y.V. Chandrachud, Bhagwati, Pathak, and Venkataramaiah, served as the Chief Justice of India (Ganguli, 2018). During this era, Justice A. Varadarajan became the first judge of the Supreme Court from the Dalit community (ibid.). However, this era also witnessed a significant credibility crisis for the higher judiciary (ibid.).

After the assassination of Prime Minister Indira Gandhi in 1984, her son Rajiv Gandhi became the new Prime Minister of India by securing a two-thirds majority in the general elections held later that year (The Times of India, 1984; Chandrachud, 2020). Soon Rajiv Gandhi's government was accused of appointing "sycophant judges" to the high courts (Chandrachud, 2020).

Justice P.N. Bhagwati, who succeeded Justice Y.V. Chandrachud as the Chief Justice of India in 1985, sought to appoint activist judges who shared his social philosophy. However, the government opposed his selections (ibid.). In retaliation, Chief Justice Bhagwati rejected the government's recommendation to appoint the Delhi High Court Chief Justice to the Supreme Court and the issue of politicised appointments continued during Chief Justice R.S. Pathak's tenure (ibid.).

The government interfered with judicial appointments at the high courts, including the Madhya Pradesh High Court, where acting Chief Justice G. Sohani was not confirmed for 18 months, possibly to coerce him into accepting the government's appointments (ibid.). When no single party won a clear majority in November 1989, the Janata Dal party formed a minority government with the support of the Bharatiya Janata Party and the Left (ibid.).

The Chief Justice of India and other judges objected to the National Judicial Commission bill (67th amendment) brought in by the new government, which sought to take away the power of appointing judges from the judiciary (Datar, 2018; Chandrachud, 2020). He argued that it threatened judicial independence (Chandrachud, 2020). Additionally, the appointment of judicial nominees was stalled (ibid.).

In 1990, a three-judge bench led by Chief Justice Ranganath Misra referred the question of judicial appointments to a larger bench, recognising the need to review the first Judges case (ibid.). The executive's tendency to reopen recommendations for judicial appointments when there was a change in the Chief Justice of the High Court or Chief Minister of the State was noted as the reason for this decision (ibid.).

After the assassination of Rajiv Gandhi on May 21, 1991, the Congress party emerged victorious in the 1991 general elections, winning 232 seats and forming a government with the support of independents (The Times of India, 1991a; Chandrachud, 2020). On 21 June 1991, P.V. Narasimha Rao was sworn in as the new Prime Minister (The Times of India, 1991b).

In 1993, the Supreme Court faced allegations against one of its judges, V. Ramaswami, and the motion for his impeachment failed in the Lok Sabha (The Times of India, 1993; Chandrachud, 2020). The motion failed in Lok Sabha because the Congress party issued a covert directive instructing its members of Parliament to refrain from voting, leaving the Supreme Court in an embarrassing position (Chandrachud, 2020).

Against this backdrop, a nine-judge bench of the Supreme Court decided the Second Judges case in 1993 (Supreme Court Advocates on Record Association v. Union of India, 1993). The Supreme Court Advocates on Record Association v. Union of India case, also known as the Second Judges

case, reaffirmed the power of the Chief Justice of India to make recommendations for judicial appointments and established the collegium system for such appointments (ibid.). The bench composition reflected regional diversity, with each judge hailing from a different state in India (Chandrachud, 2020).

The Court was faced with the question of whether the Chief Justice of India's opinion on appointing and transferring judges to the Supreme Court and High Courts should have primacy (Supreme Court Advocates on Record Association v. Union of India, 1993). The Court held that the Chief Justice of India's opinion would bind the president, signifying that consultation would be equivalent to "concurrence," overruling the First Judges Case (ibid.).

Nonetheless, the Court introduced two exceptions to this principle. If the Chief Justice of India and the Chief Justice of a High Court disagreed on a candidate's suitability for appointment to the High Court, the President could refuse to accept the Chief Justice of India's opinion (ibid.). Additionally, if there was a difference of opinion between the Chief Justice of India and the senior judges consulted, the President would not be bound by the Chief Justice of India's opinion. In this limited circumstance, consultation would not constitute "concurrence" (ibid.).

The Court also held that if the President did not consider a candidate suitable for appointment, based on the candidate's "antecedents and personal character", the President could request the Chief Justice of India to reconsider their recommendation in favour of that candidate (ibid.). The President could not make any appointments to the Supreme Court or High Courts contrary to the advice of the Chief Justice of India. However, the President was not obligated to appoint every candidate recommended by the Chief Justice of India (ibid.).

In the Second Judges' Case, the Court introduced a new process for appointing judges. In the case of Supreme Court appointments, the Chief Justice of India was obligated to seek advice from (a) the two most senior judges of the Supreme Court and (b) the most senior judge whose input would be deemed critical in assessing the candidate's eligibility (ibid.).

For appointments to a high court, the Chief Justice of India was mandated to elicit (a) views from Supreme Court colleagues familiar with the relevant high court's affairs, (b) the opinion of the chief justice of the concerned high court, after taking into account the viewpoints of at least the two most senior judges on that high court, (c) opinions from other functionaries, such as the governor of the state, who acted on the advice of the council of ministers, and (d) the input of one or more senior judges of that high court whose perspectives were significant in the Chief Justice of India's assessment (ibid.).

The Second Judges' Case declared that the power to appoint judges to the Supreme Court and High Courts would be vested in a collegium of the most senior judges of the Court. However, the term "collegium" was not expressly used in the ruling. This judicial collegium was established in response to concerns over possible executive overreach in appointing judges (Chandrachud, 2020).

Third Judges Case: Lead up to the Case and the Decision

From 1993 to 1998, India experienced political instability with weak coalition governments in power after two general elections (Chandrachud, 2020). This allowed the judiciary to continue asserting itself, increasing its power as the executive declined. The Vineet Narain v. Union of India case, popularly known as the Jain Diaries case, was a significant example of this, where the Court supervised corruption investigations through the writ of continuing mandamus[3] (ibid.).

However, the judiciary itself was not immune from corruption allegations, with the Chief Justice of the Bombay High Court resigning in March 1995 under allegations of corruption (ibid.). Meanwhile, there was dissatisfaction among the Bar with the appointment of judges to the Supreme Court of India due to "politicking" among judges (ibid.). Despite the government's attempts to make judicial appointments political once again, these efforts did not succeed (ibid.). A bill to limit the Court's ability to hear public interest litigations was also drafted but faced opposition from the BJP and Left (ibid.).

The Central Government faced doubts about the interpretation of the Second Judges case, prompting the President of India to refer 9 questions to a 9-judge bench of the Supreme Court for its opinion under Article 143 of the Constitution (Misra & Nair, 2017). This came to be known as the Third Judges case (ibid.). The Court grouped the questions into three issues:

a) the consultation process between the Chief Justice of India and other judges;
b) judicial review; and
c) seniority in appointments to the Court (Chandrachud, 2020).

In the Third Judges case, the Court departed from the Second Judges case in three significant ways. Firstly, the Court increased the number of judges the Chief Justice of India would have to consult before making appointments to the Supreme Court of India from two to four (ibid.). The Court called this group of judges the collegium (ibid.).

Secondly, the Court clarified who was to be a part of the 5-person collegium. Firstly, it was ruled that even if the next Chief Justice of India did not belong to the four most senior judges of the Court, he would still be a part of the collegium (ibid.). Secondly, the Court held that any other senior judge, apart from the four most senior judges on the Court, consulted by the Chief Justice of India would not be part of the collegium (ibid.). Finally, the Court held that the most senior judge on the Supreme Court from the high court of the candidate being considered for appointment would not be part of the collegium unless he was already a part of the collegium by seniority (ibid.).

The second significant departure the Court made was to limit the president's discretion in cases of disagreement between the Chief Justice of India and other judges (ibid.). The Court held that the president must refuse the Chief Justice's recommendation if it conflicts with the views of a majority

3 This is a process by which the constitutional court instead of delivering a conclusive verdict, keeps the litigation ongoing, giving orders from time to time, monitoring compliance through regular Hearings (Poddar & Nahar, 2017). 'Continuing Mandamus'-A Judicial Innovation to Bridge the Right-Remedy Gap. NUJS L. Rev., 10, 555.

(at least three) of the collegium members, eliminating the option to accept the chief justice's view (ibid.). The third significant departure was that the Court also diluted the importance of seniority, allowing judges of exceptional merit to be appointed to the Supreme Court, regardless of their seniority (ibid.).

These decisions in the second and third Judges cases reinforced the independence of high court judges and the institutional independence of the Supreme Court. However, the executive could still offer incentives or rewards to judges, particularly post-retirement benefits, to influence their decisions.

NATIONAL JUDICIAL COMMISSION ACT AND ITS INVALIDATION BY THE SUPREME COURT

After years of the collegium system's relatively unchallenged dominance in appointing judges, a shift occurred in 2014 with the election of Narendra Modi as Prime Minister and the BJP's majority in the Lok Sabha (Misra & Nair, 2017). This majority enabled the swift passage of two bills amending Articles 124 and 217 of the Constitution regarding judicial appointments and creating the National Judicial Appointments Commission [NJAC] (Misra & Nair, 2017). Both bills were ratified by all twenty-eight state legislatures and received presidential assent in December 2014 (ibid.).

The Ninety-Ninth Constitutional Amendment Act was thus passed. It removed the President's requirement to consult with the Chief Justice of India (and the collegium). Instead, it allowed the President to act on the recommendations made by the NJAC (ibid.). The commission consisted of the Chief Justice of India, the two most senior judges of the Supreme Court, the Union Minister of Law and Justice, and two eminent persons nominated for a three-year term (ibid.). The Prime Minister, Leader of the Opposition in the Lok Sabha, and the Chief Justice of India nominated the two eminent persons, with one being required to be from the Scheduled Castes or Scheduled Tribes community or OBC or Minority or a woman (ibid.). The NJAC Act also required any nominee for a Supreme Court or High Court judge position to agree with at least two of the commission members (ibid.).

The legality of the Constitution (Ninety-Ninth Amendment) Act and the National Judicial Appointments Commission Act was challenged in the Supreme Court in the case of the Supreme Court Advocates-on-Record Association and another vs Union of India (ibid.). A five-judge bench delivered a verdict on 16 October 2016, with a majority of 4-1, declaring both Acts unconstitutional and null and void (ibid.). The bench held that these Acts violated the basic structure of the Constitution by undermining the principles of "independence of the judiciary" and "separation of powers" and the potential for political interference in the judiciary (ibid.). Consequently, the collegium system was deemed to be operational once again.

AT LOGGERHEADS?: INSTITUTIONAL PRIMACY AND SEPARATION

Any analysis of the independence of the Judiciary must be separated into its structural (*de jure*) and operational (*de facto*) modalities (Melton & Ginsburg, 2014).

The role of the Executive in appointing judges is a crucial aspect of the debate surrounding the striking down of the constitutional amendment introducing the NJAC. Any power held by the Executive of a republican state in the appointment of judges must be gauged from a position of apprehension (Ferejohn, 2002), given the political consequences of judicial decisions (Ferejohn et al., 2004).

Cameron (2002) argues that neither structural protections nor operational norms are sufficient, in isolation, to guarantee the independence of the judiciary. Taking the American example, the author refers to a degree of trust between the different verticals of the State that govern the independence of judicial appointments (ibid.). It is important to note that in the American system of appointing judges to the Supreme Court — and all District and Appeal Courts Judges — the President proposes a name to be approved by the US Senate (McMillion, 2022). This practice would then require harmony between the President (the Executive) and the Senate (the Legislature). Therefore, the judiciary will be allowed to function independently as long as it is not detrimental to the interests of the Legislature and the Executive. The entire procedure is often a highly politicised process (Tushnet, 2011).

However, India and the US are structurally different. In India, the legislature and the executive run in tandem as the majority in the legislature must elect the executive, which is the government (The Constitution of India, 1950c). Practically, there cannot be any ideological differences between the two State functionaries. Any change in the government would necessarily entail that the new government with a different ideology, along with its accompanying legislature, will swiftly move towards promoting and appointing judges ideal to its agenda basis their prior judgments and public opinions. Hence, structural protections in appointing judges in the Indian constitutional courts become necessary.

Arriving at an analysis of the collegium and NJAC requires a foundational understanding of the turmoil between the judiciary and the executive, the idea behind judicial appointments, and the constant tussle for primacy in India.

The ideal scenario in a constitutional scheme such as India's would be to provide separate and unique mandates to different organs of the state to protect and utilise the Constitution. These separate powers would ensure a system of checks and balances where no single organ exceeds its authority and scope. Hence, the drafters of the Indian Constitution envisioned the role of the legislature and executive to draft and implement the law and the judiciary to check the validity of this law. This would lead to a constant to and fro between the organs, keeping them in check and improving the

justice system and quality of life of the citizens of India.

However, this to and fro developed a sensitive character regarding judicial appointments. The executive's standpoint has been one of discomfort due to a variety of reasons. The out-of-turn judicial appointments during the Emergency and rejections, such as those of the nominations of the collegium of Saurabh Kirpal and Gopal Subramaniam, among others, are some of the major factors. These decisions could be more acceptable if the reasons for rejection were transparent and declared publicly.

On the other hand, the judiciary has strived to increase its power in judicial appointments by reading the Constitution in a way that rewrites it, justifying such transgressions under the garb of interpretation. The verdicts in the Three Judges' Cases are a testament to the judiciary intercepting the role and priority of the executive in judicial appointments envisaged under the Constitution.

Another question that must be deliberated upon is the need for judicial primacy in judicial appointments. Several jurisdictions around the world, including the United States and Canada, provide leeway to the executive in making judicial appointments. Even the Indian Constitution provided for the Chief Justice of India to consult the executive in making such appointments. Affirmations from the judiciary were not a pre-requisite to judicial appointments, a convention that was reimagined in the Three Judges' Cases.

The judgment striking down the 99th Constitutional Amendment and introducing the NJAC represents the deep fear of executive intervention held by the judiciary. A major reason for the striking down of the NJAC was the presence of the Union Law Minister as one of the 6 members of the NJAC, which ensured the inclusion of the executive in the appointments process. The bench reasoned against the inclusion of the Law Minister, stating that as per the current practice, the Minister only provides feedback and opinions to the collegium. The NJAC, on the other hand, would provide the Law Minister with an important vote in selecting a judge. Therefore, even with only one of the six votes of the collegium, the mere presence of a member of the executive was sufficient for the judiciary to deem the executive's power excessive.

Another apprehension against the inclusion of the Minister was their ability to influence the proceedings despite the presence of three Supreme Court members in the collegium. Most interestingly, the bench rejected all international comparisons by stating that the situation in India is unique and cannot be compared to any other judicial system around the world. Additionally, the bench stated that the Union of India has the maximum number of cases before the judiciary. Therefore, the presence of a member of the executive could lead to a conflict of interest. The bench offered limited reasoning as to their rejection of the arguments raised by the Union of India.

COLLEGIUM AND NJAC

Interestingly, the Supreme Court's practices within the collegium system have tended to disregard the considerations of the Constituent Assembly. In fact, a report by the United States Institute of Peace (2009) categorised the Indian judiciary as a self-appointing judiciary due to the 'consultation' requirement.

The current appointment process states that the CJI will consult the four senior-most judges of the Supreme Court (Department of Justice, n.d.). However, if the next CJI is not one of the four, they must be included in the collegium to have a say in appointing their future brothers and sisters on the bench. The next part of the process requires the CJI to obtain the views of the senior-most judge with the same parent High Court as the proposed candidate for elevation. The opinions of the collegium must be sent in writing to the government, who will then inform the President of the same (ibid.). The procedure for High Court judges requires the respective High Court's Chief Justice, along with two senior-most judges, to send the proposed name to the Governor of the state. The nomination would then be forwarded to the Law Minister and thereon to the Chief Justice of India, who will consult the two senior-most judges of the Supreme Court. The CJI will then revert to the Law Minister, and the remnant of the procedure would be the same as that of Supreme Court judge appointments.

The vehement rejection of the NJAC suggests, to a certain extent, that the collegium system is better positioned to appoint judges to the constitutional courts. However, the collegium system itself has presented various persisting issues in the three decades of its existence. Unfortunately, the controversy with the NJAC was foxholed into a question of judicial primacy and independence. Therefore, any reform to the appointments process, be it via the NJAC or any other proposed change, must answer the following fundamental problems:

1. Vacancy

The lengthy process of appointing judges to the SC and HC under the Memorandum of Procedure leads to delays in filling up vacant spots across constitutional courts (Kumar & Dutt, 2021a). These delays arise at various steps in the process and have been at the centre of the recent to and fro between the judiciary and the executive about delays in appointments (Kumar & Dutt, 2021b). As of 1 December 2022, the sanctioned strength of high courts across India collectively is 1108. The Department of Justice (2023) data reflects that 331 of these 1114 positions lie vacant. The Supreme Court has 7 vacancies out of its sanctioned strength of 34 judges. This implies that 30% of all High Court positions and 20% of the Supreme Court's sanctioned strength lie vacant (ibid.).

Vacancies are bound to arise in constitutional courts as the Constitution mandates that HC judges retire at 62 and SC judges retire at 65 (The Constitution of India, 1950e; 1950f). This prompts that the process must be initiated at the earliest to ensure a swift replacement of the judges. A Standing Committee in the Rajya Sabha noted that the High Court collegium should start appointing judges

at least 6 months ahead of a vacancy (Department-Related Parliamentary Standing Committee On Personnel, Public Grievances, Law and Justice, 2021). However, this process is rarely initiated as per the appropriate timeline. This results in the first stage of delay of appointments.

The second stage of delay is when the executive takes no action on the recommendations of the Supreme Court for HC and SC judges. Reports mention the executive taking up to seven months to finalise such appointments (Kumar & Dutt, 2021b). Moreover, the executive can also resist the recommendations of the SC collegium by sending them back for reconsideration.

Moreover, the pendency of cases before the lower and constitutional courts is exorbitant, and the vacant positions add to this pendency. *In toto*, the collegium system, as it exists, is inefficient in mitigating the issues of pendency in the Indian judiciary.

2. Transparency

The opacity of the appointments process and its outcomes have raised concerns across the legal community about the nature of discussions within the collegium (Bari, 2013). Various personalities, and the Law Commission of India itself, have noted kin and kith relations underscoring the appointment of judges to the High Courts. The method of deliberations is unknown and has been referred to as one of the best-kept secrets in the country (LiveLaw, 2011).

In the judgment striking down the NJAC, the majority stated that it would look for ways to make the collegium's working transparent (Supreme Court Advocate-on-Record Association and Others v. Union of India and Others, 2016). The collegium took necessary steps after the judgement, with the collegium presided over by Justice Misra in 2017 publishing resolutions vis-à-vis the appointment of judges to the constitutional courts and the transfer of judges (Supreme Court of India, 2017). The collegium published these resolutions for the next two years with limited information on the Supreme Court's website. However, with the change in the Chief Justices, the practice was diluted, and resolutions turned into statements which offered information but no transparency (AK, 2019).

The Supreme Court has only recently diverted heavily from practice and published the government's response regarding the names recommended by the collegium. Rangin Pallav Tripathy (2021) notes the specifics of the resolutions published and the lack of information provided thereof. The resolutions did not contain the government's reasoning for returning recommendations for reconsideration or objecting to them. The number of judges consulted outside of the collegium also remained ambiguous within these resolutions.

Transparency in the appointments process would include publishing the reasons for nominating certain candidates, the considerations taken by the collegium to ensure diversity via such an appointment, the apprehensions and reasons for sending back the nomination by the executive to the judiciary, and the reasons behind the judiciary not considering these apprehensions of the executive to be cogent and resends the nomination. This would ensure that every decision of both branches is well-reasoned and publicly known.

3. Diversity

Multiple theoretical studies have been conducted on the collegium-led system of appointments and its difficulties and challenges (Sengupta & Sharma, 2018). The judiciary lacks diversity in professional background, gender, and caste within those elevated to the bench. Studies have shown that the majority of the judges elevated to the Supreme Court are those who are sitting judges of the High Court (Tripathy & Dhanee, 2020).

Tripathy and Dhanee (2020) undertook an extensive empirical study of the professional backgrounds of judges elevated to the Supreme Court. Their research found that an overwhelming majority of the judges were elevated to the High Court from the Bar, which means practising lawyers were elevated to the position of judges. Only a few High Court judges elevated to the Supreme Court rose through the lower judiciary and entered the judiciary via competitive exams. The study also revealed that only 10% of High Court judges were appointed while still serving in the lower judiciary, while another 2% were appointed after having left the judicial service, implying an elevation from the bar. The study notes that the executive-dominated period of appointments saw 21% of appointments in Supreme Court and 20% in the High Court from the lower judiciary. These numbers dropped to 20% and 2%, respectively, in the collegium era, implying that the elevation to the constitutional courts is dominated by the Bar and not the lower judiciary, which has the experience of the bench.

In essence, the Supreme Court majorly comprises lawyer-judges from the High Courts. There have been no appointments of eminent jurists to the bench, even though the Constitution provides for it. Coupled with the issue of transparency with appointments, the prevalent system of lawyer-judges from the High Court only adds to the suspicions of bias (ibid.).

Further, even as the number of women at the Bar has risen through the collegium era of appointments, only 10 have been raised to the position of judges of the Supreme Court (Chandra et al., 2019). Nonetheless, this number is a stark increase from the pre-collegium era and will continue to grow. The issue seems to lie at the High Court level, where Chandra, Hubbard, and Kalantry (2019) note that only 12 out of the 242 High Court Chief Justices appointed in the collegium era were women. They also note that the Supreme Court usually elevates Chiefs from the High Courts to the Supreme Court but the minimal number of women Chief Justices leads to a heavy gender imbalance in the Supreme Court (ibid.).

The tussle between the executive and the collegium intensifies concerning more diverse appointments. For instance, Mr Saurabh Kirpal, an openly gay member of the Bar, has been recommended to the High Court bench by the collegium but returned by the executive which led to a major open feud between the judiciary and the executive (Jannani, 2023). The contentions raised by the executive indicated that Mr. Kirpal's partner was a foreign national and that his sexual orientation was representative of bias (ibid.).

THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

The Ninety-Ninth Amendment Act of 2014 to the Indian Constitution introduced the National Judicial Appointments Commission by amending Articles 124 and 217 of the Constitution (The Ninety-Ninth Amendment, 2014). The system aimed at streamlining the appointments process and ensuring consistency in the opinions of the executive and judiciary by way of the discussions within the NJAC. However, the NJAC lived a short life as the Supreme Court struck down the Ninety-Ninth Amendment in 2015 (Supreme Court Advocate-on-Record Association and Others v. Union of India and Others, 2016). The recent to and fro between the Supreme Court and the members of the executive regarding the appointment process has brought the NJAC back into the limelight (Biswas, 2023).

The idea behind the NJAC was to create a more inclusive and transparent appointment mechanism. The three judicial members would be the CJI and the two senior-most judges of the Supreme Court, while the other three members would be the Law Minister and two eminent personalities. One of these personalities would represent either SC, ST, OBC, minorities, or women, and these personalities would be in the NJAC for three years without the chance of reappointment (The Constitution of India, 1950g). The provisions also stated that if any two members were to refuse a proposal, the candidate could not be appointed (National Judicial Appointments Commission Act, 2014a; 2014b). The appointments to the High Courts must also consider the opinions of the Chief Minister and Governor from the relevant state (National Judicial Appointments Commission Act, 2014c).

The NJAC judgment was a landmark decision by the Supreme Court that delved into various aspects of constitutional law and interpretations of the judiciary with different opinions from the five-judge bench. At the outset, the judges had to answer questions about the involvement of Justice Khehar on the bench and the possibility of bias, given his membership of the collegium at the time. This objection was quickly set aside since all the judges of the Supreme Court could, at some point, be directly or indirectly involved with the collegium (Supreme Court Advocates-on-Record Ass'n v. Union of India, 2016). The Union of India had also asked the Supreme Court to review the Second and Third Judges' Cases along with the NJAC. The Supreme Court rejected this motion but did end up analysing the entire case history and law on judicial appointments as it produced its order on merits (Bhatia, 2015). The Supreme Court in the NJAC order produced its reasoning on two connected points: the notion of judicial primacy and its mandatory nature to secure judicial independence, which are a part of the basic structure of the Constitution (Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr., 1973).

The contemporary discourse creates the impression that any deviations vis-a-vis the collegium system would deter judicial independence. However, the NJAC could have been a step forward in the appointment of judges in India had it been given some time to be reformed or amended to check all the boxes. The majority's opinion was that the ability of two members of the NJAC to stop an appointment could allow the opinion of the judicial members, one of whom is the Chief Justice of India, to be overruled and would therefore thwart the principle of judicial primacy (Supreme Court

COLLEGIUM SYSTEM VS NJAC

COLLEGIUM SYSTEM

Pre 1993, the opinion of the Chief Justice of India was not binding on the President, giving executive primacy in appintments.

Supreme Court Advocates on Record Association v. Union of India, 1993 (Second Judges Case) established a proto-collegium System.

Power to appoint judges to the Supreme Court and High Courts vested in a collegium (CJI + 2 senior most judges of SC + most senior judge whose input would be deemed critical in assessing the candidate's eligibility)

The Case held that the Chief Justice of India's opinion would be binding on the president

The Third Judges case established the current collegium system where CJI will consult the four senior most judges of the Supreme Court before making appointments to the Supreme Court of India.

Judiciary has primacy in appointments, President merely approves the recommendations of the Collegium.

The process of selecting judges for the SC is largely opaque and shrouded in ambiguity, with the criteria used for their appointment remaining largely unknown and informal

NJAC

The 99th Amendment Act of 2014 to the Indian Constitution introduced the NJAC by amending Articles 124 and 217 of the Constitution

The commission was to consist of the CJI, the two most senior judges of the Supreme Court, the Union Minister of Law and Justice, and two eminent persons nominated for a three-year term

The PM Leader of the Opposition in the Lok Sabha, and the CJI nominated the two eminent persons, with one being required to be from the Scheduled Castes or Scheduled Tribes community or OBC or Minority or a woman

The NJAC System required any nominee for a Supreme Court or High Court judge position to have the agreement of at least two of the commission members

A five-judge bench delivered a verdict on 16 October 2016, with a majority of 4:1 declaring both NJAC unconstitutional and null and void

The idea behind the NJAC was to create a more inclusive and transparent appointment mechanism. But The NJAC didn't make explicit provisions for transparency, continuing the opaque nature of proceedings for appointments.

Advocates-on-Record Ass'n v. Union of India, 2016). Additionally, the presence of the Law Minister would breach the principle of separation of powers. The foundation of the reasoning behind judicial primacy was not sounded out in the majority judgment.

Moreover, Justice Chelameshwar, in his dissent, stated that even if such a concept were to exist, it would not target the basic structure of the Constitution. However, the majority stated that even if an amendment has any impact on the basic structure, it will be held null and void. The focus of the judgment was the commitment towards a more transparent collegium, with the insufficiencies of the collegium system clearly identified and delved into in the dissent by Justice Chelameswar (Supreme Court Advocates-on-Record Ass'n v. Union of India, 2016).

However, compared with the collegium system, the NJAC did not change the paradigm of judicial appointments or make transparency provisions (Mehta, 2018). The even numbers within the commission are a potent flaw completely opposed to the traditional manner of constituting any committee (Datar, 2018). Additionally, the absence of definitive qualifications for the eminent persons to be appointed is an error of note.

Despite contentions and current loopholes, the NJAC is expected to lead to faster appointments of judges across the board, given the expedited discussions between the executive and judiciary. It can also lead to useful inputs from the executive regarding the character and security of the proposed judges, as is the application of the executive in the collegium system as well through background checks (Rohatgi, 2018). This warrants the proposition that the Supreme Court could have allowed the government to make requisite changes to the process and the constitutional amendment instead of striking down the entire amendment in the name of the doctrine of basic structure. These modifications could have been absorbed from the best practices followed by similar legal systems across the world.

LEARNINGS FROM INTERNATIONAL MODELS

The premise while undertaking a comparative analysis of global appointment systems is the inherent fear, or rather a suspicion, of executive participation in the appointment of judges by the Indian judiciary. International models have, over the course of the past few decades, progressed to a diverse range of systems as per the requirements or persisting norms within the country.

A classic example for India to follow in law is the United Kingdom. However, even the UK completely transformed its appointments process as early as 2005. The long-established practice within the UK was for the Lord Chancellor, a lawyer with senior standing and eminence, to be a Cabinet member of the sitting government and the head of the judiciary of the UK. The Lord Chancellor, while not bound by a written code or law, followed the general practice of appointing senior lawyers by practice and was impartial as a member of the government towards the ideologies or allegiances held by the said

lawyers (Kentridge, 2003).

Throughout the 20th century, senior judges and lawyers were consulted about the elevation or appointment of judges in "secret soundings" (van Zyl Smit, 2015). This system, while led by the executive, is similar to the collegium system in India, especially in terms of its opaqueness. Towards the end of the century, however, the governments in the UK introduced a commission to keep a check on the appointment procedure and methods practised by the Lord Chancellor (Shetreet & Turenne, 2014). However, such a check on the judiciary in India would be struck down as a threat to judicial independence.

The UK continued its reforms process and introduced a Constitutional Reform Act 2005 in 2005. The Act established two commissions for selecting candidates: one for courts in England and Wales and one for appointing the newly created Supreme Court (The Constitutional Reform Act, 2005). Lord Chancellor's power remains negligible post-2005. A model commission consisting of 15 members is appointed for the appointment of judges to the courts of England and Wales. The 15 members include 6 ordinary ("lay") persons, 5 judges, a solicitor and barrister each, a magistrate and a tribunal judge. The provisions of the Act of 2005 also enumerate the guiding principles to be followed while selecting judges, which must factor in merit, good character, and a focus on diversity (Gee, 2017).

Various Commonwealth nations have moved to a form of the appointments commission. South Africa has a Judicial Services Commission for all courts except its Constitutional Court (The South African Constitution, 1996). It consists of 23 members from legal bodies, the Parliament, four members nominated jointly by the President and the opposition in the Parliament, and a law professor (ibid.). The Commission calls for applications via forms filled out by prospective candidates and then recommends names to the President, which cannot be rejected. However, for the Constitutional Court, the Commission sends several names to the President which are to be consulted with the Chief Justice and major parties in the country. The President can return the proposed candidates to the Commission once, but if the Commission resends them, the final decisions will emerge from that list itself (Abeyratne, 2017).

Hence, the proposed models of the British and South African commissions offer adaptable insight into progressive appointment systems that India could follow.

POLICY SUGGESTIONS

Various international guidelines on judicial independence, including the IBA Minimum Standards of 1982, the Latimer House Guidelines, and the Venice Commission, have recommended the creation of judicial appointments commissions. Various like-modelled jurisdictions across the globe have also moved to a commission-based appointment system. The question that remains to be answered in the Indian context is the nature of the Commission to be adopted.

The executive can participate in the appointment of judges in several ways. In some situations, the executive could have the sole charge of appointments, as seen in the pre-2005 UK model. But these systems require streamlining rules and customary practices to ensure that the executive's power is kept in check. At any rate, these appointment systems would necessarily require extreme transparency, fixed and non-derogable[4] procedures, and clear consultation requirements. This could have been the case with a more detailed procedure set out in the Indian Constitution. However, the best practice that is being moved towards is that of creating judicial appointment commissions, either in a decisive, advisory, or oversight role. The role of the legislative can also be important in certain jurisdictions, such as in the United States. However, the Indian constitution never provided any impetus to the legislature's involvement in judicial appointments.

The aforementioned guidelines recommend having a majority of judges and members of the legal fraternity on the commission. This is primarily to nullify any possible political influence over the appointments. Most Commonwealth nations have proceeded to a system wherein at least half the members of the commission are judges or members of the legal community. However, as seen with the collegium system, a system based solely around judges can also lead to sporadic instances of impropriety. The South African model of including lay persons in the commission and the UK's model of selecting six non-legal and political members is a remedy to the same. In fact, the eminent persons to be selected in India for the NJAC would also have served the same purpose. Interestingly, as the selection panel would have consisted of the Prime Minister, the Leader of the Opposition, and the CJI, the CJI would have had the deciding vote in case of disagreement between the political leaders, giving the judiciary a vital say even in the selection of these eminent persons.

The inclusion of any executive member in the commission can raise apprehensions. Even as the counsels for the Union of India submitted a comparative analysis of 15 jurisdictions to the Supreme Court in the NJAC case to represent the involvement of the executive in appointments, the majority summarily dismissed the analysis. Reliance was placed on an opinion from the Second Judges' Case wherein international comparisons were waved away by stating that other jurisdictions are not meant to be copied. This is an interesting stance to adopt in a constitutional law matter, as the Indian Constitution is a borrowed document from other jurisdictions that have, over time, modified their laws of appointment (the UK being the primary case in point). The majority as a whole in the NJAC case dismissed the international comparisons, with Justice Goel deeming the Constitution to be different

4 Procedure that must be followed and where no deviations are permitted.

in personality from others. The dissent from Justice Chelameswar nullifies any logic behind the majority's stance, as he states that the provisions in Articles 124 and 217 themselves emerged from other jurisdictions, evident even from the Constituent Assembly discussions.

A suitable proposed model for India arrived in 2011 from the Committee on Judicial Accountability, a non-state body, that recommended an appointments commission with a very interesting, democratic, and transparent structure. The structure of the commission consisting of retired judges or eminent personalities[5] (the criteria for qualification as eminent personalities would have to be clarified or decided upon by the commission itself in good faith) for a term of five years would be as follows:

- A chairperson to be selected by all the judges of the Supreme Court;
- A member to be selected by a collegium of all the High Court Chief Justices;
- A member selected by the Government of India;
- A member by the opposition leaders in the Rajya Sabha and Lok Sabha along with the speaker of the Lok Sabha; and
- A final member from a committee comprising of the chief election commissioner, the comptroller and auditor general and the central vigilance commissioner (Bhushan, 2014).

However, before making any procedure for involving the executive, or for that matter any political member of the commission, the Indian government will have to ensure that the Indian judiciary is not dismissive of such a move to not repeat the staunch opposition to the NJAC.

5 The criteria for qualification as eminent personalities would have to be clarified, or decided upon by the commission itself in good faith.

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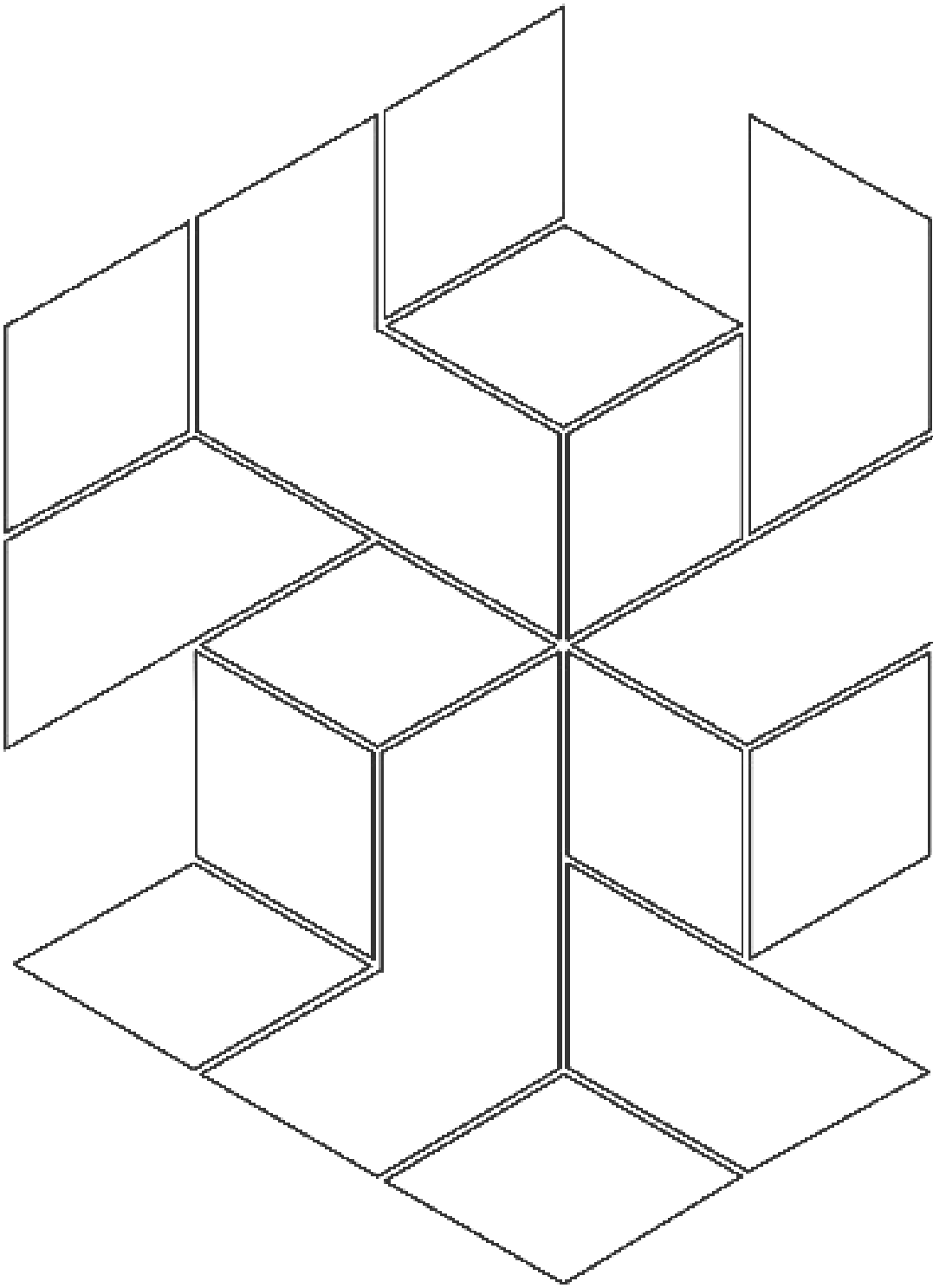

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