THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES, KOCHI

DISSERTATION

Submitted in partial fulfilment of the requirement of the award of degree of

MASTER OF LAW (LL.M)

(2023-24)

ON THE TOPIC

A COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT SYSTEM IN INDIA AND THE UNITED KINGDOM

Under the Guidance and Supervision of

Dr JACOB JOSEPH

Assistant Professor

The National University of Advanced Legal Studies, Kochi

Submitted by:

SRI MATHURA S

Register No: LM0123016
Roll No: 10574

LL.M (Constitutional and Administrative Law)

CERTIFICATE OF SUPERVISOR

This is to certify that **SRI MATHURA S**, Reg. No: **LM0123016** has submitted her Dissertation titled, "**A COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT SYSTEM IN INDIA AND THE UNITED KINGDOM**", in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that, the dissertation submitted by her is original, bona-fide and genuine.

Date: 20.06.2024
Place: Ernakulam

Dr Jacob Jospeh
Assistant Professor,
NUALS,Kochi
(Supervisor)

DECLARATION

I declare that this dissertation titled, "**A COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT SYSTEM IN INDIA AND THE UNITED KINGDOM**", researched and submitted by me to the National University of Advanced Legal Studies in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of Dr. Jacob Joseph is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

Date:20.06.2024
Place: Ernakulam

Sri Mathura S
Reg no:**LM0123016**
LL.M (Administrative & Constitutional Law)
NUALS,Kochi

ACKNOWLEDGMENT

I am deeply grateful for the invaluable guidance, support, and encouragement I received while writing this dissertation. I owe an outstanding debt of gratitude to my mentor and supervisor, Dr. Jacob Joseph, for his unwavering patience, insightful advice, and continual support, all of which were pivotal in completing this work. His mentorship helped me navigate the challenges and enriched the quality of my research and writing, making this accomplishment possible.

Additionally, I want to express my deep gratitude to Prof. (Dr.) Mini S, Director of the Centre for Post Graduate Legal Studies, for her efforts in shaping us into Post Graduate Research Scholars and instilling the confidence to express our academic opinions.

I thank all the faculty at NUALS, Kochi, for their constant support and motivation. I also want to thank the librarians for their timely help. My deepest gratitude goes to my family and friends for their love and encouragement. Without them, I wouldn't have been able to take up this project with such enthusiasm. I am incredibly grateful to my parents, who have always been my unwavering source of strength.

SRI MATHURA S

ABBREVIATIONS

BAME - Black, Asian and Minority Ethnic

CJI - Chief Justice of India

CRA - Constitutional Reforms Act,2005

EIC - East India Company

HC - High Court

IB - Intelligence Bureau

JAAB - Judicial Appointments Advisory Board

JAAC - Judicial appointments Advisory Committee

JAC - Judicial Appointment Commission

Mop - Memorandum of Procedure

NJAC - National Judicial Appointments Commission

RTI - Right to Information Act, 2005

SC- Supreme Court

UK - United Kingdom

US - United States of America

LIST OF CASES

1. Samsher Singh Vs State of Punjab AIR 1974 SC 2192
2. Union of India Vs Sankalchand Himatlalseth AIR 1977 SC 2328
3. S.P.Gupta Vs Union of India AIR 1982 SC 149
4. Supreme Court Advocates on Record Association Vs Union of India AIR 1994 SC 149
5. Presidential Reference AIR 1999 SC 1
6. Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC
7. PLR Projects (P) Ltd. v. Mahanadi Coalfields Ltd., (2020) 20 SCC 791
8. Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481
9. R.P. Luthra v. Union of India, (2018) 13 SCC 417.
10. Indira Jaising v. Supreme Court of India, (2003) 5 SCC 494.
11. Tirupati Balaji Developers (P) Ltd. v. State of Bihar, (2004) 5 SCC 1
12. Imtiyaz Ahmad v. State of U.P., (2012) 2 SCC 688.
13. Shanti Bhushan v. Union of India, (2009) 1 SCC 657
14. Harsh Vibhore Singhal v. Union of India WP(s)(Civil) No(s). 702/2023
15. Advocates Association Bengaluru v. Barun Mitra And Anr. Contempt Petition (C) No. 867/2021 in TP(C) No. 2419/2019] 2022 LiveLaw (SC) 1013
16. Anjali Bhardwaj Vs CPIO, SC(RTI Cell) 2022 Livelaw(SC)1015
17. Shri Mathews J. Nedumpara & Ors. v. Hon'ble The Chief Justice of India & Ors., Writ petition (civil) No. 1005 OF 2022
18. Maruti Sondhiya vs. Union of India and Others (Writ Petition No. 28550 of 2023) 2024 LiveLaw (MP) 91
19. CA Rakesh Kumar Gupta Vs Supreme Court of India through Secretary General 2024 LiveLaw (Del) 655

TABLE OF CONTENTS

CONTENTS	PAGE NO:
Chapter 1 - Introduction 1.1 Research Methodology 1.2 Statement of Problem 1.3 Objectives 1.4 Research Questions 1.5 Hypothesis 1.6 Limitations 1.7 Literature Review 1.8 Scheme of Presentation	**9-20**
Chapter 2- Judicial Appointment System 2.1 Introduction 2.2 Judicial Appointments in Civil and Common Law countries 2.3 Judicial Appointments in Different Nature of Governments 2.4 Methods of Judicial Appointment	**21-38**
Chapter 3 - Evolution of the Judicial Appointment System in India 3.1 Introduction 3.2 Origin and History 3.3 Ancient India 3.4 Medieval period 3.5 India under British Rule 3.6 Various Committee Reports 3.7 Constitutional Assembly Debates 3.7.1 Supreme Court 3.7.2 High Courts	**39-57**
Chapter 4 - Judicial Appointments in Indian Constitutional Courts 4.1 Introduction 4.2 Constitutional Provisions 4.3 Appointment procedure and practices 4.4 Controversy over Consultation 4.5 Landmark Judicial Decisions 4.6 Criticism of Collegium System 4.7 Enactment of NJAC & 99th Constitutional Amendment	**58-86**

Act,2014 4.8 NJAC Judgment 4.9 Critiques of NJAC Judgment 4.10 Present memorandum of procedure 4.11 Challenges 4.12 Collegium vs NJAC	
Chapter 5 - Judicial Appointment in the United Kingdom 5.1 Introduction 5.2 Historical Context 5.3 Constitutional Reforms Act, 2005 5.4 Judicial Appointment Commission 5.5 Procedure for appointment of judges to Supreme Court 5.6 Transformation and Independence	**87-98**
Chapter 6 - Comparative Analysis of Judicial Appointment System:the United Kingdom and India 6.1 Appointment Process 6.2 Qualification 6.3 Role of executive 6.4 Transparency 6.5 Accountability 6.6 Efficiency	**99-104**
Chapter 7 - Conclusion : Recommendations and Suggestions 7.1 Introduction 7.2 The Collegium under scrutiny : Key Failures 7.3 Assessing NJAC's viability as a collegium replacement 7.4 How UK's JAC has performed 7.5 Research Findings 7.6 Hypothesis Validation 7.7 Recommendations and Suggestions	**105-119**
Bibliography	**120-126**
Appendix	**127-132**

CHAPTER 1: INTRODUCTION

The judiciary is a vital institution in any democratic society, responsible for interpreting and enforcing the law fairly and impartially. It ensures that justice is served and individual rights are protected. Its importance lies in several vital functions:[1]

1. It interprets laws enacted by the legislature and ensures their consistent application, setting precedents and clarifying legal principles.
2. It serves as a critical check on the power of the executive and legislative branches, reviewing and invalidating actions that contravene constitutional principles.
3. The judiciary safeguards fundamental rights and liberties against government infringement, resolves disputes peacefully, promotes justice and fairness, and acts as the guardian of the Constitution.

The presence of an independent judiciary is crucial for the smooth functioning of a democratic constitution[2].In a society where the judiciary is independent, citizens are confident that justice will be served fairly and impartially, regardless of their social status or political affiliation[3]. This creates an atmosphere of trust and respect for the rule of law, which is vital for society's overall well-being. *"No democracy can flourish without an independent judicial system, a system free from fear or favour and isolated from the other branches of government. It enhances the prosperity and stability of the social order"*[4]. In India's democratic system, citizens who have lost faith in the political process often turn to the Supreme Court as their final recourse. It is, therefore, crucial to protect the independence of the judiciary and ensure that it continues to play an active role in safeguarding democracy.[5]

---

[1] Omdutt Role Of Judiciary In The Democratic System Of India(Judicial Activism Under The Supreme Court Of India) : Golden Research Thoughts (Sept ; 2012)

[2] Jodhta, B.K., 2023. *Indian Judiciary: A Tool for Good Governance and Promoting Democracy*. INDIAN J. INTEGRATED RSCH. L., 3, P.1.

[3] Sabita Bandyopadyay, *Reforms in Judiciary-A Loud Thinking*, JOURNAL OF ALL INDIA REPORTER 23 (2000).

[4] M.P Singh, Securing the independence of Judiciary: the Indian experience Indian international and comparative law review, vol 10 (2000).

[5] Zia Mody, 10 judgements that changed India, Penguin Books India, 2013

Judicial systems vary significantly in structure, jurisdiction, and appointment processes across the globe, reflecting different nations' diverse legal traditions and political systems. One of the critical aspects of any judicial system is the method by which judges are appointed, as it directly impacts the judiciary's independence, integrity, and credibility. A fair and impartial appointment process could protect the judiciary's ability to function independently and uphold the rule of law[6]. Appointment of judges requires careful consideration to select the most qualified individuals. An ideal judicial system shall strike a balance between judicial independence and accountability.

India adopted its Constitution 74 years ago, but the country is still grappling with appointing judges in a manner consistent with the Constitution and democratic principles. The courts are entrusted with upholding the Constitution and are seen as the embodiment of the new laws created by Indians for Indians. The members of the Constituent Assembly took considerable time in discussing and debating how to ensure the independence of the judiciary. Ultimately, they agreed upon a consultation process between the President and the Chief Justice of India (CJI) and other senior judges to appoint judges to the Supreme Court.

In the early years of Indian democracy, judicial appointments were made on a consensus between the Government of the day and the CJI.[7] However, significant changes occurred in the 1970s, resulting in conflicts between the legislative and judiciary. In the early 1990s, the Supreme Court introduced the "Collegium" system for judicial appointments, which is not stated in the Indian Constitution.

The Collegium, a group of five judges headed by the CJI, holds power to control appointment of judges to the constitutional courts in India and has taken over this responsibility from the executive branch through a series of questionable rulings. Unfortunately, the process is highly secretive and needs more transparency,

---

[6] R. C. Lahoti, *Quest for Judicial Excellence* 1 JOURNAL OF THE NATIONAL JUDICIAL ACADEMY BHOPAL (2005).

[7] Collegium System,ilerancana, https://ilearncana.com/details/Collegium-System/3294 (Last accessed at MAR 7, 2024)

so there is no room for public scrutiny of the individual nominees.

Legal scholars have proposed the establishment of a Judicial Appointment Commission, comprising both judiciary and executive public officials, to appoint judges in the higher judiciary[8]. The United Kingdom (UK) has implemented a similar process following the Constitution Reform Act (CRA) 2005. An independent Judicial Appointment Commission, consisting of political, judicial, and professional members, now handles judicial appointments in the UK.

The National Judicial Appointment Commission Act, 2014 and 99th Constitutional Amendment established the judicial appointment commission in place of the existing collegium system of appointments. In 2015, the Supreme Court of India decided the fourth judges' case[9], challenging the 99th Constitution Amendment Act, 2014 and the National Judicial Appointment Commission and held that the executive involvement in the appointment of judges impinges upon the independence of the judiciary. This violates the principle of separation of powers between the executive and judiciary, an essential feature of the Constitution.[10] The judges held that the appointment of judges, coupled with the primacy of the judiciary and the CJI, was part of the basic structure of the Constitution and that the parliament had no power to tinker with this structural distribution. ―The primacy of the judiciary and the limited role of the Executive in the appointment of judges is part of the basic structure of the Constitution. The primacy of the judiciary is in initiating a proposal and finalising the same. The CJI has the last word on the matter.After the Fourth Judges case, Indian legal scholars are again debating and discussing the lacunas of the collegium system and developing a new judicial appointment commission model. Since then, there has been debate and discussion concerning the shortcomings of the collegium system and the development of a new judicial appointment commission

---

[8] Janak Raj jai, Commission and Omission in the administration of justice, (New Delhi Regency, 2003)

[9] Supreme Court Advocates-on-Record - Association v. Union of India, AIR 2015 SC 2439

[10] Saul Porsche Makama, *Constitutionalism and Judicial Appointment As a Means of Safeguarding Judicial Independence in Selected African Jurisdictions* (2012), https://core.ac.uk/download/43173342.pdf (last accessed MAR 7, 2024)

model.

1.1 RESEARCH METHODOLOGY

The researcher has employed doctrinal, analytical, and descriptive research method to investigate and compare different models of judicial appointment. The study variable identified in this research design differs across two states: the UK has transitioned from Executive Dominance to Judicial Commission to appoint judges. India is currently transitioning from Collegium to Commission and back to Collegium with some modifications.

There are two types of sources for legal research: primary and secondary. Primary sources include legislation and case law, while secondary sources include articles published in law reviews, leading journals, textbooks, and other similar publications. For the current dissertation, the doctrinal approach has been adopted, and both primary and secondary sources have been used to gather necessary material.

1.2 STATEMENT OF PROBLEM:

India's Collegium system for selecting judges has been heavily criticised for its lack of transparency and accountability. The judges are primarily responsible for selecting their peers, leaving room for arbitrary and unreasonable exercise of powers. This system could promote nepotism and political influence, undermining public trust in the Judiciary. Furthermore, the system lacks diversity and inclusivity, failing to reflect the country's demographics and marginalised groups in its appointments[11].

The executive branch needs a balanced role in maintaining the independence and accountability of the Judiciary[12]. Additionally, there needs to be more clearly defined and consistent criteria for selecting judges based on merit, integrity, and competence. The failure of the judicial system to fill vacancies in many

---

[11] Uday Shankar & Srichetha Chowdhury, *Representative Judiciary in India: An Argument for Gender Diversity in the Appointment of Judges in the Supreme Court,* 2 ILI LAW REV. 200 (Winter 2019)

[12] JI Conference Moscow, Justice Initiative Washington Partners, https://www.jiwp.org/ji-conference-moscow (last accessed MAR 7, 2024)

High Courts for extended periods has resulted in a significant backlog of pending cases and delayed justice delivery[13]. This inadequate response has faced intense criticism from both the legal profession and the Judiciary, leading some lawyers to voice their concerns in the media and initiate week-long strikes[14].Overall, there is a need for reform in the current Collegium system to address these drawbacks and improve transparency, accountability, and inclusivity while maintaining judicial independence, which is essential to strengthen the integrity of India's Judiciary.

1.3 OBJECTIVES:

a. To conduct a comprehensive analysis of the constitutional and statutory provisions that govern the appointment of judges in the higher courts of India and the UK. The analysis will focus on the relevant provisions in the Indian Constitution, the UK Constitution, and related legislation.

b. To examine the qualification criteria and eligibility requirements for appointing judges in India and the UK. This will include a detailed review of the education, experience, and other qualifications required for appointment to the higher courts in both countries.

c. To assess the level of transparency in the appointment process of judges in India and the UK. This will involve an examination of the various stages of the appointment process, including the role of different stakeholders, the criteria for selection, and the level of public involvement and scrutiny. The analysis will also consider any recent reforms or changes to the appointment process in both countries.

1.4 RESEARCH QUESTION:

1) What are the constitutional and statutory provisions governing the appointment of judges to the higher courts in India and the UK?

---

[13] Singh, V,*Collegium system vis-à-vis national judicial appointments commission: a critical appraisal,*2016, INTERNATIONAL JOURNAL OF RESEARCH IN ECONOMICS AND SOCIAL SCIENCES, 6(1), pp.348-354

[14] Gadgil, S., *Judicial Appointments: Of Collegiums and More,* 2020,SUPREMO AMICUS, 18, p.792.

2) What are the qualifications and criteria for appointing judges in the higher courts of India and the UK?

3) How transparent is the appointment process of judges in India and the UK?

4) Are there mechanisms for public scrutiny and accountability in selecting judges in each jurisdiction?

1.5 HYPOTHESIS:

1) There are significant differences in the transparency and accountability in judicial appointment process in India and UK.

2) Qualifications and criteria for the appointment of judges in two jurisdictions differ significantly leading variations in diversity.

1.6 LIMITATION:

The research conducted on the judicial appointment system has certain limitations that need to be considered. Firstly, the study only focused on the constitutional courts of India for its comparative analysis, and did not delve into judicial appointments of subordinate judiciary in detail. The study only compares the Indian Judicial Appointment system with the UK. The UK's system underwent changes through the Constitutional Reforms Act of 2005, and the study assesses the qualifications and criteria set forth by both systems. The study highlights the differences between the two systems regarding transparency and accountability. However, it is essential to note that the study did not compare the Indian system with other available judicial appointment systems. Secondly,the research is specifically centered on the process of appointing judges, excluding any examination of their transfer between high courts and the removal of judges.Therefore, the research could have provided a broader perspective on the topic, highlighting any unique features, strengths, or weaknesses of the Indian system compared to others.It is essential to acknowledge these limitations when interpreting the research findings, as the scope of the study was limited. However, the research still provides valuable insights into the judicial appointment system of the constitutional courts of India.

1.7 LITERATURE REVIEW:

1. *"Recasting the Judicial Appointments Debate: Constitutional Amendment (120th Amendment) Bill, 2013 and Judicial Appointments Commissioner Bill, 2013"* Working Paper No.1/2014 of Centre for Law and Policy Research

The text provides a thorough analysis of how the Judicial Appointments Commissioner Bill and the proposed constitutional amendment are likely to impact the judicial appointments process in India.

2. Mr Abhinav Shakula and Dr Shailesh N Hadli, "*Judicial appointments in India- A critical analysis towards amelioration"* May 2021, Volume 8, Issue 5, Journal of Emerging Technologies and Innovative Research (JETIR).

This article examines the current process for appointing judges in India by pointing out problems and suggesting changes. The authors argue for more openness and responsibility in the way judges are chosen.

3. Kadri, Dr. Harunrashid A., *"Judicial Appointments Mechanism in India and Independence of Judiciary - A Critical Analysis"* (December 30, 2017). National Capital Law Journal, Vol. 16, 2017,

Dr. Kadri's article explores how judges are chosen in India and how this affects their freedom to make fair decisions. The article looks closely at the Collegium system and the NJAC proposal, comparing how well they protect judges' independence. The author discusses different cases to show how judges' choice affects their freedom. The article also suggests ways to make choosing judges more transparent and responsible.

4. Plascencia, Iveth A., *"Judicial Appointments: A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around the World"* (2015). Law School Student Scholarship. 666.

Plascencia's comparative study examines four distinct judicial appointment models from different sovereign states, assessing their effectiveness, transparency, and influence on judicial independence. The article presents a comparative framework that illuminates the strengths and weaknesses of each model, providing valuable insights for potential reforms in other jurisdictions, such as India. The study underscores the

significance of adopting a balanced approach that safeguards both judicial independence and accountability.

5. Chandrachud, Chintan, *"Judicialisation of Judicial Appointments? A Response from the UK"* (April 18, 2018). A Sengupta and R Sharma (eds), Appointment of Judges to the Supreme Court of India (OUP 2018).

Chandrachud's research offers a comparative analysis of judicial appointments, focusing on the UK's approach. The study explores the judicialization of the appointment process, drawing parallels with India's system. Chandrachud contends that the UK's model, which involves substantial involvement from the executive and legislative branches, could provide valuable insights for India in balancing judicial independence and accountability. The research suggests that incorporating certain practices from the UK could help address transparency and accountability concerns in India's Collegium system.

6. Dr Anurag Deep and Shambhavi Mishra, "*Judicial appointments in India and NJAC Judgment: formal victory or real defeat"* 2018 Jamia Law Journal Vol:3

This article analyzes the NJAC judgment and its implications for judicial appointments in India. Dr. Deep and Mishra examine whether the judgment signifies a formal victory for judicial independence or a real setback for systemic reforms. They discuss the potential pros and cons of the NJAC, exploring how its rejection impacts the ongoing challenges within the Collegium system. The authors advocate for a balanced approach that maintains judicial independence while improving transparency and accountability.

7. Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017) (International IDEA) Second edition.

Bulmer's primer offers a global perspective on judicial appointments, discussing various models and their constitutional implications. It provides practical insights into designing judicial appointment systems that balance independence, transparency, and accountability. The article is valuable for understanding how different countries approach judicial appointments and the principles that underpin successful systems.

Bulmer's analysis is particularly relevant for policymakers and scholars seeking to reform judicial appointments in India.

8. Roger Smith, "*Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance*," 32 Journal of Law and Society 187, 189 (2005)

Roger Smith's article in the Journal of Law and Society explores the UK's significant constitutional reforms, particularly the impact on human rights and the role of the Lord Chancellor. He discusses the transition from traditional roles to a more modernized and transparent system, evaluating the effectiveness of the reforms in achieving judicial independence and human rights protections. Smith concludes that while the reforms represent progress, ongoing vigilance and further adjustments are needed to fully realize the goals of judicial independence and human rights protection.

9. Lord Windlesham, "*The CRA2005: Ministers, Judges and Constitutional Change: Part 1,*" [2005] Public Law 806, 807

Lord Windlesham's article in Public Law analyzes the CRA2005 and its impact on the relationship between ministers, judges, and constitutional change in the UK. It highlights the creation of the Supreme Court of the UK, the establishment of the Judicial Appointments Commission (JAC), and the redefined role of the Lord Chancellor as key elements of the reform. Windlesham argues that the Act represents a significant shift in the UK's constitutional landscape, promoting a clearer separation of powers and enhancing the transparency of judicial appointments while acknowledging potential risks.

10. Graham Gee et al., "*The Politics of Judicial Appointments in the UK*," 13 Int'l J. Const. L. 183 (2015)

Graham Gee and colleagues studied how judges are selected in the UK. They discuss the influence of politics on the selection process, the role of key actors, and the challenges in maintaining judicial independence. They emphasize the need for ongoing vigilance to address emerging challenges and maintain public confidence in the judiciary.

11. Robert Hazell & Kate Malleson, "*The Politics of Judicial Independence in the UK's Changing Constitution,*" 14 U. Pa. J. Const. L. 637 (2012)

Robert Hazell and Kate Malleson's article in the University of Pennsylvania Journal of Constitutional Law discusses the evolving nature of judicial independence in the UK's changing constitutional landscape. They analyze the impact of the CRA 2005 and argue that while it has enhanced judicial independence, challenges like potential political influence in the appointment processes still remain. The article calls for continued scrutiny and adaptation of judicial appointment processes to safeguard judicial independence amidst the evolving constitutional framework.

1.8 SCHEME OF PRESENTATION

The data gathered through proper research methods will be analyzed and presented in a structured manner, divided into different chapters.

Chapter 1 - Introduction

This chapter will provide an overview of the research work, the hypothesis formulated for the study, and the methodology used to conduct the research.

Chapter 2 - Judicial Appointment System

The chapter focuses on Structure, Process of various methods used for appointing judges across the globe. There are five methods discussed in this chapter: judicial appointment by the judicial institute itself, political institute, judiciary committee, electoral system and hybrid model of appointment. This chapter covers a vast time frame and provides a recent perspective on the applied methodologies of judicial appointments worldwide.

Chapter 3 - Evolution of Judicial Appointment System in India

This chapter delves into the evolution of the judicial appointment system in India, tracing its origins from ancient India, through medieval times, and into the period of British rule. It places particular emphasis on the impact of the Government of India Acts of 1909, 1919, and 1935, examining the allocation of authority for appointing judges under these legislative acts. Furthermore, the chapter explores the debates within the constituent assembly surrounding the draft articles pertaining to judicial

appointments, shedding light on noteworthy proposed amendments within this domain.

Chapter 4 - Judicial Appointment in Indian Constitutional Courts

The chapter provides valuable insights into the evolution of the judicial appointment process over the past 75 years. It begins with examining constitutional provisions and then delves into the controversy over consultations as discussed in landmark cases such as the 1st, 2nd, 3rd, and 4th judges' cases. Additionally, the chapter highlights the criticism of the collegium system, which prompted the enactment of the NJAC and the 99th constitutional amendment. However, the NJAC was struck down in the 4th judges' case. The chapter also sheds light on the differences between the collegium and the NJAC and criticisms of the NJAC judgment.

Chapter 5 - Judicial Appointment in the United Kingdom

The process of appointing judges in the UK is studied by comparing how judges are chosen for the Supreme Court and other high courts in the UK. The study looks at the changes in the process over the past 20 years and includes information from other reports on how judges are selected. It gives a brief overview of how the UK's system for appointing judges has developed, focusing on the CRAof 2005, which was approved by a public vote. The study also looks at the current method of appointing judges in the UK, which involves a judicial committee.

Chapter 6 - Comparative study of Judicial Appointment System: The United Kingdom and India

This chapter compares how judges are appointed in India and the UK. We will analyze laws that shape the appointment process, review qualifications required, and assess transparency levels. By comparing the two systems, we can understand the balance between judicial independence and accountability.

Chapter 7 - Conclusion : Recommendations and Suggestions - The final chapter of this comprehensive study presents detailed and practical recommendations for improving the process of appointing judges in the Supreme Court and High Courts of India. The main goal of this research is to establish a judicial appointment system that is resolute, transparent, and efficient for the people of India while ensuring the

independence and accountability of the Judiciary. The chapter thoroughly examines the current system, identifies its strengths and weaknesses, and proposes specific solutions that can enhance the system's effectiveness. With these recommendations, it is hoped that the Judiciary can continue to uphold the rule of law and provide a fair and impartial justice system for all citizens of India.

CHAPTER 2 : JUDICIAL APPOINTMENT SYSTEM

2.1: INTRODUCTION

Democracy is a system in which people can participate in decision-making through electing representatives or direct involvement. In a democratic system, the Constitution is the highest authority, with the Judiciary acting as its guardian[15]. The separation of powers divides governance of the state into three branches: the Legislature, which is responsible for creating laws that represent public interests; the Executive, which is responsible for enforcing laws under the leadership of a President or Prime Minister; as the case maybe and the Judiciary, which is responsible for interpreting and applying laws, ensuring that they comply with the Constitution and protect individual rights.[16]

The system of separation of powers aims to prevent any one part of the government from becoming too powerful. This helps to keep one branch from having too much control and reduces the risk of a single person or group having too much authority. It promotes freedom and democracy. As a key part of this system, the Judiciary is responsible for ensuring that the government's laws and actions follow the Constitution. It also protects individual rights and stops the government from violating them[17].

Thus in a democratic system, the Judiciary is a vital component that helps to ensure that the government functions in the interest of the people and that there is a balance of power between the three branches of government[18]. For this reason, an independent, competent, honest, and impartial Judiciary is fundamental to the strength and resilience of a democratic constitutional order.[19] Judges are the cornerstone of the

---

[15] REETIKA BANSAL, THE ROLE OF JUDICIARY IN INDIA(2020)

[16] Lakshit Lashkar Bhadu, *Separation of Powers: A System of Checks and Balances* (August 1, 2021). Available at SSRN: https://ssrn.com/abstract=3941187 (last accessed Mar 7,2024)

[17] ibid

[18] Poonam Kataria, "*Judicial Independence in India: An Overview*" 1 INTERNATIONAL JOURNAL OF APPLIED RESEARCH 397-400 (2015) available at: www.allresearchjournal.com

[19] Drishti IAS, Democracy and the Role of the Judiciary, https://www.drishtiias.com/blog/democracy-and-the-role-of-judiciary (last accessed Mar 7,2024)

Judiciary, and their ability to perform their duties with integrity is essential to its effectiveness. In the appointment process of judges, there are three critical factors to consider[20]:

1. It is crucial to ensure the independence of the judiciary from the executive and legislature, party politics, and vested interests.
2. It is important to have a diverse and inclusive group of judges, including those of different genders, backgrounds, and ethnicities.
3. Ensuring the appointed judges possess the required quality and calibre to perform their duties efficiently is essential.

2.2 JUDICIAL APPOINTMENT IN CIVIL AND COMMON LAW COUNTRIES

The process of judicial appointments varies significantly between civil law and common law countries. Let's delve into the distinctions between these two legal systems:

2.2.1 Civil Law Countries:

The civil law system is codified and originated from Roman law, featuring a written constitution based on specific codes governing civil, corporate, administrative, tax, and constitutional law. Fundamental rights and duties are enshrined in these codes. Many countries that were former colonies or protectorates of France, the Dutch, Germany, Spain, and Portugal, including much of Central and South America, followed the civil law system. This legal structure is also prevalent in most Central and Eastern European and East Asian countries.[21]

Judges in civil law tend to follow previous judicial decisions, as there is little scope for judge-made law in civil, criminal, and commercial courts[22]. However,

---

20 Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017)

21 World Bank Toolkit (2006), Approaches to Private Participation in Water Services, (presentation to IFC on Some Differences between Civil Law and Common Law in a "nutshell" - Gide Loyrette Nouel 2007)

22 Diffen, Civil Law Vs Common Law, https://www.diffen.com/difference/Civil_Law_vs_Common_Law (last accessed Mar 7,2024)

constitutional and administrative courts can nullify laws and regulations, and their decisions are binding for all in such cases. In some civil law systems, such as Germany, legal scholars' writings significantly influence the courts. Courts specific to the underlying codes exist, with separate constitutional, administrative, and civil court systems that interpret and opine on the consistency of legislation and administrative acts with the specific code.[23]

In many civil law countries, judges typically spend their entire careers within the judiciary. They follow a trajectory that remains focused on judicial roles. Judges in civil law systems often come from legal backgrounds, having honed their expertise through years of legal practice or service. The appointment process for judges in civil law countries emphasizes qualifications, experience, and legal knowledge. These judges are often selected based on their demonstrated competence and understanding of legal principles.Civil law countries often employ a bureaucratic model for judicial appointments[24], example a judicial council or similar body.

2.2.2 Common Law Countries:

A common law system may not always have a written constitution or codified laws. Common law systems are typically followed by countries that were once British colonies or protectorates, including the United States. Judicial decisions are binding, which means that the highest court's decisions can only be overturned by that same court or through legislation. A common law system is less prescriptive than a civil law system. Everything that is not expressly prohibited by law is generally permitted. Therefore, a government may want to protect its citizens by enshrining specific legislation related to the contemplated infrastructure program[25].

Common law countries predominantly rely on executive appointments to select judges. The executive branch (usually the government) plays a central role in appointing judges. In some cases, legislative approval is required for judicial

---

[23] *ibid*

[24] Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017)

[25] World Bank Toolkit (2006), Approaches to Private Participation in Water Services, (presentation to IFC on Some Differences between Civil Law and Common Law in a "nutshell" - Gide Loyrette Nouel 2007)

appointments. The appointment process for constitutional court justices can be intricate and often involves collaboration among the executive, legislative, and judicial branches to ensure a diverse court composition.

In contrast to civil law systems, common law systems often see judges transitioning from senior positions in private legal practice to the bench. These judges bring practical experience from their legal careers[26]. Judges in common law countries are frequently appointed from among seasoned lawyers who have excelled in private practice. Their background includes advocacy, legal representation, and courtroom experience[27].

2.3 JUDICIAL APPOINTMENT IN DIFFERENT NATURE OF GOVERNMENTS

The appointment of judges is a crucial aspect of any legal system, and the nature of Government significantly influences the judicial appointment process as it shapes the transparency, independence, and effectiveness of the Judiciary. Lets us critically analyse, the different forms of Government reveals the impact of Government on judicial appointments.

I. Democratic governments must prioritise merit, expertise, and independence to uphold the rule of law and ensure judicial impartiality. The appointment of judges may involve consultation with legal experts, parliamentary committees, and independent commissions to select candidates based solely on qualifications rather than political affiliation. Partisan politics must not influence the appointment process; otherwise, it can lead to debates over ideology and judicial activism[28].

II. Authoritarian regimes are prioritising loyalty and obedience over qualifications, leading to the politicisation of the Judiciary and the erosion of

---

[26] Diffen, Civil Law Vs Common Law, https://www.diffen.com/difference/Civil_Law_vs_Common_Law last accessed Mar 7,2024)

[27] ibid

[28] Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017)

judicial independence. The Judiciary must be independent and impartial to ensure that courts remain guardians of justice rather than instruments of repression[29].

III. Hybrid systems must ensure that political considerations, party affiliations, or personal connections do not influence the appointment of judges. The Judiciary must be impartial and credible, and the appointment process must be transparent and accountable. Weak transparency and accountability mechanisms exacerbate concerns over judicial integrity.

IV. Transitional governments undergoing political reform must establish an independent and impartial judiciary. The appointment of judges must reflect competence, not political affiliation. International assistance and oversight mechanisms must promote transparency, professionalism, and adherence to the rule of law in transitional contexts, mitigating the risk of politicisation and ensuring judicial independence.

The guiding principles in assessing the working of judicial appointment system has to be based upon transparency, accountability, and adherence to legal principles and upholding the rule of law in diverse political contexts. When appointing judges, we must prioritise merit, expertise, and independence, creating an impartial judiciary that upholds the rule of law. Any attempt to politicise the Judiciary will lead to the erosion of justice and the rule of law.

2.4 METHODS OF JUDICIAL APPOINTMENT

The process of selecting judges is, therefore, critical. The selection process must be designed to ensure that only the most competent and impartial candidates are selected for judicial appointments. The process should also be open to public scrutiny to ensure the public has confidence in the Judiciary's independence and impartiality. The balance between legal expertise, practical experience, and political considerations shapes the judicial appointment landscape worldwide.To achieve this, judges must be selected based on merit without external pressure or influence. It is, therefore,

---

[29] Peter H. Solomon,*Courts and Judges in Authoritarian Regimes*. 60 WORLD POL.122(2007).

important that the mode of selecting judges helps to meet these requirements[30]. The following methods for judicial appointment systems are widely practised across the globe and can be broadly classified for the purpose of understanding as follows[31].

I. Appointment by Judiciary
II. Appointment by Judicial Council
III. Appointment by Political Institution
IV. Selection through election system
V. Hybrid Model of Judicial Appointment

I. Appointment by Judiciary :

The appointment by judiciary is a self-appointment system in which the Judiciary appoints its judges without approval from any other political institution or popular election. Thus, the Appointment by Judiciary method is a process whereby Judges are appointed by other Judges, without the need from any other institution.[32] Supporters of this system argue that it guarantees the highest level of independence for judges not only from other political institutions but also from the public[33]. The countries that follow this model are India, China, Russia and Saudi Arabia. This method provides tremendous power to the Judiciary, but at the same time it minimizes their accountability, leading to a decline in popularity of this method across the globe.

Nonetheless, it is undeniable that this methodology of appointment provides the highest degree of independence to the Judiciary, safeguarding it from checks and balances from other institutions. The model in question has been criticised due to its lack of accountability. This has resulted in a decline in its use. However, it is worth noting that this model offers unparalleled independence, a highly desirable trait for any model. Independence is necessary to

---

[30] Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017)

[31] Iveth A. Plascencia, *Judicial Appointments: A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around the World* (2015). Seton Hall Univ. Sch. Of Law Student Scholarship. 666. https://scholarship.shu.edu/student_scholarship/666 (last accessed Mar 8, 2024)

[32] United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org.(last accessed Mar 8, 2024)

[33] ibid

ensure that external factors do not influence the model and that it can function autonomously. Despite the criticisms, the model's independence remains a highly sought-after feature.

Examples:

i. India : The process of judges' appointment is the result of judicial innovation and is not a borrowed one. In India, judges are appointed as per the collegium system, which is the result of the 'Three Judges Case' adjudicated by the Supreme Court which is entrusted with the work of appointment and transfer of judges in the higher judiciary of India. Until 1993, judges of the Supreme Court and high courts were appointed by the President of India after seeking consultation from the Chief Justice of India and two senior-most judges of the Supreme Court. This has led to the judiciary being largely self-appointing in practice.[34] It is pertinent to mention here that our Constitution is silent on the present prevailing collegium system.

ii. In Saudi Arabia, the High Court Chief, and the Chiefs of the High Court Circuit are appointed by a royal decree, following the recommendation of the Supreme Judiciary Council. The council consists of ten high-level judges and other judicial heads[35]. New judges and assistant judges serve a one and two-year probation period, respectively, before receiving permanent assignments.[36] While it may appear that the executive branch (the King) makes the appointment, the individuals appointed are, in fact, chosen by a judicial council comprising only judges. Moreover, at the end of the probation period, the judges are reviewed by another panel of judges[37]. Thus, the power of appointment and retention of judges is entirely held by the judiciary[38] not given to the people or the legislature. Saudi Arabia is

---

[34] ibid

[35] Constitution of Saudi Arabia Chapter 6, art 52: The appointment of judges and the termination of their duties are carried out by Royal decree by a proposal from the Higher Council of Justice in accordance with the provisions of the law.

[36] ibid

[37] Ansary, Abdullah Fakhry. *Saudi Judicial Reform and the Principle of Independence*. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE. May 5, 2009.

[38] ibid

undertaking proactive efforts to reform and modernize its judicial systems[39], including adopting modern technology, appointing more judges, introducing intensive training programs, and electronic monitoring to ensure transparency[40].

iii. Similarly, in Japan, while the Supreme Court is appointed through a political process, the Supreme Court Secretariat has complete control over lower-level judicial appointments, training, promotion, and discipline.[41]

iv. The Iraqi Higher Judicial Council is composed entirely of judges, it follows a system of judicial self- appointment[42].

To conclude, this model is completely two-fold, it allows for complete independence while ridding itself of any accountability. In a self-appointing system judges are able to make ruling free from any pressures from political institutions and the public. However freedom comes with a complete lack of accountability which could lead to abuse of power and discretion. This is obviously the opposite extreme to a system in which all judges are elected both of which should be avoided due to the negative consequences they are likely to create. Historically, this model was commonly used however, with the increase of democracies around the world and as well as an increased demand for accountability that this model as well as any versions of it are largely in decline.

II. Appointment by Judicial Council :

A judicial council is an independent institution that is responsible for making or advising on judicial appointments. It is usually composed of a blend of judicial and non-judicial members who work together to ensure that the judiciary is balanced, professional, independent, and accountable. The Judicial Council model is used in various forms in a majority of the world's

---

[39] ibid

[40] New regulations to strengthen Kingdom's judicial system. Arab News. Nov. 26, 2013. http://www.arabnews.com/news/483346 (last accessed Mar 8, 2024)

[41] ibid

[42] AL-MAHMOOD, C.J.M., 2014. THE JUDICIARY IN IRAQ. IUNIVERSE

constitutions[43]. The Judicial Council model ensures that the judiciary is independent and professional while also being accountable and representative. By having a mix of judicial and non-judicial members, the council ensures that the appointments are based on merit and not influenced by external factors.

In this model, an independent council creates a short list of nominees for judgeship. The list is then forwarded to the legislative or executive branch, authorized to make an official nomination. This model is popular because it ensures that the selection of judges is based on merit and free from political interference.

Examples

i. In China appointment by judicial council model is used with slight variation, where the Communist Party is involved in the selection process[44]. It is a highly effective and popular model adopted in many countries, including Argentina.

ii. Argentina incorporated this model into its constitutional reform of 1994[45]. It established the Council of Magistrates of the Republic of Argentina, responsible for creating a short list of candidates to the judicial branch[46]and the President appoints them to the bench upon their recommendation, confirmed by two-thirds of the Senate[47]. The council is regulated by Article 114 of the National Constitution, which requires it to be integrated so that all branches of the government are represented. It comprises a thirteen-member team of judges, legislators, lawyers, and law professors, ensuring that the selection of judges is based solely on merit and free from any political bias[48].There has been significant

---

[43] United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org. (last accessed Mar 8, 2024)

[44] China's judicial council is made up entirely of judges.

[45] Hidalgo, *Dr. Enrique. Consejo de la Magistratura. Honorable Cámara de Diputados de la Nación: República Argentina*. Instituto de Capacitación Parlamentaria.

[46] Consejo de la Magistratura – Poder de la Nación. http://www.consejomagistratura.gov.ar/index.php/features/ique es-el-consejo (last accessed Mar 8, 2024)

[47] Arg. Const. Chapter III, Powers of the Executive Branch, 99,

[48] Arg. Const. Chapter III, § 114: The Council of the Magistracy, ruled by a special law enacted by the absolute majority of all the members of each House, shall be in charge of the selection of the judges and of the administration of the Judicial Power. The Council shall be periodically constituted so as to

criticism of the role and management of the Counsel in recent years. The Counsel holds a great deal of power in the administration of the judicial budget, which has led many to question its unchecked authority over the judicial branch, particularly at the municipal level, where budget cuts have been severe[49]. Furthermore, the Counsel needs to pay more attention to its responsibility to nominate judges, resulting in numerous vacancies in the judicial system and a backlog of cases. This has sparked controversy and movements to abolish the Counsel altogether[50]. Critics also point to the slow and undemocratic appointment process, as the public does not elect members.

iii. Paraguay also employs a judicial council[51] appointed by the Supreme Court itself, per a recommendation from an independent 9-member body known as the Council of Magistrates[52]. However, there is a difference in the appointment process between the two countries. In Argentina, it is the President appoints justices, while in Paraguay, the Supreme Court members make the appointment. Unlike Argentina, Paraguay's constitution does not grant them authority over the administration of the judicial system and its budget.

---

achieve the balance among the representation of the political bodies arising from popular election, of the judges of all instances, and of the lawyers with federal registration. It shall likewise be composed of such other scholars and scientists as indicated by law in number and form. It is empowered:

1. To select the candidates to the lower courts by public competition.
2. To issue proposals in binding lists of three candidates for the appointment of the judges of the lower courts.
3. To be in charge of the resources and to administer the budget assigned by law to the administration of justice.
4. To apply disciplinary measures to judges.
5. To decide the opening of the proceedings for the removal of judges, when appropriate to order their suspension, and to make the pertinent accusation.
6. To issue the rules about the judicial organization and all those necessary to ensure the independence of judges and the efficient administration of justice.

[49] Interview with the Dra. Yanina De Lucca, Pro-Secretary and Judiciary Intervener to the Buenos Aires Federal Court. Buenos Aires, Argentina.

[50] Roming, Shane. *Argentine High Court Deals Kirchner a Blow*. WALL STREET JOURNAL. Jun 18, 2013. (World: Latin America News).

[51] Consejo de la Magistratura de la Republica de Paraguay. – http://www.consejodelamagistratura.gov.py/ (last accessed Mar 8, 2024)

[52] Para. Const., Chapter III,1, Article 251, About Appointments: Members of appellate or lower courts of the Republic will be appointed by the Supreme Court of Justice from a list of three candidates proposed by the Council for Magistrates.

iv. Spain operates as a parliamentary democracy, where the General Council of the Judiciary, a 20-member committee chaired by the monarch, recommends judges to be appointed by the King to the Supreme Court. The council consists of presidential appointees, lawyers, and jurists elected by the National Assembly.[53]

v. In South Africa, for instance, the Judicial Service Commission established under Section 178 of the South African Constitution is a Judicial Council responsible for nominating individuals to the President for appointments to the Constitutional Court. The Commission is made up of members including the Chief Justice, the President of the Supreme Court of Appeal, and others designated by different branches of the government.

vi. The Irish Judicial Appointments Advisory Board (JAAB) functions as an advisory institution with limited power to suggest seven eligible candidates for each vacancy. However, it cannot give preference or rank according to merit. The government has the freedom to appoint anyone at its discretion, and the JAAB has no involvement in choosing the chief justice or internal promotions[54].

vii. In contrast, the Judicial Appointments Advisory Committee (JAAC) in Ontario, Canada, offers a list of three candidates for each opening, ranked in order of preference. The attorney general of the province has the authority to appoint judges and is obligated by law to choose from this list of three nominees. Nonetheless, the attorney general can reject the list and ask for fresh recommendations from the JAAC[55].

It is crucial to understand that one of the main characteristics of this model is that the council is independent and separate from political branches despite being comprised of appointed members. The council has extensive investigatory powers and reviews

---

[53] Spain Const. art. 123, Supreme Court, ¶2: The President of the Supreme Court shall the appointed by the King at the proposal of the judicial branch in the manner determined by law

[54] Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017) (International IDEA) Second edition

[55] ibid

all materials supporting or opposing potential nominees, regardless of the source. Potential nominees can apply for a judgeship or be brought to the council's attention by an individual, themselves, one of the political institutions, or a fellow council member.

Typically, judicial councils comprise members from four categories: judges, legal practitioners, government officials responsible for justice, and laypersons representing the public interest.The International Bar Association's Minimum Standards on Judicial Independence (1982) recommend that judicial council members be predominantly judges, with minimal political representation. It may be wise to grant lay members a significant say in judicial appointments as they represent broader public interests, without necessarily dominating the decision-making process. Such inclusivity and diversity of involvement could prove crucial in expanding judicial recruitment from marginalized or minority groups.[56]

III. Appointment by political institution:

In the appointment by political institution model, judges are appointed by either the executive or legislative branch of government, or other political institutions[57]. Appointment recommendations are typically made by organizations like the American Bar Association or similar affiliated groups. After a recommendation is made, the appointing institution nominates the individual, who is then confirmed or approved by the other political institution and officially appointed to the bench[58]. In most cases, appointments under this model are lifelong[59], unless extraordinary circumstances arise. This model is followed by countries such as the United States, South Africa, Australia, Belgium, Brazil, and Mexico.

Examples

i. The President of the United States has been granted the authority to nominate

---

[56] ibid

[57] United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org. (last accessed Mar 8, 2024)

[58] Judicial Nominations and Confirmations. United States Senate Committee on the Judiciary. http://www.judiciary.senate.gov/nominations/judicial.cfm (last accessed Mar 10, 2024)

[59] ibid

judges, with the advice and consent of the Senate, as stated in Article II Section 2 of the Constitution[60]. The Senate Judiciary Committee, a sub-committee of the Senate, holds a hearing for the President's nominee[61]. During the hearing, the nominee can provide their testimony and answer questions from the committee members[62]. After approval by the Senate Judiciary Committee, the nominations are referred to the Senate for full consideration[63].If a majority of the Senate votes in favour of a nomination, the President confirms the nomination. According to Article III of the Constitution, judges "shall hold their Offices during good behaviour," which often results in a lifetime term or voluntary retirement[64].

ii. The appointment process in Russia is quite similar to that of the United States, where potential members are nominated by the President and appointed by the Federation Council (Legislature); selected members are appointed for life[65].

iii. In Mexico's model,the President appoints members of the Supreme Court with the Senate's approval[66]. In contrast, district and other federal judges,

---

[60] U.S. Const. art. II, 2,The Executive Branch: He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and 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, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[61] Judicial Nominations and Confirmations. United States Senate Committee on the Judiciary. http://www.judiciary.senate.gov/nominations/judicial.cfm (last accessed Mar 10, 2024)

[62] ibid

[63] ibid

[64] U.S. Const. art. III, 1, The Judicial Branch: The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

[65] Russ. Const. Chapter 7: Judicial Power, art. 128, § 1: The judges of the Constitution Court the Russian Federation of the Supreme Court of the Russian Federal, the Higher Arbitration Court of the Russian Federation shall be appointed by the Council of the Federation upon the proposals of the President of the Russian Federation.

[66] Mex. Const. Chapter 4 of the Judicial Power, art. 96: To name the ministers of the Supreme Court of Justice, the President of the Republic will submit a short list to the consideration of the Senate, which, after comparing the persons proposed, will designate the minister to fill the vacancy. The designation will be made by the vote of two thirds of the members of the Senate present, within the term of thirty days, which may not be prolonged. If the Senate does not act within this period, the office of minister will be occupied by the person who, from the list, is designated by the President of the Republic. In the case that the Chamber of Senators rejects the entire list, the President of the Republic will submit a new

including magistrates, are appointed by members of the Supreme Court for a 4-year term. Upon the completion of the term, they can either be dismissed for bad behaviour, elevated, or transferred to a different district[67].

iv. In South Africa, the President and Vice-President of the Supreme Court of Appeals are appointed by the national President after consultation with the Joint Service Commission[68]. Additionally, Supreme Court judges are appointed by the national President after consultation with the Chief Justice and leaders of the National Assembly for 12-year non-renewable terms or until they reach the mandatory retirement age[69].

v. In Brazil, justices are appointed by the President and approved by the Federal Senate; upon appointment, they can serve until mandatory retirement at the age of other countries, bypass approval from another political institution, and designate the power to appoint to only one of the political institutions[70]. Proponents of this model state that it allows for judicial independence in that the fewer other institutions are involved the more likely

vi. In Australia, appointment is solely the executive branch's responsibility and does not require the approval of the legislative branch as is the case in the United States. Justices in Australia are appointed by the governor general in council for life with mandatory retirement at age 70[71].

Furthermore, the current system of appointing judges is highly elitist and disconnected from society. It favours those who know the right people and are in the right place at the right time rather than those with real-life experience. It is difficult to

---

one, in the terms of the last paragraph. If this second list was rejected, the office will be occupied by the person who, from this list, the President of the Republic designates

[67] Mex. Const. Chapter 4 of the Judicial Power, art. 97: Circuit magistrates and district judges will be named and given assignments by the Council of the Federal Judiciary, based on objective criteria, and according to the requisites and procedures that the law establishes. They will remain six years in the exercise of the office, at the end of which, if they are selected again or promoted to superior offices, they will be secure in their posts in the cases and according to the procedures that the law establishes.

[68] The Supreme Court of Appeal of South Africa: The Joint Service Commission is a 22-member body of judicial and other government officials, and law academicshttp://www.justice.gov.za/sca/aboutsca.htm.

[69] Francois Du Bois, *Judicial Selection in Post-Apartheid South Africa, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 280, 281 (KATE MALLESON AND PETER H. RUSSEL, eds., 2006).

[70] Braz. Const. Art. 101, 104, 111-A

[71] Austl. Const. Chapter III. Art. 72.

remove a judge from office without "good behaviour". The argument favouring an age cap as a safeguard needs to be revised. As long as a judge behaves well and performs well, age should not impede. An analysis of this model suggests that it lies somewhere in the middle of the independence-accountability spectrum, but leans more towards judicial independence than accountability[72].

IV. Selection through election system

In the 19th century, electoral systems came into existence to enhance accountability for judges considered elitist and disconnected from society[73]. There are two primary types of electoral systems: popular election, which can be partisan or non-partisan, and election by the legislature, wherein the legislative branch elects its judges[74]. There is also a third model of election called retention elections. In this model, judges receive an initial appointment by a political institution for a specific period of time, after which they must run in the general election to keep their seat. China follows this model[75].

Examples

i. The Missouri Plan is such a method of selecting judges that is employed by several US states. Its purpose is to ensure that judges are chosen based on their qualifications, rather than their political affiliations[76]. The process starts with an executive appointment by the governor, based on the recommendation of a non-partisan nominating commission. This commission carefully evaluates the qualifications of potential judges and then recommends the most qualified candidate for appointment.Once appointed, incumbent judges are subjected to retention elections, where they run unopposed on their record. Rather than competing against a challenger, voters are asked whether the judge should be retained or

---

[72] IVETH A. PLASCENCIA, *supra note* 26

[73] United States Institute of the Peace, Judicial Appointments and Judicial Independence: Jan. 2009, www.usip.org. (last accessed Mar 10, 2024)

[74] Akkas, Sarkar Ali. *Appointment of Judges: A Key Issue in Judicial Independence*. BOND LAW REVIEW. Vol. 16, Issue 2. Article 8. University of Rajshahi, Bangladesh.

[75] UNITED STATES INSTITUTE OF THE PEACE, *Supra* note 68

[76] Elliot Bulmer, Judicial appointments, in International IDEA, Constitution - Building primer 2d ed. (2017) (International IDEA) Second edition

removed from office. This unique system is designed to mitigate the negative impacts of judicial elections, which can compromise the judiciary's independence and impartiality due to the need for aggressive fundraising and campaigning[77].

ii. Recent changes in Bolivia and an amendment to its Constitution resulted in the transition from a judicial council to an election model. Article 182 Number I of the Bolivian Constitution grants the people of Bolivia the power to elect its judges[78]. The election model is non-partisan, as anyone who runs cannot be a part of any political party[79]. The amendment to the Constitution was made after the successful referendum. As a result of this referendum, Bolivia held its first judicial elections in 2011[80]. Judges of the Supreme Court and the Plurinational Constitutional Tribunal are elected from a list of pre-selected candidates made by the Legislative Assembly[81]; those that win serve six year-terms[82].

iii. In Cuba, the political system is characterized by a single-party system and a distinctive form of judicial election. In this model, judges are elected by the legislative branch[83], as outlined in Article 75 (o) of the Cuban Constitution[84]. Over a period of 2.5 years, the National Assembly of People's Power has the authority to appoint judges. Lay judges, on the other hand, are selected by workplace collectives and neighbourhood associations and then elected by municipal and provincial assemblies[85].

---

[77] ibid

[78] Bol. Const. art. 182 Number I: The Magistrates and Judges of the Supreme Court shall be chosen and elected by universal suffrage. Plascencia, I. A. (2015). Judicial Appointments: A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around the World. https://core.ac.uk/download/303931111.pdf

[79] Bolivia Const. art. 182 Number IV

[80] Driscoll, A., Nelson, M.J., The 2011 judicial elections in Bolivia, Electoral Studies (2012), doi:10.1016/j.electstud.2012.04.006. http://myweb.fsu.edu/adriscoll/CV_files/DriscollNelson2012ESBolivia.pdf.

[81] IVETH A. PLASCENCIA, *supra note* 26

[82] ibid

[83] Gerard J. Clark, *The Legal Profession in Cuba*, 23 SUFFOLK TRANSANT'L L.REV. 413, 424 (2000).

[84] Cuba Const. art. 75: The National Assembly of People's Power is invested with the following powers: (o) electing the president, vice presidents and other judges of the People's Supreme Court;

[85] Lay Judges are citizens who are chosen to serve as judges; they are not trained jurists with law degrees. Requirements to be a lay judge are appropriate education level, good moral character, good

> The Cuban Constitution guarantees that judges have the power of judicial review and are independent of other political institutions[86]. It should be noted that judges can only be removed by the body that elected them.[87]

A challenge with judicial elections is that the candidate with the most votes may not always be the most qualified, leading to concerns about the quality of the bench and the accuracy of their rulings[88]. Instead of being based on merit and qualifications, election results may depend on popularity, creating a race to win votes that does not necessarily promote accountability[89]. Additionally, studies show that judges may become more punitive during election years, hoping to be viewed as tough on crime and increase their chances of re-election. While this may seem to increase accountability, it can come at the cost of impartiality and the overall quality of judges[90].

However, it is essential to note that this system has flaws. Ensuring that the nominating commission is genuinely non-partisan can be a challenge, and retention elections can sometimes be viewed as a formality, with judges being retained even if they are not performing well. Directly electing judges enables people to hold them accountable, providing the greatest amount of accountability and allowing citizens to determine the type of judiciary they want. However, some argue that this model could politicize the judiciary and hamper the quality of judges who make it to the bench.

V.Hybrid Model of Judicial Appointment:

The discussed models for appointing judges have yet to achieve a satisfactory balance between accountability and independence effectively. A hybrid approach that combines multiple existing models may be worth considering to address

---

reputation in the community and a good attitude toward employment or any work done in matters of social interest.

[86] Cuba Const. art. 122: The judges, in their function of administering justice, are independent and only owe obedience to the law.

[87] Cuba Const. art. 126. Judges can only be recalled by the body which elected them.

[88] Huber, Gregory A. and Sanford C. Gordon. 2004. *Accountability and Coercion: Is Justice Blind when It Runs for Office?* AMERICAN JOURNAL OF POLITICAL SCIENCE 48 (2 Apr.): 247-263.

[89] ibid

[90] ibid

this issue. A potential solution involves utilizing a judicial council for appointments established by a political institution[91]. Under this proposed model, the executive branch would select judges from a list of pre-screened candidates provided by an independent council of appointed members. Following this, the President would nominate a candidate with the guidance and consent of the executive.

The judicial council should consist of appointed members from the executive, legislative, and judicial branches, as well as law professors and a law student. By having a diverse range of members, we can ensure a variety of perspectives from all aspects of the legal field. A council that actively searches for qualified candidates to add to the short list is the most effective way to address judicial vacancies. However, implementing quotas for the council may compromise the quality of nominees. Rather than waiting for vacancies to arise, a proactive system that continuously investigates qualified candidates would be beneficial[92].

The ideal system should ensure that judges are independent and free from concerns about the impact of their decisions on their careers. At the same time, the system must provide accountability to address situations where judges overstep their authority. Any system that relies too heavily on a single branch of government is self-appointing or allows citizens to elect judges undermines the judiciary's integrity. Thus, a well-functioning judiciary must operate impartially and justly, with a clearly defined scope and authority to interpret the law.

---

[91] Plascencia, Iveth A., "Judicial Appointments: A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around the World" (2015). Law School Student Scholarship. 666. https://scholarship.shu.edu/student_scholarship/666

[92] ibid

CHAPTER 3 : EVOLUTION OF JUDICIAL APPOINTMENT SYSTEM IN INIDA

3.1 INTRODUCTION

India is the world's largest democracy and a sovereign republic located in the southern part of the Asian continent. The country has a rich cultural heritage is known for its diverse population, religions, languages and topography. Historically, India was a collection of kingdoms[93] and empires that remained in a state of constant conflict with each other. The modern Indian nation-state emerged after the British conquest of the country in the late 17th century. The British ruled India until 1947, when India attained its independence.

Today, India operates through a set of institutions that are designed to uphold the principles of constitutionalism. These institutions include the Parliament, the legislative branch of the government, the judiciary responsible for interpreting laws and resolving disputes, and the executive machinery, which includes the bureaucracy and the police. The formal structures of Union-State relations and the electoral system are also essential components of India's institutional framework.

The Constitution of India plays a vital role in governing the relationships and inter-dependencies of institutions. It lays the foundation for a federal system of government, where central and state governments have distinct powers. India's parliamentary democracy operates on the principle of 'fusion of power,' where the legislature and executive work directly together in law-making. The judiciary remains independent and robust, serving as a check against any unconstitutional actions by the legislature or executive.

3.2 ORIGIN AND HISTORY OF APPOINTMENTS

The Indian Judiciary is one of the oldest in the world, dating back to the 4th century BC[94]. This is supported by literary sources like

---

[93] A.L. BASHAM, THE WONDER THAT WAS INDIA, pp. 102, 106

[94] R.S. SHARMA ANCIENT INDIA New Delhi Publication Department, NCERT 1990 p. 11

Dharmashastras and Dharmasutras[95]. Additionally, one can learn about the workings of the ancient Indian judicial system and the prevalence of the rule of law through the Vedas, Upanishads, Puranas, and Smritis[96].

The judicial system followed a hierarchy of courts that handle both civil and criminal cases. The Chief Justice Court is the highest court, and any court above it has the authority to review decisions made by lower courts. For civil and criminal cases, different standards of proof are applied, and natural justice principles are upheld. Additionally, the doctrine of res judicata is used to provide finality to court decisions. All court decrees can be appealed and reviewed based on established legal principles. The courts are committed to the essential obligation of dispensing justice without any fear or favour[97].

3.3 ANCIENT INDIA

In ancient India, the king held the ultimate responsibility of upholding justice and ensuring the safety of his people[98]. He was revered as the lord of Dharma and entrusted with supreme authority[99]. The king's court was regarded as the highest court of appeal, particularly in cases of great significance to the state[100]. To assist him, the king was advised by learned Brahmins, the Chief Justice, other judges, ministers, elders, and representatives of the trading community[101]. The Chief Justice (Pradvivaka) followed the king in rank, and a board of judges assisted the court. Brihaspati[102] described four types of tribunals: stationary, movable courts held

---

[95] ibid

[96] MUKHI H.R,ANCIENT INDIAN POLITICAL THOUGHTS AND INSTITUTIONS

[97] http://alIahahadhighcourt.in/event/TheIndianJudicialSvstem SSDhavan.pdf

[98] P.V. Kane "History of Dharmasastra", Vol III Chapter IX deals "Law and administration of justice" pp 242, 316. See also S.S. Dhavan "*Indian Jurisprudence*", (1963) vol 8 JOURNAL OF NATIONAL ACADEMY OF ADMINISTRATION p. 19

[99] O.P. Motiwal, *Changing Aspects of Law and Justice in India* 11 (CHUGH PUBLICATIONS 1st edn., 1979).

[100] Regarding the King's judicial jurisdiction Kalidas in his "abijnana shakuntalam" has referred to Dharma mitra's case . Dharama Mitra was a wealthy merchant, who died in a shipwreck. The dispute relating his property came before the King which he transferred it to his Minister. The Minister passed an order that the entire estate of the merchant be reverted to the king. Reversing this decision the king Dushyanta ordered an enquiry to be made - whether any of his widows was expecting a child, and he was informed that one of them was pregnant. The king directed that the child after birth was entitled to be property of the deceased

[101] S.D. SHARMA, ADMINISTRATION OF JUSTICE IN ANCIENT INDIA, 72 (Harman Publishing House, 1988)

[102] Brihaspati, Ch I pp. 1-3

under royal signet in the absence of the king, and commissions under the king's presidency.

In ancient times, local councils called kulani, similar to today's panchayats, were responsible for dispensing justice to villagers[103]. These councils consisted of a board of five or more members and dealt with all matters related to endowment, irrigation, cultivable land, punishment, and more. In towns and districts, the courts were presided over by government officers who acted under the king's authority to administer justice[104]. Brihaspati notes that family arbitrators held a significant role in the justice system, with judges superior to families and the Chief Justice (Adyakshya) superior to the judges[105].

The Central Courts were responsible for handling significant criminal cases under the Royal authority, while minor criminal cases fell under the jurisdiction of the village-level judicial assembly. It was customary for higher courts to have the final say over lower courts, which were expected to uphold their decisions. Consequently, the king held the ultimate authority to decide the outcome of any legal matter.One of the most important rules in the administration of justice was that a single individual should not handle it. Instead, a bench of two or more judges was always preferred to administer justice. The phrase "*No decision was given by a person singly*" was often repeated in the old texts, emphasizing the importance of collective decision-making[106]. The judicial procedure in ancient India was highly detailed and elaborate.

The ancient judicial system placed significant emphasis on caste when appointing chief judges and other judges. As per the law books, the ideal candidate for the position of chief judge or judge was a Brahmin[107], followed by a Kshatriya and then a Vysya. It was unheard of for a Sudra to hold such a position, and women were

---

[103] S. VARADACHARIAL,THE HINDU JUDCIAL SYSTEM, p. 88.
[104] S.P. TRIPATHI, "INDIAN AND CONSTITUTIONAL HISTORY", 9 (Central Law Publishing, 3 edn., 2011)
[105] Dr. Radha Kumud Mukeiji, “Local Government in Ancient India” pp 29-34, 132-142, and Dr. P.N. Sen Hindu Jurisprudence P 368
[106] ibid
[107] V. KANE,HISTORY OF DHARMASASTRA, Vol III Chapter XI p. 272-275

excluded from consideration altogether[108]. To ensure impartiality, judges were obligated to take an oath and base their decisions solely on legal principles, without being influenced by personal gain, prejudice, or bias. A judge who fulfilled these duties was believed to attain spiritual merit akin to performing a Yagna[109].

3.4 MEDIEVAL PERIOD

During the medieval period, the establishment of Muslim rule strengthened the judicial system as the administration of justice was regarded as a religious duty of a Muslim king[110]. Particularly in the Muslim rule period, the responsibility for administering Muslim laws was distributed among several officials, including Qazis, Muftis, and Chief Qazis. Qazis were appointed to decide cases in each province, district, and paragana. The qualifications for a person to become a Qazi were not specifically outlined, but the individual was expected to possess common sense. Regarding the qualifications of a Qazi, Jadunath Sarkar stated that, "*Although many Qazis were highly knowledgeable lawyers, it was believed that the fundamental and essential qualities of a Qazi should, in theory at least, include honesty, impartiality, virtuousness, and a certain degree of detachment from local society*"[111].It is evident that the honesty and impartiality of judges held significant importance. In each district (Sarkar), various courts, including Qazi, Fauzdar, Kotwal, Sadre, and Amil, were responsible for dispensing justice under the emperor's control. Similarly, in each parganah, there were courts of Quazi-e-parganah and kotwal. The kotwal served as the town's principal executive officer and had the authority to preside over petty criminal offences. This amalgamation of executive and judicial functions within a single individual challenged judicial independence. The head of the judiciary, known as the Sadre Jahan, and the Chief Justice were appointed by the Sultan. The above-said Sadre Jahan appointed the quazi or judges of subordinate

---

[108] V. MEHTA, COSMIC VISION:-MANU, IN FOUNDATIONS OF INDIAN POLITICAL THOUGHT 23-39 (Delhi, 1st edn., 1992).

[109] S.S. Dhavan,*Indian Jurisprudence*, (1963) Vol 8 JOURNAL OF NATIONAL ACADEMY OF ADMINISTRATION, p. 22

[110] FAKHR-UD-DIN MUBARAK SHAH, Edited by D.Ross, p.12

[111] M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA, 17-18 (N.M. Tripathi Pvt. Ltd. 2 1990)

courts. Despite the significant control held by the Emperor over the judges, it is evident that during the reign of the sultans, judges were appointed based on their high standard of learning in law. The judicial officers were known for their great ability and high standing in society; their independence and impartiality were renowned. A chief justice could be dismissed from the post of a Qazi if found to be incompetent and corrupt by the Sultan[112].

During the Mughal era, the emperor was regarded as the epitome of justice, and a system of multiple courts was established at different levels to administer justice[113]. Emperors such as Akbar, Shah Jahan, and Jahangir diligently appointed highly competent judges, reflecting the Mughals' emphasis on merit and their pride in selecting qualified judicial officials[114]. Despite being appointed by the Emperor, these judges operated autonomously. Although the judiciary was not entirely separate from the executive, it functioned independently in dispensing justice and had the authority to remove corrupt officers from their positions[115].However, after the conquest of Bengal by the British, the process of replacing the Mughal system of justice with the British system began[116].

3.5 INDIA UNDER BRITISH RULE

From 1688 to 1726, the East India Company (EIC) established admiralty courts in Madras and Bombay to try maritime offences[117]. The courts were presided over by individuals knowledgeable in civil law appointed by the company in England. To address challenges in the judicial system, the EIC established Mayor's courts through a charter in 1726 in all three presidency towns, overseen by the Governor and five senior members known as the Justices of Peace, directly appointed by the British

---

[112] V. D. KULSHRESHTHA, LANDMARK IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY 25, 10th edn., 1992

[113] ISHTIAQ HUSAIN QURESHI, THE ADMINISTRATION OF THE MUGHAL EMPIRE 253 (JANAKI PRAKASHAN PATNA 1ST EDN., 1979)

[114]J.L. MEHTA, "HISTORY OF MEDIEVAL INDIA: MUGHAL EMPIRE" 458-73 (STERLING PUBLISHERS PVT. LTD DELHI 1ST EDN., 1981)

[115] MUHAMMAD AZHAR, SOCIAL LIFE OF THE MUGHAL EMPERORS 95-109 (GITANJALI PUBLISHING HOUSE NEW DELHI IT EDN., 1974)

[116] Harish Verma, *Concept and History of Judicial Independence in India*, 8 INDIAN J.L. & JUST. 33 (2017).

[117]S.K. PURI, INDIAN LEGAL & CONSTITUTIONAL HISTORY,44-46(Allahabad Law Agency, 6th edn., 1983).

crown.The year 1773 saw the formal establishment of the East India Company Regulating Act, through royal decree. This Act gave rise to the Supreme Court of Judicature, located at Fort William in Calcutta. The court was endowed with complete power and authority to adjudicate on all complaints lodged against any of His Majesty's subjects, for any crime[118]. Additionally, the court was sanctioned to hear and conclude any cases or legal actions initiated against any of His Majesty's subjects.

Following the mutiny of 1857, the British East India Company's government dissolved, and the British Crown assumed control through the Secretary of State for India. The Indian Councils Act was passed in 1861 and 1892 to facilitate this transfer of power.1861 marked a significant year for legal and judicial institutions in India, as strides were made towards establishing High Courts in Calcutta, Madras, and Bombay. These new courts not only surpassed their predecessors in quality, but also brought together two distinct judicial systems - the Company's Courts in the Provinces of Bengal, Bombay, and Madras, and the three Supreme Courts in the Presidency towns[119].

However, the Indian National Congress continued to demand self-government, and the Morley-Minto Reforms were introduced in 1909 to increase representation in Legislative Councils and expand their authority. Despite these changes, true representation remained elusive, and the Government of India Act was passed in 1919, which sought to grant greater autonomy to the provinces with the ultimate goal of achieving self-rule[120]. The Government of India Act, 1919 established the concept of diarchy, granting limited self-governance to provinces and separating the judiciary from executive control[121].

In 1919, the Government of India Act was enacted to facilitate the

---

[118] ibid

[119] BIPIN CHANDRA, MODERN INDIA, New Delhi Publication Department NCERT 1990, P. 84

[120] SINGH, M.P., OUTLINES OF INDIAN LEGAL & CONSTITUTIONAL HISTORY. Universal Law Publishing 2006.

[121] BANERJEE, A.C, THE CONSTITUTIONAL HISTORY OF INDIA, Atlantic Publishers & Distri.1919-1977 (Vol. 3)

judiciary's Indianisation process. Part IX of the Act outlined the framework for Indian High Courts. Section 101 of the Act[122] mandated the establishment of High Courts, with appointments of the Chief Justice and permanent Judges left to the sole discretion of the Crown, subject to eligibility criteria. Their tenure depended entirely on the Crown's pleasure, as per Section 102. The section 101(3) outlines the qualifications for a Judge of the High Court. There are four options:

a. be a Barrister of England or Ireland or a Member of the Faculty of Advocates in Scotland with at least five years of experience,
b. be a Member of the Indian Civil Service with a minimum of ten years of experience and having served as a district judge for at least three years,
c. hold a judicial office that is not inferior to that of a subordinate judge or a judge of a small cause court for at least five years, or
d. work as a pleader of a High Court for a minimum of ten years.

The last two clauses provide opportunities for Indians to become High Court Judges, and each category has a reserved quota.The British colonial approach to appointing High Court judges in India required that at least one-third of the judges, including the Chief Justice (but excluding Additional Judges), be Barristers or advocates, and not less than one-third be Members of the Indian Civil Service. However, this approach had two concerning features: the executive branch had a quota in the High Court, and judges served at His Majesty's pleasure, with their salaries and perks determined by the executive. Advocates for an independent judiciary should have scrutinized these provisions, drawing inspiration from the UK before praising British justice[123]. It is worth noting that the Government of India Act, 1919 did not include any provision for the transfer of a Judge of a High Court.

However, dissatisfaction with this act ultimately led to the adoption of

---

[122] 101. Constitution of High Courts.-
(1).....
(2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint:

[123] 11TH LAW COMMISSION OF INDIA, REPORT NO.121 : A NEW FORUM FOR JUDICAL APPOINTMENT, P. 8 (1987).

the Government of India Act in 1935, which aimed to establish a federal system[124]. This act also established the Federal Court of India as the highest court[125], with the crucial authority to hear constitutional matters[126]. Furthermore, even during the times of the Government of India Act, 1935, the Crown had absolute discretion in appointing Judges to Federal Court and High Courts. This means that the executive had no obligation to consult the Chief Justice during the appointment process. Any consultation that did occur with the Chief Justice was merely a means for the executive to consider their view, if they so desired, but it was not a necessary requirement. The appointment of every Federal Court Judge is exclusively made by the King through a warrant[127]. The Judge will retain their position until they reach the age of sixty-five. However, if a Judge wishes to resign, they may do so by submitting a letter addressed to the Governor-General. It is also within the King's power to remove a Judge from office due to misconduct or their inability to carry out their responsibilities due to physical or mental incapacity. In such cases, the matter will be referred to the Judicial Committee of Privy Council for a report before the King issues a warrant for the Judge's removal.

The High Court Judges were appointed from four distinct groups:

(i) barristers of England and Northern Ireland or advocates in Scotland;

(ii) Members of the Indian Civil Service;

(iii) Holders of judicial office in British India; and

(iv) pleaders practising in High Courts

The authority to appoint a High Court Judge was vested in His Majesty, as stipulated in section 220(2)[128]. One notable alteration was the shift in retirement age from His

---

[124] KAILASH RAI,HISTORY OF COURTS LEGISLATURE AND LEGAL PROFESSION IN INDIA, p. 123

[125]Government of India Act, 1935, § 200

[126] ClearIAS, History of Indian Judiciary, https://www.clearias.com/history-indian-judiciary/#colonial-era-17th-to-20th-centur (last visited Mar 20, 2024).

[127]Government of India Act, 1935, § 200(2).

[128]220. Constitution of High Courts.-

(2) Every Judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-years: Provided that-

(a) a Judge may, by resignation under his hand addressed to the Governor, resign his office:

Majesty's pleasure to attaining a specified age, which was sixty years at the time. The power to determine salaries, allowances, and other benefits, as well as rights regarding leave and pension, was granted to His Majesty in Council. Similarly, the ability to appoint Judges of the Federal Court was bestowed upon His Majesty, and they were to remain in office until reaching the age of sixty-five years. The authority to determine salaries, allowances, benefits, leave, and pension rights was vested in His Majesty-in-Council.Additionally, the Government of India Act, 1935 did not include any provision for transferring a Judge. This is why proviso (c) to S. 220 of the Act stated that a Judge's office would be vacated either upon their appointment as a Judge of the Federal Court or upon their appointment to another High Court.

3.6 VARIOUS COMMITEES REPORT

3.6.1 Sapru Committee report on 1945

The committee was formed by the Non-Party Conference in November 1944 and prominent lawyer named Tej Bahadur Sapru had organized the first meeting of this conference[129]. The group was composed of individuals who represented a wide range of interests, except for those belonging to the dominant political parties such as the Indian National Congress, the Muslim League, and the Communist Party[130]. In 1945, the Sapru Committee proposed Constitutional suggestions to resolve issues related to minorities that had been causing trouble in Indian political and constitutional discussions[131].

It was recommended that the appointment of Justices to the Supreme Court and High Courts should be made by the head of the State after consulting with

---

(b) a Judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council on reference being made to them by his Majesty, report3 that the Judge ought on any such ground to be removed.

(c) the office of a Judge shall be vacated by his being appointed by His Majesty to be a Judge of the Federal Court or of another High Court.

[129]RIMA. HOOJA, CRUSADER FOR SELF-RULE- TEJ BAHADUR SAPRU & THE INDIAN NATIONAL MOVEMENT, New Delhi 1999, pp.11- 23.

[130] S.K. BOSE, BUILDERS OF MODERN INDIA: TEJ BAHADUR SAPRU, New Delhi 1978, pp.4-21.

[131] Chandel, N., 2015. *Political Relevance of Tej Bahadur Sapru,* RESEARCH REVIEW JOURNAL OF MULTIDISCIPLINARY, Mar 2018, Vol 3 Issn 2455- 3085

the Chief Justice of the Supreme Court. In the case of High Court Judges, the Chief Justice of the High Court and the head of the unit (State) should also be consulted[132]. The Committee also provided a process for the removal of judges on the grounds of misbehaviour or infirmity of mind by the head of the State, with the concurrence of the Supreme Court for High Court Judges' removal and with the concurrence of a special Tribunal for Supreme Court Judges.

Regarding salaries, the Committee believed that they should be fixed in the Constitution Act, and should not be varied during a judge's term in office or modified without the sanction of the head of the State and recommendations from the High Court, Supreme Court, and Government. The Committee emphasized the importance of incorporating these provisions to ensure the absolute independence of the High Courts (and presumably the Supreme Court as well) and keep them free from party politics or influence[133].

"We have deliberately kept the appointment of Judges, including those of Provincial High Courts, separate from party politics. While we recognize that this provision may appear to impinge on the theoretical autonomy of the provinces, we stand by it nonetheless. The Constitution Act should determine the number of Judges in the various High Courts. If the needs of the provinces exceed the prescribed number of Judges, we recommend that the number be adjusted. However, the legislature should not be responsible for making this decision. Rather, the High Court and the relevant Government, along with the Supreme Court, should make the recommendation. As the highest court, the Supreme Court is better equipped to offer an impartial perspective on the matter. Even in such circumstances, the Head of State must sanction the decision".

3.6.2 Ad-hoc Committee on Supreme Court

Following the Indian Independence Act of 1947, the Union Constitution Committee appointed an Ad-hoc Committee on Supreme Court,

---

[132]Sapru. Sir Tej Bahadur, et.al, Constitutional Proposals of the Sapru Committee, Bombay: 1945, pp.127-28.

[133] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, p.: 76, Oxford, Bombay (1974).

consisting of renowned experts such as former Judge of the Federal Court, Mr. S. Varadachariar, Sir Alladi Krishnaswami Ayyar, Mr. B.L. Mitter, Mr. K.M. Munshi, and Mr. B.N. Rao, the Constitutional Adviser. Their report, submitted on May 21, 1947, was heavily influenced by the provisions of the Government of India Act, 1935[134], and focused on establishing a Supreme Court at the apex of the judiciary system, with each state having its own High Court. The committee recognized the need for a federal structure with a division of powers between the federation and the federating units, a written Constitution with a Bill of Rights, and an independent body to monitor and address any encroachment of power by one over the other.

As outlined in paragraph 13 of the report, the Supreme Court should comprise two Division Benches, each comprising five judges. This would necessitate the appointment of ten judges, in addition to the Chief Justice, to account for any potential absences or unforeseen events. Furthermore, it may be prudent to appoint one judge to oversee miscellaneous matters about appellate jurisdiction, including revisional and referential jurisdiction[135].

The recommendations made by the Constituent Assembly Experts Committee (Ad hoc Committee on the Supreme Court) on qualifications, appointment, and retirement of judges of the Supreme Court were remarkably emphatic and resolute. The committee recommended that the qualifications of judges should be similar to those of Federal Court judges, and judges from the superior courts of states that join the Union should be considered for appointment.

To ensure the independence of the judiciary, the committee was of the view that the appointment of judges of the Supreme Court should not be left to the discretion of the President of the Union. Instead, the President should nominate a person in consultation with the Chief Justice of the Supreme Court. The nomination should be confirmed by a majority of at least seven out of a panel of eleven composed of some of the Chief Justices of the High Courts of the constituent units, some

---

[134] B. Shiva Rao, The Framing of India's Constitution

[135] Gagrani, H., *Appointment or Disappointment: Historical Backdrop and Present Problems in the Appointment of Judges of Indian Judiciary*, 2009,NLIU LAW REVIEW, Forthcoming

members of both the Houses of the Central Legislature, and some of the law officers of the Union. Another option would be for the Panel of 11 to recommend three names out of which the President, in consultation with the Chief Justice, may select a judge for the appointment.

The committee also suggested that the retirement age of judges of the Supreme Court should be 65 years, the same as in the case of Federal Court judges. In this regard, the proposal to provide for temporary judges was considered undesirable, and the committee recommended that the advisable way to deal with any sudden temporary increase in work would be to have in place the system of Ad hoc judges out of a panel of Chief Justices or Judges of the High Courts.

The committee was unequivocal in its opinion that the main features of the recommendations should be incorporated in the Constitution Act. Detailed provisions of all such aspects should be provided for by a separate judiciary Act to be passed by the Union Legislature. The committee believed that these recommendations would ensure the independence of the judiciary.

3.6.3 Union Constitution Committee

In April 1947, the Constituent Assembly appointed the Union Constitution Committee, chaired by Pt. Jawaharlal Nehru, to report on the principles of the Union Constitution. The Constitutional Advisor submitted a memorandum on May 30, 1947, adopting the recommendations of the Ad hoc Committee on the Union Constitution, except the method proposed for the appointment of judges. He recommended that the President should appoint judges with the approval of at least two-thirds of the Council of States, which was to be a body similar to the Privy Council. However, the Union Constitution Committee rejected the proposal for setting up a Council of States. Instead, it disagreed with the method of appointment of judges suggested by the Ad hoc Committee and subscribed to the observations of the Sapru Committee.

The Union Constitution Committee recommended that there should be a Supreme Court with the constitution, powers, and jurisdiction recommended by the Ad hoc Committee on the Union Judiciary, and a judge of the

Supreme Court should be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court, as well as judges of the High Courts, as may be necessary for the purpose[136]. The Constituent Assembly adopted the recommendations of the Union Constitution Committee, although there was little debate on the method of appointment of judges, but the provisions for the removal of judges ensued a hectic and protracted debate in the Assembly. The members of the Constituent Assembly even moved amendments on the proposals put forward by the Committees mentioned above.

3.7 CONSTITUENT ASSEMBLY DEBATES

3.7.1 Appointment of judges to the Supreme Court

India's judicial system was passed down from the British and was well-structured and efficient. While some of its aspects could be utilized by members, creating new judicial provisions required more than mere replication. Due to the constraints of the 1935 Act, courts' authority was restricted, particularly on constitutional matters. Assembly members were tasked with deciding which provisions to keep and how to modify them to serve the needs of a newly independent state. They also had to consider how courts' jurisdiction and powers should be expanded to confront the challenges of a new era[137].

According to the Government of India Act in 1919 and 1935, appointing High Court judges was solely the responsibility of the crown. However, the Draft Committee believed that this unilateral decision-making power shouldn't rest with the executive. The Nehru report proposed a federal constitution for an independent India and suggested several important changes to the existing judiciary system, including the creation of a Supreme Court with original jurisdiction in all federal matters and the power of judicial review for interpreting the constitution[138]. The report recommended maintaining the hierarchy of courts while placing the

---

[136] B. Shiva Rao.T*he Framing of India's Constitution: A Study*. p. 486, THE INDIAN INSTITUTE OF PUBLIC ADMINISTRATION, NEW DELHI (1968).
[137] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION- CORNERSTONE OF A NATION, p. 206 (36th impression 2019)
[138] ibid

Supreme Court at the apex of the judiciary[139].

In 1945, the Sapru Committee recommended a Constitutional Proposal that suggested appointing Supreme Court and High Court justices by the head of the state in consultation with the Chief Justice of the Supreme Court. For High Court Judges, the consultation would also include the High Court Chief Justice and the head of the unit concerned[140]. The Ad Hoc Committee of the Union Constitution in 1947 agreed with this proposal but did not recommend leaving the power of appointing judges to the unfettered discretion of the President. Instead, they suggested two alternative methods. The first authorized the President to nominate a person for appointment to the Apex Court, with the consultation of the Chief Justice. This nomination would then require confirmation by a panel of seven to eleven members comprising Chief Justices of High Courts, Members of Parliament, and Law officers of the Union. The second method required a recommendation of three persons to come from the above panel, one of whom has to be appointed by the President in consultation with the Chief Justice of India. The same procedure was to be followed for the appointment of Chief Justice of India, except that the Chief Justice was not to be consulted[141].

Sri B.N. Rau, who served as the Constitutional Advisor, suggested that judges should be appointed by the President only after receiving the approval of at least two-thirds of the Council of State. The Chief Justice of India would be an ex-officio member of this council. However, the Union Constitution Committee differed from the Ad Hoc Committee's recommendation. They proposed that the President should appoint a Supreme Court judge after consulting the Chief Justice of India, as well as other judges from the Supreme Court and High Courts, as necessary.

In December of 1947, the judges were quick to respond to the draft constitution's judicial provisions. The Chief Justice of the Federal Courts, H.J. Kania,

---

[139] Nehru report clause 46-52. There are direct precedents for these provisions in clauses 55-65 of Mrs. Besant‘s commonwealth of India bill.

[140] Granville Austin, the Indian Constitution- cornerstone of a nation, p. 219 (36th impression 2019)

[141] Jay Vinayak, O. and Sengupta, A., 2020. *Judicial appointments in India: from pillar to post,* CONSTITUTIONAL COURT REVIEW, 10(1), pp.43-64.

who likely reviewed the provisions shortly after their drafting, penned a letter to Nehru expressing his concerns. Justice Kania refrained from commenting on the courts' jurisdictions and powers, instead focusing on the judiciary's independence. He proposed that the draft constitution clearly define the relationship between the executive and the judiciary to safeguard against any suspicion of executive control. Kania stressed that when nominating a person for a High Court judgeship, the governor and the High Court Chief Justice should communicate directly to prevent interference from the provincial home ministry. Otherwise, Justice Kania cautioned, local politics could compromise the selection of judges[142].

On May 24th, 1949, the assembly discussed the appointment of Supreme Court judges and expressed concerns about the influence of politics on the judiciary system[143]. One member suggested that the appointment of judges should require the approval of two-thirds of both houses of parliament in order to maintain their independence. In response, Dr. Ambedkar argued that the draft provision struck a balance between the English system, in which judges were appointed by the Lord Chancellor without much oversight, and the American system, in which judicial appointments were confirmed by the Senate and often became politicized. The majority of the assembly agreed with Dr. Ambedkar's arguments, and the provision was subsequently adopted.In this reference it is pertinent to discuss the views of Prof Shibban Lal Saksena, Prof K. T. Shah and Dr. B.R. Ambedkar.

- Professor Shibban Lal Saksena has shared his thoughts on the proposal to replace clause (2) of Article 103. His suggestion is that the President appoint the Chief Justice of the Supreme Court of Bharat, subject to confirmation by a two-thirds majority of the total number of members of Parliament assembled in a joint session of both Houses of Parliament. Clause (3) outlines that every judge of the

---

[142] Memorandum Representing the Views of the Federal Court and the Chief Justices Representing All the Provincial High Courts in the Union of India, *Comments on the Provisions of the Draft Constitution of India* (New Delhi, 1948), 20–8.

[143] Misra, S. and Nair, R., 2017,*Independence of the Judiciary: Appointments of Judges to the Supreme Court and High Courts of India,* SOUTH ASIA JUDICIAL BAROMETER, p.11

Supreme Court should be appointed by the President on the advice of the Chief Justice of Bharat, under his hand and seal, and should remain in office until they reach the age of sixty-five years. Additionally, it is noted that a judge may resign from their position by writing under their hand addressed to the President, or a judge may be removed from their role in the manner provided in clause (5). He proposed that the Chief Justice of the Supreme Court should be appointed by the president but confirmed by at least two-thirds majority of both houses. Currently, the President appoints the Chief Justice on the Prime Minister's advice. This means that the Chief Justice is not completely independent of the executive, which he wanted to change. Further,he provided that the President shall have the initiative, which means that the executive can suggest names, but the joint session of both houses of the assembly will choose the appropriate name by a two-thirds majority vote.

According to professor, the Chief Justice of the Supreme Court should be independent, and the highest tribunal of justice in our country should be above suspicion and not influenced by any executive.He listed out two advantages for his proposal first, it gives the executive the right to choose a candidate they think is proper and second, it ensures that the name proposed is not chosen in a party spirit, but in a manner that all the members of both houses shall approve. Thus, the President will have the initiative to choose the name, but the appointed person shall enjoy the confidence of both houses of the legislature[144].

- Professor K T Shah: Professor Shah expressed his views on Clause (2) of Article 103 and suggested an amendment to make the appointment of judges impartial. He proposed that after the word "with," the words "the council of states and" be added. So, the revised provision would read, "*Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with the council of states and such of the judges of the Supreme*

[144] Excerpts from the Constituent Assembly of India Deabtes, Volume VIII, Book No 3. Date- 24 May 1949. Referred from Choosing Hammurabi- Debates on Judicial Appointment, edited by Santosh Paul.

Court and of the High Court in the states as may be necessary for the purpose and shall hold office until he attains the age of sixty-five years."

He further suggested that the appointment of judges should be free from political influence. He noted that the current constitution concentrates significant power and influence in the hands of the prime minister regarding the appointment of judges, ambassadors, or governors, which poses a risk of the prime minister becoming a dictator. Professor Shah felt that some cases, such as the appointment of judges in the Supreme Court, should be removed from the political influence of party maneuvering. He proposed that the appointment of judges should be made by the president after consultation with not only the judicial service but also the council of states. This approach would eliminate or minimize the party element and any political influence, allowing for the appointment of judges to be made purely on the basis of balance of power, similar to the financial powers[145].Further he suggested the involvement of the council of states in advising the President, aiming to mitigate any undue influence the prime minister might exert. Thus, incorporating the council of states as an advisory entity to the President, especially in the appointment of the Supreme Judiciary, is seen as unobjectionable as it comprises state representatives and ensures a balanced perspective.[146]

- Dr.B.R.Ambedkhar : During the session, Dr. Ambedkar addressed the issue of appointing judges to the Supreme Court, highlighting three proposals that were put forward. The first proposal involved the appointment of judges with the approval of the chief justice, while the second suggested that the president's choices should be subject to a two-thirds vote by parliament. The third proposal suggested that the council of states should be consulted in the appointment process. Dr. Ambedkar acknowledged the importance of this matter and stressed

---

[145] Excerpts from the Constituent Assembly of India Deabtes, Volume VIII, Book No 3. Date- 24 May 1949. Referred from Choosing Hammurabi- Debates on Judicial Appointment, edited by Santosh Paul.

[146] ibid

the need for an independent and competent judiciary[147]. He raised the question of how these two objectives could be achieved.Different countries have varying systems for making appointments. In Great Britain, appointments are made by the crown, which essentially means the executive of the day has unlimited power. Conversely, in the United States, officers of the Supreme Court and other state offices are only appointed with the agreement of the senate.In today's world, it would be perilous to allow the president to appoint officers without any form of reservation or limitation, based solely on the advice of the executive of the day. Similarly, requiring every appointment to be approved by the legislature is not the most practical provision. It is cumbersome and also leaves room for political pressure and considerations to influence appointments[148].

Some argue that the chief justice should have the final say in appointing judges, but this assumes impartiality and sound judgment. It's risky to give the chief justice veto power as it transfers too much authority. The assembly reached a compromise by requiring the executive to consult well-qualified individuals on judge appointments. Two provisions were laid down for appointing judges to the Supreme Court and High Courts.

1. The President shall appoint every Judge of the Supreme Court after consulting with the Judges of the Supreme Court and the High Courts in the States as deemed necessary. The appointed Judge shall hold the office until they reach the age of 65 years. However, in the case of appointing a Judge other than the Chief Justice, the Chief Justice of India must be consulted.
2. The President shall appoint every Judge of a High Court after consulting with the Chief Justice of India, the Governor of the State, and, in the case of appointing a Judge other than the Chief Justice, the Chief Justice of the High Court.An

---

[147] Kumar, K., 2017. *Indian constitution: The vision of BR Ambedkar*. INTELLECTUAL RESONANCE, 3(5), pp.144-57.

[148] Chakrabarty, B., 2016. *BR Ambedkar and the history of constitutionalizing India*. CONTEMPORARY SOUTH ASIA, 24(2), pp.133-148.

additional or acting Judge shall hold office as provided in article 224, and in any other case, until they reach the age of 62 years[149].

3.7.2 Appointment of Judges to the High Courts

Articles 191 to 206 in Chapter YII of Part VI of the original Draft Constitution dealt with matters pertaining to High Courts. Discussions about these provisions began in the Constituent Assembly on June 6, 1949[150].

- Mr B. Pocker Sahib (Madras: Muslim) introduced an amendment to Article 193 of the original Draft Constitution. The amendment proposed that the Chief Justice of the High Court concerned should be the primary recommender for appointing Judges. The Governor of the Province should be consulted, and the concurrence of the Chief Justice of India should be obtained. The amendment emphasized that the recommendation must come from the Chief Justice of the High Court concerned, and the Governor should only be consulted. The rationale behind this amendment was to ensure that appointments to the High Courts were made free from any political considerations, and the Ministry had no actual role in these appointments.[151]
- Shri Krishna Chandra Sharma, a representative from the United Provinces, proposed an amendment suggesting that when appointing other Judges of a High Court in a State, consulting with the Chief Justice alone should be sufficient. He argued that consulting with the Governor would be an unnecessary precaution and thus undesirable[152].

The provisions regarding the appointment of Judges of the Higher Judiciary, as agreed upon by the Constituent Assembly, exemplify the profound importance that the framers of the Constitution placed on the independence of the Higher Judiciary in a federal democratic republic that is governed by the rule of law.

---

[149] Excerpts from the Constituent Assembly of India Deabtes, Volume VIII, Book No 3. Date- 24 May 1949. Referred from Choosing Hammurabi- Debates on Judicial Appointment, edited by SantoshPaul.

[150] Chaudhuri, A.K., 1977. *Judicial Appointments in High Courts*. THE INDIAN JOURNAL OF POLITICAL SCIENCE, 38(4), pp.494-505.

[151] "Constitution Assembly Debates (Proceedings)," Constituent Assembly of India Vol. VIII, dated June 6,1949, part- II.To sustain his proposed amendment, he also brought in vehemently the recommendations of Federal Court and Chief Justices of High Courts.

[152] Ibid dated June 7,1949, part-1

CHAPTER 4 : JUDICIAL APPOINTMENTS IN INDIAN CONSTITUTIONAL COURTS

4.1 INTRODUCTION

The appointment of judges for constitutional courts is of utmost importance in the Indian legal system. As the upholder of constitutional rights and the interpreter of laws, the judiciary relies on a strong and transparent process for appointing judges.This chapter examines the various aspects of judicial appointments in India, with a focus on both the Supreme Court and the High Courts. By analyzing the criteria, procedures, and discussions surrounding these appointments, we can understand the delicate balance between judicial independence, meritocracy, and democratic accountability.The chapter begins with a look at constitutional provisions and then delves into the evolution of law in judicial appointments, highlighting significant judgments. It also explores criticisms of the collegium system, the enactment of the National Judicial Appointments Commission (NJAC), the subsequent ruling that deemed the NJAC act unconstitutional, and critiques of the ruling.

4.2 CONSTITUTIONAL PROVISIONS

4.2.1 Related to appointment of Judges to the Supreme Court

Chapter IV of Part V of the Indian Constitution deals with the Union Judiciary, which comprises of Articles 124 to 147[153]. Article 124(1)[154] establishes the Supreme Court of India, with the Chief Justice of the Court designated as the Chief Justice of India. The Supreme Court is located in Delhi, and its composition and jurisdiction are outlined in Articles 124 to 147[155] of the Constitution. During the 1950s, the Supreme Court initially consisted of a Chief Justice and seven other judges, but over the years, the number of judges gradually increased.

---

[153] INDIA CONST. art.124 - 147.
[154] INDIA CONST. art.124,cl.1.
[155] INDIA CONST. art.124 - 147.

Article 124(2)[156] can be inter alia read as — "Every Judge of the Supreme Court shall be appointed by the President by the warrant under his hand and seal after consultation with such of the Judges of 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: Provided that in the case of appointment of a Judge other than Chief Justice, the CJI shall always be consulted"[157].

Article 124(3)[158] of the Constitution outlines the qualifications for appointment as a Supreme Court Judge. According to this provision, even a distinguished jurist may be appointed to the position, subject to the President's opinion. This means that even non-practicing lawyers may be considered for the role. It is important to note that Article 124(3) sets forth the specific qualifications that a person must possess to be eligible for appointment as a Supreme Court Judge.

"A person shall not be qualified for Appointment as a Judge of Supreme Court unless he is a citizen of India and –

a) has been for at-least five years a Judge of High Court or of two or more such court in succession; or

b) has been for at-least ten years an Advocate of High Court or of two or more such court in succession; or

c) is, in the opinion of President, a distinguished Jurist"[159].

4.2.2 Related to appointment of Judges to the High Courts:

The Article 217 of the Constitution inter alias, deals with the mode of appointment,removal, resignation, qualification and conditions of service of Judges of High Courts. According to Clause (1) of Article 217[160], it is required that every Judge

---

[156] INDIA CONST. art.124,cl.2.
[157] INDIA CONST. art.124,cl.2.
[158] INDIA CONST. art.124,cl.3.
[159] ibid
[160] INDIA CONST. art.**217. Appointment and conditions of the office of a Judge of a High Court**-cl. (1) 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

of a High Court be appointed by the President using a warrant under his hand and seal. However, this must be done after consulting with the CJI, the Governor of the State, and, in the case of appointing a Judge other than the Chief Justice, the Chief Justice of the High Court. This procedure is applicable to both regular (Permanent) Judges and Additional Judges under Article 224[161]. Moreover, the consultation must be a "full and effective consultation", meaning that the consulted person must be given the same information and materials, and their opinion should be taken after careful consideration.

To be considered for the role, the applicant must hold Indian citizenship and have a minimum of ten years of experience as an advocate or pleader in one or more High Courts consecutively, or have served in a judicial office within India for at least a decade. Preference is often given to candidates who have prior experience in either practicing advocacy or serving as a judicial officer[162].In case of any ambiguity regarding the age of a High Court Judge, the final decision shall be taken by the President after consulting with the Chief Justice of India. The decision of the President in this regard shall be considered as final[163].

The **Indira Jaising case**[164] of 2003 established that the SC does not have disciplinary control over High Court judges. Following this, the **Tirupati**

---

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]]: Provided that-

(a) a Judge may by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

[161] INDIA CONST. art.224

[162]INDIA CONST. art.217,cl.2 - A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and- (a) has for at least ten years held a judicial office in the territory of India; or (b) has for at least ten years been an advocate of a High Court [***] or of two or more such Courts in succession;

[163]INDIA CONST. art.217,cl.3

[164]Indira Jaising v. Supreme Court of India, (2003) 5 SCC 494.

Balaji Developers case[165] in 2004 clarified that the High Court is not subordinate to the Supreme Court. Moreover, the **Imtiyaz Ahmad case**[166] in 2012 affirmed that the Supreme Court does not have superintendence powers over the High Court.

4.3 APPOINTMENT PROCEDURE AND PRACTICES

4.3.1 Appointment Procedure of Chief Justice of India[167]

It is the general consensus that the CJI should be appointed based on their seniority and deemed fit to assume the position. The seniority norm, a simple, entirely objective, precisely measurable criterion, could significantly impact the Supreme Court‘s jurisprudence[168]. The SC of India does not convene end banc or in plenary sessions. Its judges sit in benches or panels, usually of two judges. The CJI is the one who determines how each bench is to be composed, and more importantly, he also determines the type of cases that each bench or panel will typically decide. For this reason, the question of who becomes CJI is very important[169]. In this reference, a brief note on how seniority is measured is necessary:

a) when two lawyers are appointed to a High Court on the same day, the senior lawyer, that is, who was registered with the state bar council prior in time, is considered is the senior.

b) if a lawyer and a judge are appointed to a court on the same day, the lawyer (called a bar judge) is considered senior[170].

At the appropriate time, the Union Minister of Law, Justice and Company Affairs will request a recommendation from the outgoing Chief Justice of India for the next

---

[165]Tirupati Balaji Developers (P) Ltd. v. State of Bihar, (2004) 5 SCC 1

[166] Imtiyaz Ahmad v. State of U.P., (2012) 2 SCC 688.

[167]Department of Justice, India, "Memorandum of Procedure for Appointment of Supreme Court Judges," https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court (last visited Apr 12, 2024)

[168] George H. Gadbois, Jr. 1982. *Judicial appointments in India: the perils of non-contextual analysis*, ASIAN THOUGHT AND SOCIETY.

[169] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION- UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA p. 64.

[170] When justice Santosh hedge and R.P. Sethi were appointed to the supreme court of India on the same day, Santosh hedge- the _bar judge‘, was considered senior to R.P. Sethi, the Karnataka court chief justice. However, this ms to be a norm of convenience, which has at times been violated in the past. S.S. Sodhi, the other side of justice. New Delhi: Hay House. Today it is therefore unlikely that a lawyer appointed to the supreme court will be given seniority‘ over a high court judge appointed to thesupreme court on the same day, as stated by ABHINAV CHNDRACHUD IN, THE INFORMAL CONSTITUTION UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA p. 86

appointment. If there is any uncertainty regarding the suitability of the most senior judge for the role of Chief Justice of India, consultation with other judges will be conducted

4.3.2 The Appointment of other judges : In the early years of the Indian republic, the process of appointing judges was put to the test. Since the constitution did not provide detailed guidelines, a protocol was established for selecting Supreme Court and High court judges[171]. Over the first two decades, a tradition of consensus developed among the constitutional officials. Even under political pressure, the presidents would not make a decision without the agreement of the CJI when it came to appointing judges[172].

Whenever a vacancy is expected to arise in the office of a Judge of the Supreme Court, the CJI will initiate a proposal and forward his recommendation to the Union Minister of Law, Justice and Company Affairs to fill the vacancy. The opinion of the CJI for appointing a Judge of the Supreme Court should be formed in consultation with a collegium of the four most senior Judges of the Supreme Court. If the appointment concerns a high court, the CJI must ascertain the views of the most senior Judge in the Supreme Court who hails from the High Court where the recommended person comes from. If he does not know the recommended person's merits and demerits, the next senior-most Judge in the Supreme Court from that High Court should be consulted. Upon receiving the final recommendation from the CJI, the Union Minister of Law, Justice, and Company Affairs will present the recommendations to the Prime Minister, who will then advise the President on the appointment. Once the President signs the warrant of appointment, the Secretary to the Government of India in the Department of Justice will publicly announce the appointment and release the necessary notification in the Gazette of India[173].

---

[171]Law Commission of India, The Method of Appointment of Judges, 80th Report, Ministry of Law and Justice, Government of India (1979)

[172] B.P. SINHA, REMINISCENCES AND REFLECTIONS OF A CHIEF JUSTICE, p. 98.

[173] Department of Justice, India *Supra* Note 171

4.4 CONTROVERSY OVER CONSULTATION

The Constitution outlines two types of consultation: discretionary and mandatory. When appointing judges, the President must consult with the Chief Justice of India, but when appointing the CJI, no consultation is required. It must be noted that the word "may" used in Art.124[174] makes it clear that consultation is not mandatory.The provisions give the President wide discretionary power in selecting judges. However, it's important for the government to follow healthy principles of convention. The term "after consultation with" technically means that the CJI must be consulted, but his opinion need not be respected. This could contradict the principle of separation of the executive and judiciary and undermine judicial independence.

The consultation process for judicial appointments in India was questioned in the 14th report by the Law Commission of India[175]. The commission conducted interviews with judges, members of the bar, and questionnaires were circulated widely across the country. The report highlighted that communal and regional considerations were often prioritized over merit when it came to judicial appointments[176]. This was contrary to what the drafters had envisioned and what the law commission believed should be the case[177].Although the question of whether the President should appoint judges based on the opinions of the Chief Justice and other judges was discussed in the Constituent Assembly and ultimately dismissed, it was later revisited in several Supreme Court cases.

4.5 LANDMARK JUDICIAL DECISIONS

In the case of **Samsher Singh v. State of Punjab**[178], the SC of India ruled that it is mandatory to consult with the CJI under Articles 217[179] and 124[180]. The government of India must accept this consultation. The court emphasized that the CJI's opinion should hold the utmost importance, and the rejection of his advice should

---

[174] INDIA CONST. art.124

[175] Law Commission of India, 14th Report, Ministry of Law and Justice, Government of India (1958)

[176] A number of sources are cited by the Law Commission in coming to this conclusion, including an opinion by an unnamed chief justice of India. Law Commission 14th Report, p. 106.

[177] ARGHYA SENGUPTA, INDEPENDENCE & ACCOUNTABILITY OF THE INDIAN HIGHER JUDICIARY, p. 20

[178] AIR 1974 SC 2192

[179] INDIA CONST. art.217

[180] INDIA CONST. art.124

only be done for valid reasons. If there is a suspicion of improper motives behind the decision, the court has the power to investigate whether any external factors influenced the verdict of the executive[181].

In the landmark case of **Union of India v. Sankalchand Himatlal Sheth**[182], the Supreme Court made it clear that the consultation required under Article 222(1)[183] must be full and effective, not merely a formality. To ensure that the consultation is both genuine and productive, the government must provide the CJI with all relevant materials and its proposed course of action. It is the President's duty, as enshrined in the Constitution, to communicate this information to the CJI.Similarly, the CJI has a responsibility to carefully consider all information provided and offer advice that serves the public interest, particularly with regard to the justice system. Although the President is not bound by this advice[184], consultation with the Chief Justice is required by the Constitution, not their agreement.

In the case of **S.P. Gupta, also known as the First Judges Case**[185], the appointment and transfer of judges was reviewed by a five-judge bench of the SC. The court upheld the decision made in the Sankalchand Himatlal Sheth Case, stating that consultation must be fully effective and must happen prior to the actual transfer of a judge. If this doesn't happen, then the transfer would be considered unconstitutional[186].The court rejected the petitioner's argument that the CJI should be given more importance in the consultative process. It was decided that each constitutional functionary was entitled to equal weightage. While it is mandatory for the Central Government to consult the Chief Justice, they are not obligated to act in accordance with their opinion, though it would be given great weight. As a result, the ultimate power of appointment rests with the Central Government.

The First Judges Case was seen as a blow to judicial independence because the opinion of the CJI would not be binding on the president. This means that

---

[181] ibid
[182] AIR 1977 SC 2328.
[183] INDIA CONST. art.222, cl.1
[184] 1978 SCR (1) 423, 506
[185] AIR 1982 SC 149. Para 589
[186] ibid

consultation does not amount to concurrence. Although this case only dealt with High Court judges and chief justices, the decision would have significant consequences for the manner in which even Supreme Court judges would be appointed[187].

In **the second Judges' case, the Supreme Court Advocates on Record Association v Union of India**[188], a seven-judge majority overruled the S.P. Gupta case[189] and significantly changed the appointments process in Article 124 and Article 217 of the Constitution. The bench examined three questions regarding the appointment of judges[190]:

a) Does the opinion of the Chief Justice of India bind the President, i.e., does consultation amount to concurrence?

b) Does the opinion of the CJI take precedence over the opinion of the High Court Chief Justice, i.e., does the CJI have primacy over the Chief Justice of a High Court in the S.P. Gupta sense?

c) Does the opinion of the CJI take precedence over the opinion of the Supreme Court judges he consults before making appointments?

The first question (a) answered in affirmative. The SC of India established its authority over the executive by ruling that the views of the CJI would be binding on the president. The court also determined that if the CJI and the Chief Justice of a High Court disagreed on a candidate's suitability for appointment to the High Court, the president could reject the CJI's opinion[191]. In answering second question, the court found that if the CJI and the Chief Justice of a High Court disagreed in their opinions as to the suitability of a candidate for appointment to the High Court, then the president of India would have the option of refusing to accept the opinion of the CJI[192].The third question was answered negatively. The President is not required to follow the CJI's opinion if there is a disagreement between him and the senior judges

---

[187] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION- UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA

[188] AIR 1994 SC 268.(Per Verma J)

[189] AIR 1991 SC 631

[190] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION- UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA

[191] ibid

[192] *Supra* Note.146

consulted. This means that consultation in such limited circumstances would not be considered concurrence. It was also explained that if the President does not find a candidate suitable for appointment due to their antecedents and personal character, the Chief Justice of India can be asked to reconsider their recommendation in favour of that candidate. However, if the CJI and the senior judges consulted all agree on an appointment, the President must make the appointment, following healthy convention[193].The SC has set a new appointment procedure for judges. The CJI must consult with different people before making a decision.

For appointments to the Supreme Court, the Chief Justice of India must consult:

1. The two most senior judges on the Supreme Court
2. The most senior judge on the Supreme Court whose opinion is important in determining the candidate's suitability. This could be because the judge comes from the same High Court as the candidate or for another reason.

For appointments to a High Court, the Chief Justice of India must seek the views of:

1. Colleagues on the Supreme Court who are familiar with the affairs of the concerned High Court.
2. The Chief Justice of the High Court (after ascertaining the views of at least the two most senior judge on that High Court), whose opinion carries the most significant weight.
3. The governor of the state, acting on the aid and advice of his council of ministers, whose opinion is important.
4. Two or more senior judges of that High Court, if the Chief Justice of India wishes to seek their opinion. All opinions must be expressed in writing to avoid ambiguity.

Criticism of the judgment: The Second Judges' case was intended to reduce political influence in the appointment of judges and limit the individual discretion of chief justices of the Supreme Court and High Courts. This led to the establishment of a decentralized, collegium system of governance[194]. However, some critics viewed this

---

[193] ibid

[194] C.S. Vaidyanathan, *Appointment of judges to the Higher Judiciary in Human Rights and The Rule*

decision as an overcompensation and an exaggerated remedial measure to address the Supreme Court's ruling in the First Judge's case[195]. In fact, the decision effectively rewrote certain provisions of the constitution by changing the term "consultation" to "concurrence[196]." Opponents have widely denounced the Second Judges' case[197], with Krishna Iyer noting that the collegium system lacks a structure for hearing public input, laying down principles, or conducting investigations, leading to a sense of anarchy. Although senior advocate Fali S. Nariman was successful in his petition (Supreme Court Advocates-on-Record Association) challenging the Second Judges' case decision, he has since admitted that it was a case 'he would have preferred to lose[198]'.*"My 1993 judgement…. Was very much misunderstood and misused… Therefore, some kind of rethink is required. My judgement says the appointment process of High Court and Supreme Court judges is basically a joint participatory exercise between the executive and the judiciary, both taking part in it."*[199]

Back in 1998, the Collegium was enlarged by the SC to include five members, consisting of the Chief Justice of India and his four most experienced colleagues, at the behest of a **Presidential Reference** seeking its viewpoint(Third Judges Case)[200]. Presently, the SC collegium is helmed by the CJI and comprises four other esteemed judges of the court. Similarly, a High Court collegium is overseen by its Chief Justice and includes four other distinguished judges from that particular court.During this period, the legislature made two endeavours to grant the executive branch the authority to appoint judges once more. V.N. Gadgil made an effort to introduce a bill with this objective, yet it did not succeed[201]. Subsequently, Law Minister Ramakant D. Khalap put forth a constitutional amendment bill that sought to

---

of Law: Essay in honour of Soli Sorabjee.

[195] DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA

[196] D.D. BASU, SHORTER CONSTITUTION OF INDIA

[197] ZIA MODY, 10 JUDGEMENTS THAT CHANGED INDIA, PENGUIN BOOKS INDIA, 2013

[198] NARIMAN, BEFORE MEMORY FADES

[199] Words of Justice J.S. Verma in V. Venkatesan, INTERVIEW WITH JUSTICE J.S. VERMA, former Chief Justice of India, frontline issue 20, Sep 2008

[200] In re presidential Reference AIR 1999 SC 1.

[201] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION- UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA

divest the Chief Justice of India of the power to appoint judges. However, this bill too was unsuccessful in its implementation[202]. There were some controversies around the appointments and transfer of judges, which resulted in litigations[203]. In light of this, the President referred the matter to the Supreme Court for its opinion under Article 143 of the Constitution. The court was asked to address nine issues related to the appointments and transfer of judges and also to clarify any doubts that had been raised about their decision in the Second Judges Case.

The **Third Judges' Case[204]** refers to the advice given by the Supreme Court to the President under Article 143 of the Indian Constitution. In this case, the President had posed nine questions to the Supreme Court of India for consideration and to report its opinion thereon.

(1) "whether the expression 'consultation with the CJI' in articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the CJI or does the sole individual opinion of the CJI constitute consultation within the meaning of the said articles";

(2) "whether the transfer of judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that "such transfer is not justiciable on any ground" and its further observation mat limited judicial review is available in matters of transfer, and the extent and scope of judicial review;"

(3) "whether article 124(2) as interpreted in the said judgment requires the CJI to consult only the two seniors most Judges or whether there should be wider consultation according to past practice";

(4) "whether the CJI is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non appointment of a judge recommended for appointment";

---

[202] SUMIT MITRA AND SANYAM CHAKRAVARTHY, LOCKING HORNS INDIA TODAY, 1997

[203] M.P. SINGH, SECURING THE INDEPENDENCE OF THE JUDICIARY-THE INDIAN EXPERIENCE, (2000) p.274

[204] In re presidential Reference AIR 1999 SC 1.

(5) “whether the requirement of consultation by the CJI with his colleagues, who are likely to be conversant with the affairs of the concerned High Court refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other Court”;

(6) “whether in light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the 'strong cogent reason' required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her”;

(7) “whether the government is not entitled to require that the opinions of the other consulted Judges be in writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views”;

(8) “whether the CJI is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India;”

(9) “whether any recommendations made by the CJI without complying with the norms and consultation process are binding upon the Government of India.”

The court consolidated these questions into three groups of issues: Nature of consultation process,Composition of collegium, Judicial Review and Relevance of seniority in making appointments to the court.The first departure was about the nature of the consultation process between the CJI and other judges. The SC increased the number of judges in the consultation process of appointment of Supreme Court judges as it would ensure a better selection process and named it, The Collegium- The Chief Justice of India and four senior judges of the Supreme Court. It was held that even if the next Chief Justice of India by the seniority norm were not one of the four most senior most judges on the court, he would invariably be part of the collegium. In its decision in the Third judges‘ case, The Supreme Court answered all 9 questions

which was posed by reference and the court emphasised the point that the answers should be read in conjunction with the body of this opinion[205]:

1) The Constitution of India mandates that "consultation with the CJI" in Articles 217(1) and 222(1) requires the consultation of multiple Judges, not just the Chief Justice's opinion alone.

2) Judicial review of puisne judge transfers is limited to the recommendation made by the Chief Justice of India, which must be done in consultation with the four most senior Supreme Court judges. The views of the Chief Justices of the High Courts involved must also be considered.

3) The CJI recommends appointments to the Supreme Court and transfers to High Courts after consulting with the four most senior Puisne Judges of the Supreme Court for Supreme Court appointments and two most senior Puisne Judges for High Court appointments.

4) The CJI must consult other judges of the Supreme Court regarding the non-appointment of a recommended judge based on information provided by the Government of India.

5) The CJI must consult with colleagues familiar with a High Court, including judges who have served as Judges or Chief Justices of that High Court on transfer.

6) Reasons for passing over a senior judge need not be detailed, but positive reasons for the recommendation must be recorded.

7)The opinions of the consulted Judges must be documented in writing and conveyed to the Government of India by the CJI, along with his own opinions, to the extent explained in this document.

8) The CJI must follow the consultation process and norms while recommending to the Government of India.

9)Non-compliance with the consultation process makes CJI recommendations non-binding on the Government of India.

---

[205] ibid

4.6 CRITICISM OF COLLEGIUM SYSTEM

The reasoning behind the creation of the judicial collegium for appointments was not provided in the presidential reference, lacking both textual and normative justification[206]. Although the use of "consultation" in Article 124 and Article 217 suggests a multiplicity of opinions, it does not specify a required size. The court did not explain the number of individuals in the collegium, including their specific roles or how a minimum number would protect judicial independence and prevent arbitrariness[207]. However, the collegium's establishment aimed to shield judicial appointments from executive interference and safeguard the judiciary's independence. Due to the opaque nature of the process, the reasons for certain appointments and non-appointments remain unknown. Nonetheless, some controversial appointments have exposed significant deficiencies in the collegium's appointment process or lack thereof[208]. As Krishna Iyer noted, under the collegium system, *"there is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made and sort of anarchy prevails"*.It became clear that the Indian system had failed when PD Dinakaran[209], who was facing a string of corruption allegations, was nominated for elevation to the Supreme Court by the collegium in 2009[210]. The Law Commission of India's 214th Report criticized the First, Second, and Third Judges Cases for rewriting the Constitution and giving the Chief Justice of India undue primacy. It argued that the Constitution does not grant such primacy or

---

[206] Bansal, A., 2023. *Collegium System in India*. Issue 1 INDIAN JL & LEGAL RSCH., 5, p.1.

[207] ARGHYA SENGUPTA, INDEPENDENCE AND ACCOUNTABILITY OF THE INDIAN HIGHER JUDICIARY, Cambridge University Press, 2019.

[208] ARGHYA SENGUPTA & RITWIKA SHARMA, APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA, OXFORD UNIVERSITY PRESS, 2018.

[209] The appointment of Justice P.D. Dinakaran to the Supreme court demonstrates the deficiencies of the process. At the time the proposal to appoint him was leaked, several senior members of the bar provided details of the judges disproportionate assets obtained in purported violation of the law as well as several questionable judicial orders in matters when he had an interest in the outcome of the case.The statutory committee set up during the process of impeachment found 12 charges to be prima facie tenable. However, before their report could be tabled, Justice Dinakaran resigned lending further truth to these charges. Irrespective of their veracity, it demonstrated the complete lack of fitness for the task of collegium, since it neither had the infrastructure nor the processes to check antecedents of candidates. Chandani Banerjee, what in the name of Justice, outlook (13 June 2011) As referred by ARGHYA SENGUPTA & RITWIKA SHARMA, APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA, Oxford university press, 2018.

[210] Suhrith Parthasarathy by appointment Only- i*s the supreme court collegium compromising judicial independence*, LEXIS NEXIS 2016.

mention the "Collegium" or fix the number of judges to be consulted. Only the President has the power to consult judges. The Commission stressed that the SC cannot add new words to the Constitution and called for a reconsideration of these judgments to bring clarity and consistency to the appointment process[211].

The collegium system needs reforms to consider lawyers from trial courts and law firms for judicial appointments, thus promoting diversity and expertise within the judiciary[212].The lack of action has resulted in a substantial number of vacancies in the courts and a subsequent rise in the number of pending cases[213]. Many believe that the collegium system is unconstitutional, as the Constitution specifies that the President should appoint with the input of the judiciary, not the other way around[214]. Despite dwindling public trust, this method persists, even though it is legally unsound, operationally challenging, and riddled with significant procedural and substantive issues[215].

4.7 ENACTMENT OF NATIONAL JUDICIAL APPOINTMENTS COMMISSION AND 99TH CONSTITUTIONAL AMENDMENT ACT, 2014

In 2014, Parliament passed two laws that established the National Judicial Appointments Commission (NJAC)[216]. These laws - the Constitution (Ninety-ninth Amendment) Act and the NJAC Act - amended Articles 124 and 217 of

---

[211] Law Commission of India, 214th Report on PROPOSAL FOR RECONSIDERATION OF JUDGES CASES I, II AND III – S.P. GUPTA V. UNION OF INDIA, Ministry of Law and Justice, Government of India (2002)

[212] Vikas Singh, *Collegium System Needs Improvement; Lawyers in Trial Courts, Law Firms Ignored: SCBA President Vikas Singh*, LIVELAW (Nov. 28, 2022, 9:16 PM), https://www.livelaw.in/top-stories/collegium-system-needs-improvement-lawyers-in-trial-courts-law-firms-ignored-scba-president-vikas-singh-215116.(Last accessed on Jun 10,2024)

[213] Fourth Report, 'Ethics in Governance', Second Administrative Reforms Commission

[214] Shambhu Sharan and Gunjan Chhabra,*The National Judicial Appointment Commission- A critique.* https://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Aug/The%20National%20Judicial%20Appointment%20Commission%20-.pdf

[215] ARGHYA SENGUPTA, INDEPENDENCE AND ACCOUNTABILITY OF THE INDIAN HIGHER JUDICIARY, Cambridge University Press, 2019.

[216] The Constitution (Ninety-ninth Amendment) Act, 2014 (India); National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014 (India). Under Article 368 of the Constitution, the Constitution (Ninety-ninth Amendment) Act had to be passed by two-thirds of each house of Parliament and presented to the president for her assent.

the Constitution[217], replacing the word "consultation" with "on the recommendation of the National Judicial Appointments Commission"[218]. The NJAC was created by the Indian Parliament as an alternative to the current "collegium" system, in which senior SC Justices have the final say on higher judiciary appointments[219]. The NJAC consisted of the CJI, two additional senior Justices, the Union Minister of Law and Justice, and two "eminent persons," as stipulated by the constitution[220]. Political leaders and civil society representatives worked together with the Indian Parliament to promote transparency and accountability in the judicial selection process.

As a result, the NJAC's recommendations on appointments to the Supreme Court and High Courts became binding on the President[221]. The Ninety-ninth Amendment provided the framework for the NJAC, which would consist of the CJI, the next two eldest judges of the Supreme Court, and the Union Minister of Law and justice, and ―two eminent persons[222]. Article 124B outlines the responsibilities of the NJAC, which consist of:

(1) recommending individuals to be selected for the Supreme Court and High Courts;

(2) recommending the transfer of judges from one High Court to another; and

(3) ensuring that the suggested nominees possess the required ability and integrity[223].

Article 124C lets Parliament regulate selection procedures and empower the NJAC to pass the required principles. The NJAC Act let the commission issue regulations and determine judicial appointments and transfers[224]. However, the Act

---

[217] The Constitution (Ninety-ninth Amendment) Act, 2014 (India), arts. 3, 6. Articles 222 and 224 were also amended to give the National Judicial Appointments Commission (NJAC or Commission) the final word on the transfer and additional high court appointments, respectively. INDIA CONSTITUTION. arts. 222, 224

[218] The Constitution (Ninety-ninth Amendment) Act, 2014 (India), Article 2, clause a.

[219] Arghya Sengupta, Judicial Primacy and the Basic Structure: *A Legal Analysis of the NJAC Judgment*, 48 ECON. & POL. WKLY. 27, 27 (2015).

[220] INDIA CONSTITUTION. Article 3, amended by The Constitution (Ninety-ninth Amendment) Act, 2014.

[221] ibid

[222] eminent persons were to be nominated by a committee comprised of the prime minister, the leader of the opposition in the Lok Sabha (the lower house of Parliament), and the Chief Justice. Article 3.

[223] ibid

[224] ibid

restricted the NJAC from recommending a nominee if two members did not concur, allowing any two members, including eminent persons, to veto judicial nominations[225].

4.8 NJAC JUDGMENT

In 2015, some lawyers challenged the Ninety-ninth Amendment in the Supreme Court. Because the case raised significant questions about the Constitution, the Supreme Court referred it to a five-judge bench. On October 16, 2015, the Supreme Court of India decided the case of **"Supreme Court Advocates-on-Record Association v. Union of India (NJAC Judgment)[226]"**, with four Justices voting in favour of the majority and one against. The court declared the Ninety-ninth Amendment to the Indian Constitution and the related legislation, which established the National Judicial Appointments Commission, to be unconstitutional[227].

In the ruling, Khehar J., along with Lokur J., Kurian J., and Goel J., referred to two past cases, S**amsher Singh v. State of Punjab**[228] and **Sankalchand Himatlal Sheth v. Union of India**[229]. In **Samsher Singh's case**, the Supreme Court had stated that while appointing judges to the High Courts or the Supreme Court, the President must rely on the advice of the Chief Justice of India. This principle was also reiterated in Sankalchand's case. However, this principle was ignored in the First Judges case. The court based its decision on the Constituent assembly debates and upheld the interpretation granted to them in the 2nd Judges case and the 3rd Judges case.

According to Justice Khehar, there were two primary reasons why the NJAC was deemed destructive of the basic structure. Firstly, it failed to ensure sufficient judicial representation during the selection process, which meant that even if the Chief Justice and two most senior puisne judges agreed on an appointment, it

---

[225] National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014 (India), Article 12 arts. 5–6, 9. Article 5(2)
[226] (2016) 4 SCC 1
[227] ibid
[228] AIR 1974 SC 2192
[229] AIR 1977 SC 2328

was not guaranteed to be made[230]. Secondly, the inclusion of the Law Minister created a conflict of interest and infringed on judicial independence since the Government of India was involved in much litigation in the courts[231]. Additionally, Justice Khehar noted that the 'eminent persons' clause was void for vagueness as it did not specify any minimum qualifications for such persons[232]. Justice Khehar, together with Justice Goel, seemed to use the terms 'judicial primacy' and 'judicial independence' interchangeably without providing any substantive reasoning on why judicial primacy is necessary for preserving judicial independence.

Justice Chelameswar argued for judicial restraint in his strong dissent, focusing mainly on the power of Parliament to pass the Amendment in question. He made a clear distinction between the 'basic features' and 'basic structure' of the Constitution[233], stating that amending a 'basic feature' would not necessarily harm the constitutional scheme as a whole[234]. The NJAC Act gives eminent persons too much power to veto decisions made by the Chief Justice of India in consultation with other judges[235]. The veto power is not part of the 99th Constitution Amendment Act, 2014. It was not intended by the Constitution and has disrupted the process of appointing judges set by the Constituent Assembly, damaging the basic structure of the Constitution.

As per the court's verdict, the minister's participation in the judicial appointment procedure as a member of the NJAC led to the possibility of a conflict of interest. Although the minister did not possess the authority to veto or take the ultimate decision, the court opined that the mere presence of the minister in the NJAC undermined the tenets of judicial sovereignty and the division of powers[236].

The court has stated that the judiciary's independence, separation of powers, federalism, democracy, rule of law, and supremacy of the Constitution are all

---

[230] Ibid at para 227
[231] Ibid at para 287
[232] Ibid at para 301
[233] Ibid at Para 492
[234] Ibid at Para 492- 502
[235] A SENGUPTA INDEPENDENCE AND ACCOUNTABILITY OF THE INDIAN HIGHER JUDICIARY (2019) 65.
[236] A Sengupta,*Appointment of Judges and the Basic Structure Doctrine in India* (2016) 132 LAW QUARTERLY REVIEW 201, 205.

essential to its primacy. The Constitution (99th Amendment) Act 2014 and the NJAC Act could harm the judiciary's primacy and are against the fundamental structure of the Constitution. Therefore, they must be invalidated. The Supreme Court's decision in the Fourth Judges Case was based on the argument that the new regime does not give the Chief Justice of India's opinion primacy. This goes against the Constitution's basic structure, as the judiciary's primacy is an essential element of it. However, this argument does not align with the Constitutional mandate under the pre-amended Articles 124 and 217, though it is consistent with previous Supreme Court judgments.

The Supreme Court rejected a proposed new law, leading to disagreement with the Executive. However, they agreed to revise the appointment procedure for judges, keeping the Collegium in charge. The Supreme Court also sought suggestions to improve the Collegium's efficiency. On November 3, 2015, the Supreme Court compiled the suggestions and received a report from Additional Solicitor General Pinky Anand and Senior Advocate Arvind P. Datar. The suggestions can be grouped into four categories: transparency, judge eligibility, secretariat, and complaint mechanism[237].

I. The collegium was not transparent before 1998. To increase transparency, well-defined criteria for appointing a judge should be publicly accessible, and candidates should disclose all their judicial relationships. However, Fali S. Nariman warns that too much transparency can hinder the appointment process[238].
II. Suggestions were made to improve the selection process for judges, including clearly defining eligibility criteria, widening the pool of candidates, and considering judges from lower courts for higher positions[239].
III. Judges of the collegium were already burdened with adjudication of cases, and appointing judges would add to their workload. Hence, collecting data on

[237] Writ Petition (Civil) No. 13 of 2015, available at: http://judis.nic.in/
[238] ibid
[239] ibid

candidate eligibility, number of judgments delivered, and quality of judgments would reduce the burden and ensure efficiency.

IV. The collegium needs a complaint mechanism to address any issues with its functioning. All complaints will be taken seriously and addressed accordingly. Valid complaints will be handled directly by the Executive. However, frivolous and baseless complaints will be dismissed[240].

On October 3rd, 2017, the collegium made a decision to be more transparent by publicly posting its recommendations and explanations for selecting or rejecting judges[241]. However, this raised concerns about the right to reputation versus the right to information. When reasons for rejection included negative comments, it could harm the candidates' reputations. One solution could be to communicate the reasons for rejection to the candidates personally. This would increase transparency and lead to better judicial appointments.

4.9 CRITIQUES OF NJAC JUDGMENT:

The Supreme Court's view that judicial primacy is essential for maintaining judicial independence in appointments cannot be considered a part of the basic structure of the Constitution[242].The basic structure doctrine aims to prevent fundamental changes to the Constitution, and it is incorrect to argue that judicial primacy, a concept that only existed after the second judge's case, is part of the basic structure[243]. Furthermore, the court needed to provide a compelling rationale for why these interpretations should be considered part of the Constitution's basic structure[244]. It is unreasonable to include judicial primacy, which is a practice established by the Supreme Court, as a fundamental part of the Constitution[245].The NJAC had a

---

[240] ibid

[241] Available at: http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-MinutesTransparency.pdf

[242] JAISING, INDIRA. *National Judicial Appointments Commission: A Critique.* ECONOMIC AND POLITICAL WEEKLY 49, no. 35 (2014): 16–19. http://www.jstor.org/stable/24480485.

[243] Rehan Abeyratne, Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective

[244] Arghya Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgement*, 50 (2015) https://www-jstororg.opj.remotlog.com/stable/pdf/44002894.pdf?ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fa stly-default%3Afb5b0de51523aaf7c1bd448faaeed871 (last visited Jun 3, 2024).

[245] ibid

fundamental flaw because it had an even number of members[246]. A powerful panel like this should have an odd number of members to ensure that decisions can be made with a clear majority. The NJAC did not address this, which could lead to a deadlock. Additionally, while the 99th Amendment and the Act included two eminent persons, there were no guidelines for their nomination[247]. The proposed Article 124C violates the Constitution by giving Parliament power over appointing judges, undermining the judiciary's independence. Section 5 of the NJAC Act allows someone to stop an appointee from being chosen. However, there are no rules on how to use this power, so it could be used for personal gain[248]. Section 6 of the NJAC Act made the process of choosing someone confusing. It did not say if the opinions of other senior judges could overrule the Chief Justice, and it needed to be clarified what some of the words meant. Section 12 allowed the NJAC to create rules, which would be published in the Official Gazette[249]. This means that another executive notification could change the criteria for making appointment regulations.Also, Section 13 of the NJAC Act allows Parliament to change NJAC rules, which could threaten the body's autonomy. All these issues were not addressed in the decision[250]. The NJAC and the 99th Constitutional Amendment of 2014 significantly shifted the power of judicial appointments to the executive branch. The issue of judicial appointments has always been closely tied to the concept of judicial independence, which is consistently recognized as a basic structure of the Constitution. Granting such substantial authority to the executive, as outlined in the NJAC Act of 2014, undermines judicial independence and impairs the separation of powers[251].It wouldn't be fair to say that

---

[246] Arvind Datar, Arghya Sengupta & Ritwika Sharma, Eight Fatal Flaws: The Failings of the National Judicial Appointments Commission, in Appointment of judges to the supreme court of India

[247] Shambhu Sharan & Gunjan Chhabra, The National Judicial Appointment Commission – A Critique, (2017),https://www.mondaq.com/india/trials-appeals-compensation/647748/the-national-judicial-appoi ntment commission-a-critique (last visited June 6, 2024)

[248] Supra Not.204

[249] Srishti maheshwari & Ojasvi Chhabra, *A critique on the NJAC Judgment* , JINDAL LAW SCHOOL, INDIAN JOURNAL OF LAW AND LEGAL RESEARCH Vol III Issue 1, ISSN: 2582-8878

[250] Haidya Iyengar, *Analysis on the NJAC Judgement*, (2016), https://blog.ipleaders.in/analysis-of-the-njac judgement/ (last visited Jun 6, 2024).

[251] Garg, R. and Garg, N., *Separation of Powers is a Myth: In reference to National Judicial Appointment Commission or NJAC.*2020 INTERNATIOMAL JOURNAL OF INTEGRATED LAW REVIEW . Vol 1 Iss 1,113

the NJAC was flawless. Major flaws could have had a disastrous impact, but it wouldn't be right to say that it was completely unconstitutional either.

4.10 PRESENT MEMORANDUM OF PROCEDURE (MoP)[252]

The Memorandum of procedure (MoP) is a set of guidelines govern the appointment process for judges to constitutional courts. The MoP underwent revisions in 1971 and 1983[253], and again in 1994[254] and 1998[255] after the Second and Third Judges' cases. In 2015, the SC struck down the 99th constitution amendment, which aimed to replace the collegium system with the National Judicial Appointment Commission[256]. However, the court recognized the shortcomings of the collegium system and acknowledged the need for increased transparency and efficiency in the MoP. The bench provided guidelines to the central government to develop a new draft MoP for improving the system. Unfortunately, four years have passed, and there has been no further progress in finalizing the MoP. As a result, appointments continue to be made under the previous MoP established during the tenure of Former CJI J.S. Verma.

4.10.1. Supreme Court[257]

- Appointment of Chief Justice of India : The senior most Judge of the Supreme Court is considered for the post of Chief Justice of India. The Union Minister of Law, Justice and Company Affairs requests the outgoing Chief Justice of India for a recommendation. In case of doubt, other Judges will be consulted as specified in Article 124 (2) of the Constitution. The Prime Minister advises the President about the appointment after receiving the recommendation of the Chief Justice of India.
- Appointment of Supreme Court Judge[258]: The Chief Justice of India's opinion is formed in consultation with a group of four senior-most judges from the Supreme

---

[252] Available at :https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/

[253] http://sri.nic.in/sites/default/files/Constitutional%20Provisions%20relating%20to%20appointment%20and20transfer%20of%20Judges%20of%20the%20higher%20judiciary.pdf

[254] Supreme court Advocates on Record Association v. Union of India AIR 1994 SC 268.

[255] In Re Presidential Reference, AIR 1999 SC 1

[256] Supreme court advocates on record association v. Union of India 2015

[257] Memorandum of procedure of appointment of Supreme Court Judges | Department of Justice | India. https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/

[258] INDIA CONST. art 124, cl. 2

Court. If the next Chief Justice of India is not one of these four senior-most judges, they will become a part of the group. The Chief Justice of India considers the views of the most senior judge in the Supreme Court who comes from the High Court from which the recommended candidate comes. If they don't know enough about the candidate's qualities, the next most senior judge from that High Court is consulted. It's not just judges from that particular High Court who are consulted, but also judges who have transferred to that High Court. The opinions of the collegium and the senior-most judge from the High Court are written and transmitted to the Government of India along with the Chief Justice of India's opinion. If non-judges provide opinions, they don't have to be in writing. However, the person who elicits the opinion should keep a memorandum of it and convey its substance to the Government of India.After the Chief Justice of India provides the final recommendation, the Union Minister of Law, Justice and Company Affairs forwards it to the Prime Minister, who advises the President in the matter of appointment.Once the President signs the warrant of appointment, the Secretary to the Government of India announces the appointment and issues the necessary notification in the Gazette of India.

- Appointment of Acting Chief Justice : As per Article 126[259]of the Constitution, the appointment of an acting Chief Justice is the responsibility of the President. In the event of a vacancy, the most senior available Judge of the Supreme Court will be appointed to perform the duties of the Chief Justice of India. Once the President approves the appointment, the necessary notification will be issued in the Gazette of India.
- Appointment of AD HOC Judges: Article 127[260] of the Constitution allows the Chief Justice of India to request a Judge from a High Court to attend sittings of the Supreme Court in case of Judge shortages. The process involves consultation with the relevant High Court, obtaining the Chief Minister's consent, and then informing the Union Minister of Law, Justice, and Company Affairs. Upon the

[259] INDIA CONST. art 126
[260] INDIA CONST. art 127

Prime Minister's advice, the President appoints an ad hoc Judge through a government notification.

4.10.2 High Courts[261]

- Appointment of Chief Justices to the High Courts : The Government has decided to appoint Chief Justices for all High Courts from outside in consultation with the CJI. For elevation as Chief Justices, the inter-se seniority of puisne Judges will be reckoned on the basis of their seniority in their own High Courts. The CJI will initiate the proposal for the appointment of a Chief Justice of a High Court by his recommendation for the appointment of a puisne Judge of the High Court as Chief Justice of that High Court or of another High Court, in consultation with the two senior-most Judges of the Supreme Court. The Union Minister of Law, Justice and Company Affairs will obtain the views of the concerned State Government and submit the proposals to the Prime Minister. As soon as the President approves the appointment, the Department of Justice will announce the appointment and issue necessary notification in the Gazette of India.
- Appointment of Acting Chief Justice: As per Article 223 of the Constitution, the President can appoint an Acting Chief Justice when the Chief Justice is on leave or unable to perform their duties[262]. The senior most puisne Judge on duty can be appointed as Acting Chief Justice. The Union Minister of Law, Justice, and Company Affairs will make the appointment, and the Secretary to the Government of India in the Department of Justice will inform the Chief Minister and issue the necessary notification in the Gazette of India.
- Distinct constitutional provisions have been established to appoint permanent judges[263], additional judges[264], and acting judges[265]. In the **First Judges case** 1981[266], the SC stated that Additional Judges were not appointed temporarily but

---

[261] Memorandum of procedure of appointment of High Court Judges | Department of Justice | India. https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/

[262] INDIA CONST. art 223

[263] INDIA CONST. art 217, cl.1

[264] INDIA CONST. art 224, cl.1

[265] INDIA CONST. art 224, cl.2

[266] S.P. Gupta v. Union of India, 1981 Supp SCC 87.

rather as permanent judges. In the **Shanti Bhushan case**[267] (2009), it was ruled that an Additional Judge should not be considered as being on probation for the purpose of permanent appointment. Additionally, in a Supreme Court Collegium resolution[268], it is specified that the judgments of Additional Judges shall be evaluated by a committee of two Supreme Court Judges. However, the primary distinction lies in the medical certificate requirement, which is exclusively applicable to permanent judges. The MoP outlines the process and time line for appointing High Court Judges by the constitutional authorities as follows[269]:

1. The Chief Justice of the High Court shall send the High Court Collegium's recommendation for the appointment of permanent Judges to the Chief Minister of the State, the Chief Justice of India, and the Union Law Minister at least 6 months before the vacancy arises.

2. The State's Chief Minister shall provide their comments on the recommendation within 6 weeks of receiving the proposal.

3. The Union Law Minister shall forward recommendations to the CJI without specifying a time line.

4. The CJI shall seek the views of the relevant Judge(s) of the Supreme Court without a specific time line.

5. The Supreme Court Collegium shall send recommendations to the Union Law Minister within 4 weeks of consulting with the relevant Judge(s).

---

[267] Shantl Bhushan v. Union of India, (2009) 1 SCC 657

[268] Ministry of Law and Justice, Supreme Court Collegium Resolution Meeting dated 26-10-2017, Regard being had to the necessity of assessment of judgments and also bearing in mind the principle that peers should not be judged by peers, the Collegium in partial modification of its earlier decision taken on 3-3-2017 has decided that the judgments of Additional Judges of the High Courts shall be called for from the Chief Justices of the High Courts concerned and the same shall be evaluated by the Committee of two Hon'ble Judges of the Supreme Court, other than consultee-Judges, to be nominated by the Chief Justice of India.

[269]Appointment of Supreme Court and High Court Judges: Need for a Fresh Look, SCC ONLINE (Oct. 26, 2022), https://www.scconline.com/blog/post/2022/10/26/appointment-of-supreme-court-and-high-court-judges-need-for-a-fresh-look/. (Last accessed on Jun 10, 2024)

6. The Law Minister may return names for reconsideration to the CJI with specific reasons, or submit the file to the Prime Minister within 3 weeks of receiving the recommendations.

7. The Prime Minister shall advise the President for the appointment.

The Supreme Court set new time frames for appointing High Court Judges[270], detailing the following steps:

1. The Intelligence Bureau (IB) has 4 to 6 weeks to submit its report after receiving the High Court Collegium recommendation.

2. The Law Ministry has 8 to 12 weeks to forward recommendations to the Chief Justice of India after receiving inputs from the State Government and IB.

3. The Government of India has 3 to 4 weeks to make the appointment after the recommendation from the Supreme Court Collegium, if not sent back.

It is worth noting that although time frames have been set for each stage of the appointment process, neither the MoP nor the recent order in the **PLR Projects case** has set a time frame for the Supreme Court Collegium to make its recommendation. In several instances, the Supreme Court Collegium has taken 8 to 12 months to makeits recommendations after receiving the proposal.The plea, filed by Advocate Harsh Vibhore Singhal[271], argues that delays in notifying these appointments violate fundamental rights and judicial independence. The SC has referred to previous judgments emphasizing timely appointments and directed the Attorney General to assist.

4.11 CHALLENGES

Despite the MoP to appoint judges, there have been persistent vacancies in both the Supreme Court and High Courts.The MoP has not been revised despite being found unsatisfactory in the Fourth Judges case[272]. Additionally, the SC has urged the Attorney General to expedite the finalization of the MoP in the larger public interest,

---

[270] PLR Projects (P) Ltd. v. Mahanadi Coalfields Ltd., (2020) 20 SCC 791

[271] Harsh Vibhore Singhal v. Union of India | Writ Petition(s)(Civil) No(s). 702/2023

[272] Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1 : (SCC pp. 805-07, paras 1252 & 1255-1256.

but the process remains pending[273]. The current process of appointing judges has faced significant public criticism due to doubts about the selection process, lack of transparency, and the need for more accountability[274]. Reforms are necessary to uphold judicial independence and regain public trust in the judiciary's impartiality. The SC has emphasized that any delay in approving collegium recommendations undermines judicial independence, in response to the government's repeated delays in processing the recommendations[275] and reaffirmed[276] that the collegium system for judicial appointments is "*the law of the land*" and must be followed by the central government.With the collegium appointment system under scrutiny, judicial independence has become a central topic, with proponents and detractors citing it to bolster their arguments[277].

The reasons forming part of the collegium decision making process cannot be demanded by a stranger under the RTI(Right to Information Act)[278].Subhash Chandra Agarwal, an RTI activist, sought information on the appointment of Supreme Court Judges and requested disclosure of their assets[279]. The SC ruled that the Judges' assets can be disclosed, but personal data and appointment details cannot be provided due to privacy rights and confidentiality duties[280].Despite this, the Supreme Court website only uploads a statement on the resolutions of the Collegium rather than the resolutions themselves after October 2019.

---

[273] R.P. Luthra v. Union of India, (2018) 13 SCC 417.

[274] TR Andhyarujina, *Appointment of Judges by Collegium of Judges* THE HINDU (New Delhi 18th December 2009) accessed on Apr 13 2024.

[275] *Unhappiness Over NJAC Behind Govt Delay on Collegium Recommendations; Govt Needs to Follow the Law of the Land: SC*, THE HINDU (Nov. 26, 2022), https://www.thehindu.com/news/national/unhappiness-over-njac-behind-govt-delay-on-collegium-recommendations-govt-needs-to-follow-the-law-of-the-land-sc/article66195526.ece.(Last accessed on Jun 10,2024)

[276] Advocates Association Bengaluru v. Barun Mitra And Anr. Contempt Petition (C) No. 867/2021 in TP(C) No. 2419/2019] 2022 LiveLaw (SC) 1013

[277] Arghya Sengupta *Judicial Independence and the appointment of judges to the higher judiciary in Indian: A conceptual enquiry* 5 INDIAN J. CONST. L. (2011) 99

[278] Anjali Bhardwaj Vs CPIO, SC(RTI Cell) 2022 Livelaw(sc)1015

[279] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal: RTI and Judicial Independence – Background, SUPREME COURT OBSERVER, https://scobserver.in/cases/central-public-information-officer-supreme-court-subash-chandra-agarwal-rti-and-judicial-independence-background/ (last visited June 14, 2024)

[280] Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481

There is a trend of dismissing or not admitting petitions challenging the current collegium system. This suggests that the judiciary may be reluctant to address the issues and seeks to safeguard the system from scrutiny.The Madhya Pradesh HC dismissed a plea challenging the appointment of High Court judges and the absence of reservations for backward classes, emphasizing the binding nature of the collegium system[281]. The plea was found insufficient due to several grounds.The Delhi HC dismissed a plea challenging the Supreme Court Collegium's decisions on judge appointments, emphasizing that detailed reasons are unnecessary and would impact the Collegium's functioning and judicial independence[282].

4.12 COLLEGIUM VS NJAC[283]

The NJAC and collegium systems embody distinct approaches to judicial appointments in India, each with its own benefits and drawbacks[284]. While the collegium system prioritizes judicial independence, it may compromise transparency and accountability[285]. On the other hand, the NJAC aims for a more inclusive and transparent process but raises concerns about safeguarding the judiciary's independence[286].Striking a balance that upholds both independence and accountability is the key challenge, possibly necessitating reforms to the collegium system or a reformed NJAC that addresses the issues highlighted by the Supreme Court[287].

---

[281] Maruti Sondhiya vs. Union of India and Others (Writ Petition No. 28550 of 2023) 2024 LiveLaw (MP) 91

[282] CA Rakesh Kumar Gupta Vs Supreme Court of India through Secretary General 2024 LiveLaw (Del) 655

[283] Rishika Singh & Akanksha Tiwari, *The Debate around NJAC and Collegium System*, 3 SUPREMO AMICUS 480 (2018).

[284] Singh, V., *Collegium system vis-à-vis national judicial appointments commission: a critical appraisal,*2016,INTERNATIONAL JOURNAL OF RESEARCH IN ECONOMICS AND SOCIAL SCIENCES, 6(1), pp.348-354.

[285] Ananda, D., 2023. *Judges Appointments: Collegium System versus National Judicial Appointments Commission*. GNLU JL DEV. & POL.,13, p.53.

[286] Sharma, L. and Singh, A., *National Judicial Appointment Commission and Collegium System in India: Comparative Analysis,*2015,INTERNATIONAL JOURNAL OF RESEARCH IN SOCIAL SCIENCES, 5(5), pp.518-531

[287] Upadhyay, R., 2021. *NJAC Judgement*. INDIAN JL & LEGAL RSCH., 2, p.1.

Sl.No	Context	Collegium	NJAC
1	Composition	The Chief Justice of India (CJI) and a collegium of at least three senior-most judges recommend appointments and transfers.The President appoints judges based on these recommendations.	Comprised the CJI, two senior judges, the Union Law Minister, and two eminent persons nominated by a committee.The NJAC would recommend appointments and transfers
2	Independence vs. Accountability	Prioritizes judicial independence but suffers from a lack of accountability and transparency	Aimed to enhance accountability and transparency but at the risk of compromising judicial independence.
3	Transparency vs. Insularity:	Criticized for its secretive nature, which leads to decisions being made without sufficient external oversight.	Proposed a more transparent process, involving a wider array of stakeholders, potentially mitigating the issue of insularity.
4	Effectiveness and Efficiency:	While experienced in judicial matters,the collegium's opaque processes have led to delays and controversies in appointments.	Although designed to be more inclusive, its effectiveness was never tested due to its nullification by the Supreme Court.
5	Insularity And Political Influence	Criticized for being an insider's club, potentially overlooking deserving candidates outside the immediate judicial network.	The system risked appointments being swayed by political considerations, especially given the role of the Law Minister and the potential influence of the ruling party.

CHAPTER V: JUDICIAL APPOINTMENTS IN THE UNITED KINGDOM

5.1 INTRODUCTION:

Analyzing how judges are appointed in different countries can provide valuable insights into improving the process. For various reasons, the United Kingdom (UK) is often considered a reference point for judicial appointment systems.India and the UK possess legal systems rooted in British colonial rule, leading to comparable judicial systems that lend themselves to meaningful comparisons. India's legal framework bears a strong imprint of the British legal tradition, particularly in its approach to judicial appointments. The UK's historical ties to India have significantly influenced the evolution of its legal institutions, rendering it a natural candidate for comparative analysis. Notably, both nations have constitutional provisions that govern the appointment and operations of their judiciaries.Additionally, both India and the UK encounter similar obstacles in securing an independent, capable, and diverse judiciary. These hurdles include ensuring transparency in the appointment procedures, upholding judicial autonomy, and fostering diversity within the judiciary.

Further, India introduced the NJAC and the 99th Constitutional Amendment, drawing inspiration from the UK's judicial appointment and its functioning after CRA, 2005, which was found to be more effective than the old method of Lord Chancellor appointments. Unfortunately, the NJAC was deemed unconstitutional without a chance to prove its effectiveness. Despite the differences in governance between the two countries, the UK was chosen for this comparative study for two main reasons. Firstly, India drew inspiration from the UK and introduced the NJAC and the 99th constitutional amendment based on the Constitutional Reforms Act (CRA), 2005. Secondly, the UK demonstrated the efficiency of its independent appointment commission in its functioning after incorporation of CRA,2005.

5.2 HISTORICAL CONTEXT :

Nearly exclusive authority to appoint judges to all courts rested with the Lord Chancellor until 2005[288], who served as a principal advisor to the Crown and later to the Prime Minister[289]. An office of the Lord Chancellor dates back to 11th Century[290]. The Lord Chancellor had various responsibilities related to the judiciary, such as deciding on salaries and pensions, looking into complaints, enforcing disciplinary actions, and managing the courts. In addition to making appointments, the Lord Chancellor could also observe cases not involving the government, although this was rarely done before the CRA[291]. Despite these multiple roles, few specific cases raised concerns about improper behavior. However, the combination of titles and duties across the three branches of government created perceptions of bias and unfairness[292].

The UK is well-known for its parliamentary sovereignty. Despite the doctrine of parliamentary sovereignty, Parliament had no formal role in the judicial appointment process[293]. However, individual Members of Parliament were able to influence judicial appointments behind the scenes. According to Robert Stevens[294], *"While the Act of Settlement may have been intended to prevent royal interferencewith the judges, Parliament showed no interest in curbing its tradition of interfering with the judges.[295]"* The Lord Chancellor's Department inquired about qualified candidates

---

[288] The Lord Chancellor position dates to 605 - A.D. Peter L. Fitzgerald,*Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*,18 TEMP. INT'L & COMP.L.J.233, 235 (2004).

[289] The office of the Prime Minister was created in the early eighteenth century following the Glorious Revolution and 1701 Act of Settlement.

[290] Roger Smith, *Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance* (2005) 32 JOURNAL OF LAW AND SOCIETY 187, 189.

[291] Lord Windlesham, 'T*he Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 1'* [2005] PUBLIC LAW 806, 807.

[292] Lord Falconer, '*The Role of the Lord Chancellor After the 2005 Reforms*' Bentham Lecture, 11 March 2015 available at https://www.laws.ucl.ac.uk/wp-content/uploads/2015/03/The-Role-of-The Lord-Chancellor-After-the-2005-Reforms-Lord-Falconer-of-Thoroton-PC-QC.pdf (accessed on Apr 24, 2024).

[293] Clark, M. L.*Advice and Consent vs. Silence and Dissent: The Contrasting Roles of the Legislature in U.S. And U.K. Judicial Appointments*. 2011, https://core.ac.uk/download/360836.pdf

[294] ROBERT STEVENS, THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION 10 (2002)

[295] The Act of Settlement granted judges the rights of service in "good behavior," replacing the prior convention of service at the pleasure of the, Crown. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.). It was not until 1760 that high court judges gained tenure in good behavior for the duration of their lives. Prior to that change, high court judges' tenure could be terminated upon the succession of a new monarch, and often was. The year 1799 saw the introduction, by Parliament, of judicial pensions, which, like life tenure in good behavior, promoted judicial independence.

for judicial positions[296].The chancellor's primary challenge was to ensure that appointments were not politically biased, as he held a political role[297].The Lord Chancellor typically selected judicial candidates by means of "taps on the shoulder" to serve[298].The Lord Chancellor couldn't review all candidates individually, so the screening process involved private contact with unnamed sources. Vacancies weren't publicly advertised, appointment criteria weren't clearly stated, and diversity wasn't considered a top priority in the appointments process[299]. This led to widespread suspicion that bench appointments could be influenced by political favouritism.The Lord Chancellor's practice of appointing judges came under scrutiny for its lack of transparency and accountability[300].

Although candidates were selected on merit, the pool of eligible candidates was relatively small, leading to a lack of diversity within the judiciary.Reports showed that while 59% of all law graduates were women, only 28% of district judges, 11% of circuit judges, and 7% of high court judges were women[301].In 2001, less than 2% of judges in England and Wales were from ethnic minorities[302]. This lack of diversity meant that certain groups of people, such as women, ethnic minorities, and those from non-traditional legal backgrounds, were under represented in the judicial system, which could hurt the quality and fairness of the justice system.

5.3 CONSTITUTIONAL REFORMS ACT(CRA) 2005

The concept of establishing a commission to appoint judges gained support from reform groups, lawyers, and politicians by the mid-1990s[303]. Although the

---

[296] Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States*?, 34 FORDHAM URB. L.J. 387, 397 (2007).

[297] Aniketan S, , *Comparative Analysis Of Appointment Of Judges To Higher Level Of Judiciary In India, USA And UK Indian*, JOURNAL OF LAW AND LEGAL RESEARCH,Christ (Deemed to be University) Mar 4, 2023

[298] Mary L. Clark, *Advice and Consent vs. Silence and Dissent - The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451 (2011).

[299] Ibid

[300] Supra 205.

[301] THE FAWCETT SOCIETY, INTERIM REPORT ON WOMEN WORKING IN THE CRIMINAL JUSTICE SYSTEM (March 2004).

[302] Courts and Tribunals Judiciary, 'Annual Diversity Statistics 2001' available at https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2001/

[303] Malleson, K. (2004). *Creating a judicial appointments commission: which model works best?*. Public Law, 102-121.

decision-making process was lengthy and frustrating for supporters, it provided an opportunity to draw insights from the establishment of the Judicial Appointment Board in Scotland in 2002[304] and the creation of a judicial appointments commission in Northern Ireland[305]. These experiences have offered valuable models for defining the role and function of the commission in England and Wales by contributing to the coherence and consistency of the UK judicial selection processes as a whole[306].

On the 12th of June 2003, the Prime Minister unveiled a proposal for the creation of a new Supreme Court, the elimination of the position of Lord Chancellor, and the restructuring of the judicial appointment system in England and Wales. Subsequently, in July 2003, the Department for Constitutional Affairs released consultation documents titled "Constitutional Reform: A Supreme Court for the UK"[307] and "Constitutional Reform: A New Way of Appointing Judges[308]".This was followed by the publication of the consultation paper "Constitutional Reform: reforming the office of the Lord Chancellor[309]" in September. The consultation paper[310] argues that the judicial appointments process needs to change because the role of the Lord Chancellor in the appointment process, is old-fashioned[311].

Further, explained that restructuring the judicial appointments process is part of a larger modernization program which also includes abolishing the office of Lord Chancellor, establishing a new Supreme Court, and abolishing or reforming the Queen's Counsel system.Both Houses of Parliament held hearings on the Government's proposal[312]. Several witnesses testified before the House of

---

[304] Details of the Judicial Appointments Board can be found at www.judicialappointmentsscotland.gov.uk/judicial/JUD_Main.jsp.

[305] The framework for establishing a commission is set out in the Justice (Northern Ireland) Act 2002. A new Justice Bill is to be introduced in autumn 2003 to allow the Commission to be established prior to the devolution of justice.

[306]The need for a degree of consistency in judicial appointments procedures throughout the UK will be more pressing once the Supreme Court of the UK is set up. The task of selecting its judges is likely to be given to a commission drawn from members of the three appointing bodies (those of England and Wales, Scotland and Northern Ireland).

[307] DCA Consultation Paper, CP 11/03 Back

[308] DCA Consultation Paper, CP 10/03 Back

[309] DCA Consultation Paper, CP 13/03 Back

[310] Supra Note 207.

[311] ibid

[312] For the House of Commons committee hearing, see infra note 219. For the House of Lords committee hearing, see infra note 222

Commons Constitutional Affairs Select Committee in support of parliamentary scrutiny or confirmation of judicial candidates[313]. Professor Robert Hazell emphasized the increased accountability through parliamentary scrutiny, stating, "Appointments to the judiciary are too important to be left only to the judiciary or a Judicial Appointments Commission. The judges would be seen as a self-appointing group, especially if the Commission was led by a senior judicial figure"[314] (as it eventually was). As a compromise, Hazell preferred post-appointment parliamentary hearings for high-level judges as a way for the legislature and the public to become acquainted with the new judges, essentially as a type of "meet and greet"[315]. Malleson testified that the sensationalism of the U.S. Supreme Court confirmation process had contributed to a failure to appreciate the importance of an appointment role for Parliament[316]. As with the Commons committee, the Lords committee did not detail its reasoning in rejecting a judicial appointment role for Parliament[317].

The CRA, when enacted, replaced the Appellate Committee of the House of Lords with a new Supreme Court in October 2009 and significantly limited the Lord Chancellor's role in judicial appointments, replacing his nearly exclusive authority to appoint judges with minimal review by two new judicial appointment commissions[318]. These commissions are responsible for screening and recommending judicial candidates at the Supreme Court and lower court levels. The process for appointing Supreme Court justices is outlined in the Sections 25 to 31[319] and Schedule 8 of CRA 2005. The commission responsible for this is led by the Court's President, assisted by its Deputy President, and includes one member from each of the

---

313 CONSTITUTIONAL AFFAIRS COMMITTEE, REPORT ON JUDICIAL APPOINTMENTS AND A SUPREME COURT (COURT OF FINAL APPEAL), 2003-4,H.C. 48-1, at 27-28 (U.K.) [hereinafter JUDICIAL APPOINTMENTS REPORT 1]

314 CONSTITUTIONAL AFFAIRS COMMITTEE, REPORT ON JUDICIAL APPOINTMENTS AND A SUPREME COURT (COURT OF FINAL APPEAL), 2003-4,H.C. 48-1, at 27-28 (U.K.) [hereinafter JUDICIAL APPOINTMENTS REPORT 1]

315 ibid

316 CONSTITUTIONAL AFFAIRS COMMITTEE, REPORT ON JUDICIAL APPOINTMENTS AND A SUPREME COURT (COURT OF FINAL APPEAL), 2003-4, H.C. 48-1, at 27-28 (U.K.) [hereinafter JUDICIAL APPOINTMENTS REPORT 1]

317 See CONSTITUTIONAL REFORM REPORT I, supra note 222

318 The Supreme Court-History, THE SUP. CT., http://www.supremecourt.gov.uk/about/history.html (last visited May 8, 2024).

319 Constitutional Reform Act 2005, c. 4, § 25 (UK).

JAC for England and Wales, Northern Ireland, and Scotland[320]. The commission recommends one candidate for each vacancy. The Lord Chancellor can accept, reject, or ask for the candidate to be reconsidered up to three times for each vacancy[321]. After this review, the Lord Chancellor forwards the selection to the Prime Minister, who then passes it to the Queen for royal assent[322]. It's important to note that Parliament does not play a role in the Supreme Court appointment process[323].

The CRA also created a second judicial appointment commission (the "Judicial Appointment Commission for England and Wales") to screen and recommend a large volume of lower court judges each year[324].This JAC is much larger in size than the Supreme Court commission and is permanent rather than temporary, in nature[325]. As with Supreme Court appointments, the Lord Chancellor must accept, reject, or seek reconsideration of each candidate recommended by the JAC for England and Wales and cannot name candidates independent of the commission process[326].

The CRA strengthened the separation of powers in three ways. First, it removed the Lord Chancellor from his role as head of the judiciary. Second, it set up a permanent judicial appointments commission to limit the involvement of the political executive in the appointments process. Lastly, it moved the functions of the Appellate

---

[320] The CRA specified the composition of the JAC for England and Wales (with 15 members, including 5 judges, 5 legal professionals, and 5 lay members), Constitutional Reform Act, 2005, c. 4, sched. 12 (U.K.), while the Judiciary and Courts (Scotland) Act, 2008, c. 3, sched. 1 (U.K.), provided for 10 members, including five judges and/or lawyers and five lay members of the JAC in Scotland (referred to as "Judicial Appointments Board" in the Scottish Act), ,and the Justice (Northern Ireland) Act, 2002, c. 26, § 3 (U.K.), and Justice (Northern Ireland) Act, 2004, c. 4, sched. 1 (U.K.), provided for the composition of the JAC in Northern Ireland (13 members likewise to be drawn from the judiciary, legal profession, and lay public). As noted in Part II.B, supra, judges had historically been substantially involved in judicial appointments behind-the scenes, providing informal evaluations of prospective judicial candidates to the Lord Chancellor through so-called "secret soundings."

[321] Section 29 of Constitutional Reforms Act,2005

[322] The Constitutional Renewal Bill, 2008-9, H.L. Bill [34] (U.K.), sought to eliminate the Prime Minister's role, instead providing for direct recommendation by the Lord Chancellor to the Queen.

[323] Clark, M. L. (2011). Advice and Consent vs. Silence and Dissent: The Contrasting Roles of the Legislature in U.S. And U.K. Judicial Appointments. https://core.ac.uk/download/360836.pdf

[324] Constitutional Reform Act, 2005, c. 4, sched. 12, pt. 1.

[325] Id. c. 4; see also Kate Malleson, The New Judicial Appointments Commission in England and Wales, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, at 39, 48.

[326] Constitutional Reform Act, 2005, section 29.

Committee of the House of Lords to a new Supreme Court located in a building in the southwest corner of Parliament Square in London[327].The CRA made significant changes to how judges are chosen by creating a independent JAC, which started in April 2006. The JAC, now selects judges, making the process more open and clear.

5.4 JUDICIAL APPOINTMENT COMMISSION(JAC)

The CRA set up the JAC in April 2006 to appoint judges[328]. This change aimed to make the system more transparent. The JAC is an independent group of fifteen Commissioners, including a lay chair, five judicial members, two members from the legal professions, five lay members, a tribunal office holder, and a magistrate[329]. It is believed that a diverse group will ensure balanced representation - "*Judicial representatives provide expert knowledge of the requirements of judicial posts, legal members provide representation from the pool from which candidates are drawn, and lay members provide input from outside the legal world and represent the community served by the courts"*[330].

In October 2006, the JAC clearly outlined its new selection processes for judges and established specific merit criteria for evaluating judicial candidates[331]. The JAC's system, involves a number of stages, including an online application, competency-based assessments, and an interview. The commission is also tasked with ensuring that appointments are made on merit, based solely on the candidate's abilities and qualifications, and free from any political interference[332]. One of the most notable features is the independence of the JAC from the government, which guarantees that political considerations do not influence the selection of judges.The JAC is in charge of advertising job openings and evaluating candidates for those positions. Only candidates recommended by the JAC can be hired.

---

[327] Jack Beatson, *'Reforming an Unwritten Constitution*' (2010) LAW QUARTERLY REVIEW 48, 54.
[328] Section 61 The Judicial Appointments Commission (1) There is to be a body corporate called the Judicial Appointments Commission
[329] The Governance of Britain, 22 2007
[330] Department for Constitutional Affairs, Constitutional Reform: A new way of appointing judges (July 2003), para. 119
[331] Constitutional Reforms Act, 2005 Report, 5th ed. http://www.judicialappointments.gov.uk/select/qualities.htm
[332] ibid

Appointments are based on merit, but in 2013, it was clarified that when candidates are equally qualified, the JAC can choose the candidate that enhances diversity on the bench[333].The JAC aims to encourage inclusivity and diversity in the pool of candidates and provide equal opportunities to all applicants.While promoting diversity, the JAC still strongly focuses on merit-based selection. The commission assesses candidates based on their qualifications, experience, and suitability for the role, ensuring that the most qualified and capable candidates are selected for judicial positions. As one scholar observes, 'much judicial business which was previously conducted behind closed doors in the old Lord Chancellor's Department is now out in the open'[334].

5.5 PROCEDURE FOR APPOINTMENT OF JUDGES TO THE SUPREME COURT

The judicial appointments being made in the Supreme Court includes the appointment of the Lord Chief Justice, Heads of Division, Lords Justices of Appeal, and Puisne judges (the judges of the High Court, apart from those who are the heads of the division). Section 25 of CRA 2005[335] sets out the qualifications for appointment and it was amended by Sections 50-52 of the Tribunals and Enforcement Act 2007[336]. The qualifications now require applicants to have served in a high judicial role for at least two years. 'High judicial role' includes High Court Judges of England and Wales and of Northern Ireland; Court of Appeal Judges of England and Wales and of Northern Ireland; and Judges of the Court of Session or Applicants for

---

[333] See Crime and Courts Act 2013, schedule 13, part 2 (amending section 63 of the Constitutional Reform Act 2005).

[334] Robert Hazell, '*Judicial independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005*' (2015) PUBLIC LAW 198, 203.

[335] Section 25 Qualification for appointment (1) A person is not qualified to be appointed a judge of the Supreme Court unless he has (at any time)— (a) held high judicial office for a period of at least 2 years, or (b) been a qualifying practitioner for a period of at least 15 years. (2) A person is a qualifying practitioner for the purposes of this section at any time when— (a) he has a Senior Courts qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41), (b) he is an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary, or (c) he is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland

[336] Tribunals, Courts and Enforcement Act 2007, c. 15, §§ 50-52 (UK)

judicialappointments must have practised law for at least 15 years or be a qualified practitioner for the same period[337]. To meet the 15-year requirement, an individual must have been a solicitor or barrister in England and Wales for at least 15 years and have gained legal experience. A qualified practitioner is defined as an advocate in Scotland, a solicitor entitled to appear in certain courts, a member of the Bar of Northern Ireland, or a solicitor of the Court of Judicature of Northern Ireland[338].

The process for selecting and recommending candidates for appointment to the Supreme Court is outlined in sections 26[339], 27[340], 28, 29, 30, and 31, along with Schedule 8. When there is a vacancy in one of the specified offices, or if it is expected that there will soon be a vacancy, the Lord Chancellor must convene a selection commission.After the completion of the selection process, the Lord Chancellor informs the Prime Minister about the person chosen by the commission. Following this, the Prime Minister is required to recommend the Queen to appoint the

---

[337]The Supreme Court, Appointments of justices Appointments of Justices - The Supreme Court, https://www.supremecourt.uk/about/appointments-of-justices.html (last visited Jun 7, 2024)

[338] ibid

[339] 26 Selection of members of the Court (1) This section applies to a recommendation for an appointment to one of the following offices— (a) judge of the Supreme Court; (b) President of the Court; (c) Deputy President of the Court. (2) A recommendation may be made only by the Prime Minister. (3) The Prime Minister— (a) must recommend any person whose name is notified to him under section 29; (b) may not recommend any other person. (4) A person who is not a judge of the Court must be recommended for appointment as a judge if his name is notified to the Prime Minister for an appointment as President or Deputy President. (5) If there is a vacancy in one of the offices mentioned in subsection (1), or it appears to him that there will soon be such a vacancy, the Lord Chancellor must convene a selection commission for the selection of a person to be recommended. (6) Schedule 8 is about selection commissions. (7) Subsection (5) is subject to Part 3 of that Schedule. (8) Sections 27 to 31 apply where a selection commission is convened under this section.

[340] 27 Selection process (1) The commission must— (a) determine the selection process to be applied, (b) apply the selection process, and (c) make a selection accordingly. (2) As part of the selection process the commission must consult each of the following— (a) such of the senior judges as are not members of the commission and are not willing to be considered for selection; (b) the Lord Chancellor; (c) the First Minister in Scotland; (d) the Assembly First Secretary in Wales; (e) the Secretary of State for Northern Ireland. (3) If for any part of the United Kingdom no judge of the courts of that part is to be consulted under subsection (2)(a), the commission must consult as part of the selection process the most senior judge of the courts of that part who is not a member of the commission and is not willing to be considered for selection. (4) Subsections (5) to (10) apply to any selection under this section or section 31. (5) Selection must be on merit. (6) A person may be selected only if he meets the requirements of section 25. (7) A person may not be selected if he is a member of the commission. (8) In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom. (9) The commission must have regard to any guidance given by the Lord Chancellor as to matters to be taken into account (subject to any other provision of this Act) in making a selection. (10) Any selection must be of one person only

individual selected by the Lord Chancellor. The rules in Schedule 8[341] explain how the selection commission for appointing judges to the Supreme Court is formed. It states who can be on the commission, how it is called together, and how it operates. This commission will recommend candidates for appointment to the Lord Chancellor, who will then notify the Prime Minister. The Prime Minister will then recommend the candidates to Her Majesty for appointment, following the procedure in sections 26-31[342].

In 2013, the CRA was amended to allow the Lord Chancellor to make regulations, with the approval of the President of the Supreme Court and Parliament, regarding the selection process used by the Selection Commission for appointments to the Court. This power to make regulations is meant to offer flexibility in amending the selection process without requiring new legislation[343]. The Supreme Court (Judicial Appointments) Regulations 2013 outline the composition requirements for the Selection Commission when appointing the President of the Supreme Court. Separate composition requirements are mandated for appointments to the other positions within the Court[344].Further, requires the Selection Commission to determine the selection process for nominees. The requirements include selecting candidates based on merit and statutory qualifications, ensuring that no commission members are selected, and ensuring that the judges collectively have knowledge and experience in practising the law in each part of the UK.The Selection Commission must consult senior judges not on the commission, the Lord Chancellor, the First Ministers of Scotland and Wales, and the Northern Ireland Judicial Appointments Commission.When choosing a candidate, the Selection Commission must consider guidance from the Lord Chancellor, consulting the senior judge of the Supreme Court. The Lord Chancellor must present the proposed guidance to each House of Parliament[345].

---

[341] Constitutional Reform Act 2005, c. 4, sch. 8 (UK).
[342] Constitutional Reform Act 2005, c. 4, §§ 26-31 (UK).
[343] http://hdl.handle.net/10603/456928
[344] ibid
[345] ibid

5.6 TRANSFORMATION AND INDEPENDENCE

The CRA 2005 was a pivotal moment in the UK's judiciary's history. The CRA served to strengthen the independence of the judiciary, and it brought about fundamental changes to the way judges are appointed. Before the CRA, the appointment of judges was mainly in the hands of politicians. However, with the introduction of the CRA, the responsibility for making judicial appointments shifted to an independent commission. The transformation of the appointment process has brought about positive results in several areas:

1. Increased Diversity[346]: The JAC has actively encouraged people from different social and economic backgrounds to apply. The number of women judges has increased since the JAC was created. In 2023, women make up 34% of judges, up from 18% in 2006. More women now hold senior judicial roles. They make up 27% of judges in the Court of Appeal and 25% in the High Court.The number of Black, Asian, and Minority Ethnic (BAME) individuals in the judiciary has increased. BAME individuals now make up 8% of the judicial workforce, compared to 3% in 2006.BAME representation in leadership roles has been increasing steadily, which shows the commitment of the JAC to promoting diversity at all levels[347].The open competition and removing barriers to entry has resulted in a more diverse and skilled judiciary that is better equipped to meet the needs of the diverse communities it serves.
2. Public Confidence: The JAC's transparent and independent process enhances public confidence in the judiciary. The public can rest assured that appointments are made on merit and that the selection process is free from political influence.

---

[346] Judiciary of the United Kingdom. Judicial Diversity and Inclusion Update 2023. Judiciary of the United Kingdom. https://www.judiciary.uk/wp-content/uploads/2024/01/Judicial-Diversity-and-Inclusion-Update-2023.pdf (Last accessed on June 4, 2024)

[347] Ministry of Justice. (2023). Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2023 Statistics. UK Government. Last accessed on June 4, 2024, https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics#fn:1

3. Efficiency in Filling Vacancies: The JJAC has made the judicial appointment process more efficient, which has led to fewer vacant seats. In 2023, the vacancy rate for judicial positions is below 5%, down from about 12% in 2006. The time to fill a judicial vacancy has also decreased, with most positions being filled within six months of the announcement, compared to more extended periods before the JAC was established[348].

The shift to an independent commission for judicial appointments has improved the process in the UK. The JAC is committed to promoting diversity and achieving a more representative judiciary, but there is still work to be done to fully reflect the UK population's diversity.

[348] Ministry of Justice. (2015, January 19). Judicial Appointments Commission: Triennial Review Report. https://assets.publishing.service.gov.uk/media/5a7dc91540f0b65d8b4e37d3/jac-triennial-review.pdf Last accessed on June 4, 2024

CHAPTER VI: COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENTS : THE UK AND INDIA

When examining the judicial appointment systems in India and the UK, it becomes evident that there are notable disparities in their procedures, necessary credentials, and levels of transparency. While both systems strive to guarantee the appointment of exceptionally qualified and impartial judges to uphold the rule of law, they do so through different means.

6.1 APPOINTMENT PROCESS :

In India, the collegium system comprises the most senior judges of the Supreme Court, including the CJI, who recommend appointments and transfers of judges within the higher judiciary. The executive's role is limited to formal approval and appointment based on these recommendations.The collegium, consisting of the CJI and four senior judges, makes decisions through confidential deliberations. The executive's involvement is minimal and primarily involves formally appointing judges as recommended by the collegium[349].

The UK: JAC is an independent body responsible for selecting candidates for judicial offices in England and Wales by recommending candidates to the Lord Chancellor, who plays a limited role in the final approval. The JAC employs a merit-based selection process, which includes a combination of applications, interviews, and assessments conducted by panels. The Lord Chancellor has the authority to accept or reject the JAC's recommendations but cannot appoint individuals who have not been recommended by the JAC.

In the UK, the JAC operates a highly organized and transparent selection process, which is based on merit and involves extensive participation from the public and stakeholders. In contrast, India's collegium system is characterized by a more closed and insular approach, where decisions are made by senior judges within a secluded environment.

---

[349] Bhatnagar, V.,*Revisiting the Collegium System,* JUS CORPUS LJ,2021, 2, p.139

6.2 QUALIFICATION:

Under Indian law, Supreme Court judges must be Indian citizens and meet one of the following criteria as per Art 124[350]: (a) served as a judge in one or more High Courts for at least five years, (b) been an advocate in a High Court for at least ten years, or (c) be a distinguished jurist in the opinion of the President. As per Article 217(2)[351] of the Indian Constitution High Court judges must have at least ten years of experience as an advocate or in a judicial office in India.

In the UK, Section 25 of the CRA 2005[352] outlines the qualifications for judicial appointments,Specifically, candidates must have either (a) held high judicial office for at least 2 years, or (b) been a qualifying practitioner for at least 15 years, defined as holding a Senior Courts qualification, being an advocate or solicitor in Scotland or Northern Ireland, or being a member of the Bar of Northern Ireland. The JAC assesses candidates on several criteria, including legal knowledge, integrity, impartiality, and the ability to deliver fair judgments. Applicants must demonstrate significant legal expertise and a proven track record of exceptional professional performance

Both nations demand a considerable level of legal proficiency, but the United Kingdom's standards tend to be more intricate and organized, reflecting their transparent and well-defined procedures.

6.3 ROLE OF EXECUTIVE:

India: The Ministry of Law and Justice is important in the early stages of appointing judges. After the Collegium makes its recommendations, the Law Ministry reviews them and may ask for more information or clarification before sending the names to the President for final approval. Although the Law Ministry is involved, its role is primarily administrative. The power of the executive branch to influence appointments is limited by how the Supreme Court interprets the Collegium System.

---

[350] INDIA CONST. art 124
[351] INDIA CONST. art 217, cl. 2
[352] Constitutional Reform Act 2005, c. 4, § 25 (UK).

In the UK, the Lord Chancellor consults with senior judiciary members and other stakeholders during the appointment process. This consultative role is crucial for balancing judicial independence with accountability. The JAC recommends candidates, and the Lord Chancellor has the authority to accept, reject, or request reconsideration of the recommendations. This process ensures that the final decision adheres to the merit-based criteria established by the JAC while allowing for some executive oversight.The Lord Chancellor's office and the JAC provide annual reports detailing the appointments process, promoting transparency and public trust.

The roles of the Law Ministry in India and the Lord Chancellor in the UK exemplify different approaches to balancing executive influence and judicial independence. In India, the system emphasizes judicial primacy through the Collegium with minimal executive involvement, while the UK's model integrates a consultative role for the executive, ensuring transparency and promoting diversity. Both systems aim to safeguard judicial independence, but the UK's approach includes more structured mechanisms for accountability and inclusivity.

6.4 TRANSPARENCY :

India: The collegium system has faced criticism for its lack of transparency, as decisions are made behind closed doors without publicly disclosed criteria or detailed explanations for the selection or rejection of candidates.The system's limited public accountability and transparency have prompted calls for reforms to enhance openness and reduce potential biases.

The UK: The JAC operates with a high level of transparency, as the selection process is publicly advertised, and the criteria for selection are clearly outlined. Additionally, the JAC publishes an annual report detailing its activities and selection procedures.The JAC's processes involve public consultations and stakeholder engagement, which contribute to the transparency and accountability of the judicial appointment process.

The United Kingdom's judicial system is known for its transparency, characterized by clear procedures, publicly advertised job positions, and published

selection criteria. In contrast, India's collegium system, while designed to uphold judicial independence, is criticized for its lack of transparency and public accountability.

6.5 ACCOUNTABILITY :

In the Indian system, there is a notable absence of external checks or supervision. The Collegium System relies on senior judges for oversight but lacks formal mechanisms for external monitoring. This lack of transparency has led to suspicions of favouritism and nepotism, undermining public trust in the judiciary's fairness and independence. The Law Ministry primarily manages procedures and offers limited accountability, with no formal avenues for public or legislative review of the Ministry's actions in the appointment process.

In the UK, the JAC releases detailed annual reports that outline its activities, selection criteria, and statistics on diversity and appointments. The commission operates with high transparency and accountability, which fosters public trust and allows for external scrutiny. The JAC assesses candidates using clear, published criteria to ensure appointments are based on merit, reducing the risk of favouritism and enhancing accountability. The consultative role of the Lord Chancellor adds a layer of accountability, and decisions made by the JAC can be reviewed without compromising its independence.The JAC is subject to external oversight through public reporting and feedback mechanisms. The Lord Chancellor's role provides an additional check on the JAC's decisions without compromising its independence.

The UK's judicial appointment system provides greater transparency and merit-based selection than India's Collegium System. The independent JAC and the consultative role of the Lord Chancellor contribute to higher public confidence and perceived fairness in the UK model. Conversely, the Indian system lacks transparency and formal accountability mechanisms, highlighting areas for potential reform to enhance judicial independence and public trust.

6.6 EFFICIENCY

India : The Collegium System has been criticized for being slow to make decisions. It takes a long time for senior judges to agree, which means positions stay empty for a while. There is no statutory time limit for the Collegium, so the process can take even longer. When the executive (like the Law Ministry or the President) sends a recommendation back for more thought, the Collegium often takes a while to think about it again[353]. Extended delays occur due to poor coordination between the Collegium and the Law Ministry can worsen these delays.India's higher judiciary currently has a lot of vacancies. For example[354], as of 2024, over 29% of the judges that should be in High Courts were missing.The high number of vacant positions within the justice system poses significant challenges in efficiently processing cases. This backlog of unfilled roles not only hampers the system's ability to handle cases effectively but also leads to a slowdown in the overall execution of justice.

In the UK, the JAC uses a streamlined, merit-based, and criteria-driven selection process to fill vacancies more efficiently. The Lord Chancellor has a limited but defined role in the final approval process to avoid unnecessary delays.The UK judicial system typically has a vacancy rate of below 5%. Efficient filling of vacancies ensures that the judiciary operates at near-full capacity, contributing to effective case management and reducing backlogs.

The UK's system for appointing judges is more efficient than India's. In the UK, the JAC and the Lord Chancellor manage the process, resulting in low vacancy rates and an efficient judiciary. In contrast, India's system faces delays and high vacancy rates, impacting judicial performance. To improve, India could create clear

---

[353] Varun Chhachhar, V., *Appointment of Judges in India through Collegium System: A Critical Perspective.* 2018,SHIMLA LAW REVIEW by Himanchal Pradesh National Law University, Shimla.

[354] Times of India. (2024, May 1). 327 judge posts in 25 HCs, or 29% of total, are lying vacant. Times of India.from https://timesofindia.indiatimes.com/india/327-judge-posts-in-25-hcs-or-29-of-total-are-lying-vacant/articleshow/109740138.cms (Last accessed on June 8, 2024)

timelines, streamline processes, and enhance coordination between the Collegium and the executive.

In summary, the UK's judicial appointment system is known for its transparency, structured qualifications, and efficiency. In contrast, India's Collegium System struggles with transparency, accountability, and efficiency while aiming to uphold judicial independence. Introducing clear timelines, improving coordination between the Collegium and the executive, and enhancing public accountability could help strengthen judicial independence and public trust in India's system.

CHAPTER VII : CONCLUSION

7.1 INTRODUCTION :

The dissertation began with the exploration of judicial appointment models from across the globe. Later, the focus shifted to the historical evolution of judicial appointments in India, starting from the ancient and medieval periods and extending to the era of British rule. Following independence and the constitution's enactment, debates in the Constitutional Assembly regarding judicial appointments and constitutional provisions are analyzed. In the following chapter, the study discusses the advantages and disadvantages of the current collegium system and the proposed NJAC model. In the comparative analysis between the UK's JAC and India's collegium system, significant variations are found in their constitutional and statutory provisions, qualifications and criteria for judicial candidates, and transparency and accountability mechanisms in both systems. As we conclude, it is essential to recap the findings and reflect on the key concepts from this comparative study, aiming to provide valuable insights for legal scholars, policy makers, and those interested in the law's intricate framework worldwide.

7.2 THE COLLEGIUM UNDER SCRUNITY : KEY FAILURES

The collegium's performance in recent years has been less than commendable, characterized by sluggish decision-making and a surprising lack of expertise. Instead of a judicially sound selection process based on rational principles and comprehensive evaluation, decisions often seem to be influenced by executive favouritism and lack meaningful input from the legal community or the public.

1. In 2008, an incident involving a judge of Calcutta High Court revealed the connection between judicial misconduct and a flawed appointment system. Despite facing ongoing proceedings for misappropriation at the time of his appointment, the Chief Justice of Calcutta High Court still recommended his appointment, which raises questions about the decision-making process[355].

---

[355] *Panel Chargesheets Justice Soumitra Sen*, THE ECONOMIC TIMES, May 5, 2009, https://economictimes.indiatimes.com/news/politics-and-nation/panel-chargesheets-justice-soumitra-se

2. The Chief Justice of the Karnataka High Court has been implicated in allegations of amassing substantial assets, notably a large number of land holdings, despite being recommended for elevation to the Supreme Court by the collegium[356]. Furthermore, there is a growing movement to impeach the Chief Justice of the Karnataka High Court, with 75 Rajya Sabha members signing a petition seeking his removal on charges of corruption and land-grabbing[357].
3. The "Provident Fund case" involved 34 judges from subordinate to supreme levels in misappropriation, and the "Cash-for-judge-scam Case" involved two High Court judges, indicating that the present appointment system needs critical evaluation[358].
4. During his tenure, Justice Dipak Misra, India's 45th Chief Justice, faced troubling allegations of corruption and misconduct. A major point of contention was the assignment of court cases, which raised concerns about the fairness and integrity of the legal system. Specifically, there were claims that Justice Misra influenced a case involving the loss of recognition for a private medical college, leading to the arrest of a retired judge on bribery charges[359]. Furthermore, Justice Jasti Chelameswar and three other senior judges publicly expressed dissatisfaction with Justice Misra's decisions on case assignments, citing potential harm to the fairness of the legal process. Due to the discontent among judges and the serious corruption allegations, some government officials attempted to remove Justice Misra from his position. In April 2018, the Rajya Sabha, was asked to remove him based on allegations of corruption, judicial violations, and misuse of

---

n/articleshow/5827617.cms?from=mdr (accessed on Jun 10,2024)

[356] *Corruption, Land Grab Among 16 Charges Slapped on Dinakaran*, THE HINDU, December 19, 2013

[357] V.R.Krishna Iyer, _Issues raised by I'affaire Dinakaran', available at http://www.judicialreforms.org/files/issue%20raised%20by%20I%E1ffaire%20Dinakaran.pdf

[358] Supreme Court Judge V.S. Sirpurkar will head a three-member committee that will investigate the grounds for impeachment of Karnataka Chief Justice. Justice A.R. Dave, Chief Justice of the Andhra Pradesh High Court and eminent jurist P.P. Rao are the other members of the panel constituted by Rajya Sabha Chairman Hamid Ansari. For details http://www.hindu.com/2010/01/17/stories/2010011758940100.html

[359] *Supreme Court Judge Bribing Scandal: Why Chief Justice Dipak Misra Faces New Questions*,INDIA TODAY, Nov. 17, 2017, https://www.indiatoday.in/magazine/up-front/story/20171127-supreme-court-judge-bribing-scandal-chief-justice-dipak-misra-1087447-2017-11-17. (Last accessed on Jun10,2024)

administrative power. However, the Vice-President and Chairman of the Rajya Sabha, M. Venkaiah Naidu, denied the request, citing insufficient evidence[360].These allegations against Chief Justice Dipak Misra shed light on the challenges in upholding honesty and transparency in the top tiers of the legal system, emphasizing the need for judicial selection and administration reforms.

5. Allegations of sexual harassment against CJI Ranjan Gogoi emerged in April 2019[361], when a former Supreme Court employee accused him of making unwanted sexual advances and subsequently mistreating her when she rejected him. She claimed she was transferred to a different job and later dismissed for refusing his advances[362]. In response, CJI Gogoi dismissed the allegations as part of a larger plan to disrupt the court system and challenge his authority. The accusations sparked a significant debate among legal experts, prompting concerns about the handling of sexual harassment cases within the court. To address the issue, CJI Gogoi held an unprecedented hearing in the Supreme Court, where he asserted his innocence and affirmed his commitment to continuing his duties. Subsequently, the Supreme Court established an internal committee led by Justice S.A. Bobde to investigate the allegations against CJI Gogoi[363]. The handling of this case raised questions about the independence and transparency of the court system. Some argued that the absence of an external body to investigate allegations against sitting judges was a significant issue. Despite the controversies, CJI Gogoi continued to preside over important cases until his retirement in November 2019.
6. The inefficiency of the Collegium System has had a profound impact on the Indian judiciary's ability to dispense timely justice. Recent reports confirm

---

[360] Vice President Venkaiah Naidu Rejects Impeachment Motion Against CJI Misra, LIVE LAW (Apr. 23, 2018), https://www.livelaw.in/vice-president-venkaiah-naidu-rejects-impeachment-motion-cji-misra. (Last accessed on Jun10,2024)

[361] CJI Sexual Harassment Case: A Timeline, LIVE LAW (May. 9, 2019), https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830. (Last accessed on Jun10,2024)

[362] ibid

[363] Supreme Court Observer,*Sexual Harassment Allegations Against CJI*, https://www.scobserver.in/court-case/sexual-harassment-allegations-against-cji.(Last accessed on Jun10,2024)

significant vacancies in the Indian judiciary, as acknowledged by the Supreme Court of India. As of January 2024[364], the National Judicial Data Grid indicates over 400 vacancies in the High Courts across India, amounting to more than 36% of the total positions remaining unfilled out of a sanctioned strength of 1,108 judges. The 245th Law Commission Report highlighted that the average time to fill a vacancy in the High Courts is approximately 12-18 months[365].

7. It has been observed that since the 1980s, individuals below the age of 55 have not been appointed to the SC. Moreover, to be considered for a SC appointment, one must either hold the position of Chief Justice of a High Court or, exceptionally, be a very senior judge of a High Court. It is important to note that there is limited regional and demographic diversity in these appointments[366]. For example, only 4% of judges of all time are women on the Supreme Court[367]. Furthermore, statistics indicate that over 40% of the judges at any given time were Brahmins, while 50% came from Forward Castes. In contrast, only around 10% of the judges represented the Schedule Caste/Schedule Tribe and Other Backward Classes[368].

A report by the Vidhi Centre for Legal Policy noted that the backlog of cases has reached alarming levels, with over 4 crore cases pending across various courts in India, attributed to the inadequate number of judges. This underscores that the current judge-to-population ratio is significantly lower than recommended[369].As of December 2023, the Allahabad High Court, one of the largest High Courts in India,

---

[364] National Judicial Data Grid, Vacancy Reports (Jan. 2024), https://njdg.ecourts.gov.in. (Last accessed on Jun10,2024)

[365] LAW COMMISSION OF INDIA, 245TH REPORT, ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER (2014) https://satyamevajayate.info/wp-content/uploads/2017/08/Law-Commission-report-245.pdf (Last accessed on Jun10,2024)

[366] Abhinav Chandrachud,*Age, Seniority, Diversity,*Frontline (May 3rd, 2013)

[367] Gauri Kashyap, 4% of Supreme Court Judges of All Time are Women, Supreme Court Observer (June 30, 2023), https://www.scobserver.in/journal/4-of-supreme-court-judges-of-all-time-are-women/.(Last accessed on Jun14,2024)

[368] Madhav Khosla, Sudhir Krishnaswamy "*Inside Our Supreme Court*" Book Review of *George H. Gadbois Jr. Judges of the Supreme Court of India (OUP, 2011*) in ECONOMIC AND POLITICAL WEEKLY (Vol.XLVI No. 34, Aug 2011) p.29

[369] *Vidhi Centre for Legal Policy, State of the Indian Judiciary* (2023), https://vidhilegalpolicy.in. (Last accessed on Jun10,2024)

was operating with less than 50% of its sanctioned strength, linked to delays in Collegium recommendations and subsequent approvals by the Central Government[370]and only 3 out of 25 High Courts are operating at full capacity, causing significant case backlogs and delays in the administration of justice[371].The failure of the Collegium System to fill judicial vacancies promptly has significantly impacted the efficiency and credibility of the Indian judiciary. The persistent delays and high number of unfilled positions have led to an overwhelming backlog of cases, undermining the judiciary's ability to deliver timely justice.

7.3 ASSESSING NJAC's VIABILITY AS A COLLEGIUM REPLACEMENT

The debate surrounding the NJAC in India centers on its viability as an alternative to the existing Collegium system. The Collegium system for judicial appointments in India has faced criticism for its lack of transparency and accountability, leading to concerns about favouritism and inefficiency in filling over 400 vacant High Court seats. High-profile cases illustrate the system's inadequacies in addressing judicial misconduct and enforcing accountability.In response to concerns over the appointment process, the NJAC was proposed[372] to create a more transparent and accountable system. It aimed to include a diverse panel and establish clear criteria for appointments. Despite being rejected by the Supreme Court in 2015, the principles of the NJAC highlight the need for reform to enhance transparency, accountability, and judicial independence. Let us take a quick look at some key features and intended benefits of the NJAC.

1. Broad-Based Composition[373] :The NJAC was intended to encompass a

---

[370] *Allahabad High Court Functioning with Less Than Half of Sanctioned Strength*, THE TIMES OF INDIA (Dec. 2023), https://timesofindia.indiatimes.com. (Last accessed on Jun10,2024)

[371] High Court Vacancies Remain Unaddressed: Only Three Out of 25 Functioning at Full Strength, Supreme Court Observer (Dec. 14, 2023), https://www.scobserver.in/journal/high-court-vacancies-remain-unaddressed-only-three-out-of-25-functioning-at-full-strength. (Last accessed on Jun10,2024)

[372] Kumari, S., 2023. *Understanding the Collegium System in India*. Issue 2 INT'L JL MGMT. & HUMAN., 6, p.3104.

[373] The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, Bill No. 97-C of 2014.(India)

variety of members from different sectors, aiming for a balanced representation. The commission was supposed to be composed off:

1. The Chief Justice of India (Chairperson, ex officio).
2. Two senior-most Supreme Court judges (ex officio).
3. The Union Minister of Law and Justice (ex officio).
4. Two eminent persons, nominated by a committee consisting of the Chief Justice of India, the Prime Minister of India, and the Leader of Opposition in the Lok Sabha.

This composition aimed to create a more equitable and inclusive decision-making body by incorporating viewpoints from the judiciary, executive, and civil society.

2. Transparency in Appointments: The NJAC aimed to make the appointment processes publicly accessible in order to improve the transparency of judicial appointments and reduce the perception of arbitrariness and bias that was associated with the Collegium system[374].
3. Mechanism for Scrutiny and Accountability: The NJAC proposed to introduce a mechanism for better scrutiny and accountability in judicial appointments[375]. By including members from outside the judiciary, such as the Union Minister of Law and Justice and eminent persons, the NJAC aimed to create a system where potential issues, including allegations of misconduct, could be more effectively addressed and investigated[376].
4. Timely Appointments : The NJAC aimed to expedite the appointment process to minimize delays, ensuring prompt filling of judicial vacancies. This efficiency was expected to reduce case backlogs and enhance the

---

[374] Ananda, D., 2023. Judges Appointments: *Collegium System versus National Judicial Appointments Commission*. GNLU JL DEV. & POL., 13, p.53.

[375] Arun Jaitley, *NJAC SC Verdict: Democracy Cannot Be Tyranny of the Unelected,* THE INDIAN EXPRESS (Oct. 17, 2015), https://indianexpress.com/article/india/india-news-india/njac-sc-verdict-democracy-cannot-be-tyranny-of-the-unelected-says-arun-jaitley/. (Last Accessed on Jun 10, 2024)

[376] Rishika Singh & Akanksha Tiwari, *The Debate around NJAC and Collegium System*, 3 SUPREMO AMICUS 480 (2018).

judiciary's ability to provide timely justice[377].

Despite its advantages, the NJAC faced criticism for not being a perfect replacement for the collegium system. Some critical arguments against NJAC included concerns about deadlocks due to an even number of members, unclear guidelines for selecting "eminent persons", the President's veto power over recommendations, and potential legislative interference. Both NJAC and the collegium system lacked transparency in their selection processes, potentially favouring seniority over merit in appointments. Ultimately, the Supreme Court struck down the NJAC Act, identifying concerns about judicial independence in India.

Recently,the SC Registry has declined to accept a petition[378] seeking to abolish the Collegium system and reinstate the NJAC. The refusal is based on procedural grounds, emphasizing that the correct procedure was not followed in submitting the petition. This incident highlights that India is still seeking a reliable judicial appointment model that can stand the test of time. Therefore, the upcoming model should emphasize judicial independence, safeguarding the judiciary from undue influences, and establishing mechanisms for holding judges accountable for their conduct.

7.4 HOW UK's JAC HAS PERFORMED

The CRA of 2005 introduced significant changes to the UK's judiciary by establishing the JAC and transferring the responsibility of judicial appointments from Lord Chancellor to an independent body. This shift has had several positive outcomes. The JAC has actively promoted applications from individuals from diverse backgrounds, resulting in a higher representation of women and Black, Asian, and Minority Ethnic (BAME) judges. As of 2023, women account for 34% of judges, a substantial increase from 18% in 2006, and BAME representation has risen from 3% to 8%. Moreover,

---

[377] 20th LAW COMMISSION OF INDIA, REPORT NO.245: ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER (2014), https://satyamevajayate.info/wp-content/uploads/2017/08/Law-Commission-report-245.pdf (Last accessed on Jun10,2024)

[378] Shri Mathews J. Nedumpara & Ors. v. Hon'ble The Chief Justice of India & Ors., Writ petition (civil) No. 1005 OF 2022

more women and BAME individuals now hold senior judicial positions. The JAC's transparent and merit-based process has bolstered public trust by ensuring that appointments are free from political influence. Furthermore, the JAC has significantly reduced the vacancy rate for judicial positions to below 5% in 2023 from around 12% in 2006, with most vacancies being filled within six months.Thereby, the UK's JAC upholds the principles of independence and transparency by selecting judges without any political influence and operating with clear rules and processes. This approach is crucial in fostering public trust in the fairness of judicial appointments. While the JAC has made strides in improving the appointment process, efforts to fully reflect the diversity of the UK's population are ongoing.

7.5 RESEARCH FINDINGS

1. Constitutional and Statutory Provisions for Judicial Appointments in India and the UK

India: The judicial appointment mechanism for India's higher judiciary, including the Supreme Court and the High Courts, is detailed in the Indian Constitution from Articles 124 to 127[379] and Articles 214 to 217[380] respectively. Initially, judges were appointed by the President of India in consultation with the Chief Justice of India and the Governor of the concerned state. However, the Collegium System, which was not explicitly mentioned in the Constitution, became the established practice following a series of landmark decisions known as the "Three Judges Cases" in the years 1981, 1993, and 1998. Under this system, the Chief Justice of India and the four most senior judges of the Supreme Court make recommendations for judicial appointments and transfers for the constitutional courts.

In the UK, the JAC plays a crucial role in ensuring transparency and meritocracy in judicial appointments. Established under the Sections 25 to 31[381] and Schedule 8[382] of the CRA 2005, the JAC is responsible for selecting candidates based

[379] INDIA CONST. art 124 - 127
[380] INDIA CONST. art 214 - 217
[381] Constitutional Reform Act 2005, c.4, §§ 25 - 31 (UK).
[382] Constitutional Reform Act 2005, c. 4, sch. 8 (UK).

on merit. They consider qualifications, experience, and diversity. The JAC conducts a rigorous assessment process, including interviews and references, to ensure a fair and transparent appointment process.

2. Qualifications and Criteria for Appointing Judges:

India: According to Articles 124[383] of the Indian Constitution, in order to be appointed as a judge of the Supreme Court, a person must be a citizen of India and must have served as a judge of one or more High Courts for at least five years, or have been an advocate in a High Court for at least ten years. Additionally, the President may appoint a person who is considered a distinguished jurist. According to Article 217(2)[384] of the Indian Constitution, High Court judges must have at least ten years of experience as an advocate or in a judicial office in India.

In the UK, Section 25 of the CRA 2005[385] outlines the qualifications for judicial appointments,Specifically, candidates must have either (a) held high judicial office for at least 2 years, or (b) been a qualifying practitioner for at least 15 years, defined as holding a Senior Courts qualification, being an advocate or solicitor in Scotland or Northern Ireland, or being a member of the Bar of Northern Ireland. The JAC assesses candidates on several criteria, including legal knowledge, integrity, impartiality, and the ability to deliver fair judgments. Applicants must demonstrate significant legal expertise and a proven track record of exceptional professional performance.

3. Transparency in the Appointment Process:

India: The Collegium System has faced criticism for its lack of transparency. The decision-making process is carried out behind closed doors, and the selection criteria are not publicly disclosed. While recent reforms in the memorandum of procedure have sought to enhance transparency, the system still falls short of the openness observed in other jurisdictions.

In UK, the JAC follows a transparent appointment process for judicial positions. This process includes open job advertisements, detailed application

[383] INDIA CONST. art 124
[384] INDIA CONST. art 217,cl.2
[385] Constitutional Reform Act 2005, c. 4, § 25 (UK).

procedures, and public interviews. The goal is to ensure that judicial appointments are based on merit and are open to public scrutiny. However, there are continued demands for even more transparency in the UK's judicial appointment process.

4. Mechanisms for Public Scrutiny and Accountability:

In India, accountability mechanisms involve addressing complaints against judges through an internal procedure, enforcing codes of conduct, and providing judicial education as regulated by the Judges Inquiry Act, 1968. However, these mechanisms are frequently considered insufficient due to the lack of an independent oversight body and the non-transparent nature of the Collegium System.

In contrast, the UK's JAC operates with transparency, as judicial appointments are made following parliamentary scrutiny and compliance with judicial conduct rules. These procedures contribute to a higher level of accountability and foster public confidence in the judicial system.

7.6 HYPOTHESIS VALIDATION

7.6.1 Hypothesis 1 :

The hypothesis that there are significant differences in transparency and accountability in the judicial appointment processes of India and the UK can be validated based on the following points:

A. Transparency in appointment process

The appointment process for judges in the UK is transparent and based on merit. The JAC conducts open competitions for judicial positions, and its procedures and criteria are publicly accessible. This transparency ensures that the process is accountable to the public. Additionally, the selection panels include lay members to enhance public confidence in the appointments.In contrast, in India, the Collegium system, which includes the Chief Justice of India and four senior-most Supreme Court judges, operates with a high degree of secrecy. The criteria and processes for selecting judges are not publicly disclosed, leading to criticisms of opacity and potential favouritism. The need for more transparency in decision-making processes undermines public trust and raises concerns about accountability.

B. Accountability Mechanisms

The UK's JAC includes members from the judiciary, legal profession, and laypersons, providing a balanced approach to appointments. The inclusion of non-judicial members ensures that the process is not solely controlled by the judiciary, enhancing accountability. Additionally, the JAC's decisions and processes are subject to public and parliamentary scrutiny.

In India, the Collegium system lacks external checks and balances. There is no formal mechanism for investigating complaints against judges recommended by the Collegium, leading to a lack of accountability. The absence of a structured and publicly accountable system for handling judicial misconduct has been highlighted in high-profile cases, such as those involving Chief Justices Ranjan Gogoi and Dipak Misra.

7.6.2 Hypothesis 2:

The hypothesis that the qualifications and criteria for the appointment of judges in the UK and India differ significantly, leading to variations in diversity, can be validated based on the following points:

A. Judicial appointment criteria:

The UK's judicial appointment criteria aim to enhance diversity and inclusivity. The JAC actively seeks to diversify the judiciary by considering a broad range of professional experiences, including legal academics, solicitors, and barristers. The focus is not solely on years of experience but also on skills, competence, and contribution to the legal profession.

The Indian system primarily prioritizes the number of years of experience as a judge or an advocate (as per Article 124[386] and Article 217[387] of the Indian Constitution). There is less emphasis on the diversity of professional backgrounds or specific competencies beyond judicial experience. This narrower focus can limit the pool of candidates and affect the overall diversity within the judiciary.

B.Impact on Diversity:

---

[386] INDIA CONST. art 124
[387] INDIA CONST. art 217

UK: Encouraging applications from a wider pool of candidates and promoting a diverse judiciary has led to a gradual increase in the representation of women and ethnic minorities within the UK judiciary. The transparent and inclusive process of the JAC contributes to a more representative judicial system.

India: Under the Collegium system, the Indian judiciary has faced criticism for its lack of diversity. The emphasis on seniority and experience tends to favour a homogeneous group of candidates, often from similar socio-economic and professional backgrounds. As a result, the judiciary does not fully reflect the diversity of Indian society.

The validation of these hypotheses emphasizes the necessity for reforms in the Indian judicial appointment system. In light of a comprehensive comparison with the UK's JAC, it becomes evident that a transparent, accountable, and inclusive appointment process yields numerous benefits. It is clear that adopting similar guiding principles has the potential to foster greater public trust and inclusivity within the Indian judiciary, effectively mitigating the existing shortcomings of the system.

7.7 RECOMMENDATIONS AND SUGGESTIONS

The cornerstone of judicial reform rests in the careful selection and appointment of judges, whether for the Supreme Court, the High Court, or the subordinate judiciary. This process of selecting judges is the critical first step in the comprehensive overhaul of the judicial system. Currently, there is increasing concern over the consultative procedure, with many expressing frustration over its perceived complexity and the significant hurdles it poses. Here are some proposed suggestions.

1. We are advocating for establishing an Independent Judicial Appointments Commission, inspired by the UK's JAC. This commission would be comprised of judges, lawyers, and esteemed legal academics, aiming to maintain the impartiality and answerability of the judiciary by assessing candidates within the legal profession. The executive members would be tasked with validating qualifications and conducting thorough background checks on prospective candidates.

2. The commission, which might consist of retired judicial officers[388], should aim to streamline the selection process for judges by pro actively identifying suitable candidates at least 6 months before a position becomes vacant. The government should promptly carry out verification procedures, after which the executive branch may exercise the right to veto the nomination. An impartial commission can reduce power imbalances and biases and guarantee a transparent appointment process.

3. We suggest a shift from seniority-based appointment practices to merit-based appointments. It is crucial that appointments be based on merit to fulfill the aims and objectives of such legislation. This requirement should be explicitly stated, similar to the CRA of 2005 in the UK, where Section 63(2)[389] stipulates that the "Selection must be solely on merit," and Section 63(3)[390] states, "*A person must not be selected unless the selecting body is satisfied that he is of good character*".

4. Implementing publicly available selection criteria and a transparent selection process is important. The UK's JAC publishes detailed job descriptions, competency frameworks, and selection procedures, which can serve as a model for India. Transparency in the selection process ensures that appointments are based on clear and objective criteria, reducing allegations of nepotism and favouritism.

5. Incorporate public consultations and involve a broader range of stakeholders in the appointment process. The UK's JAC consults with various legal bodies and incorporates feedback from diverse groups.Engaging the public and stakeholders in the appointment process enhances legitimacy and accountability. It enables a more comprehensive assessment of candidates' qualifications and suitability, ensuring that appointees are legally competent and aligned with societal values and expectations.

6. Establish clear goals and mechanisms to promote diversity in judicial appointments, encompassing inclusivity of women and marginalized and under

---

[388] Justice Nariman Suggests Having Collegium with Retired Judges, Says *Collegium System is the Worst, But There's Nothing Better*, LIVELAW (Mar. 28, 2023), https://www.livelaw.in/top-stories/collegium-system-is-the-worst-but-theres-nothing-better-justice-nariman-suggests-having-collegium-with-retired-judges-244737. (Last accessed on Jun15, 2024)

[389] Constitutional Reform Act 2005, c. 2, § 63 (UK).

[390] Constitutional Reform Act 2005, c. 3, § 63 (UK).

represented communities. In the UK's CRA of 2005, Section 64[391] states the need to "encourage diversity." It specifies that the Commission must consider the need to promote diversity in the pool of individuals available for appointment, while also taking into account their merit and good character when carrying out its functions under this Part. A diverse judiciary ensures that a variety of perspectives are represented in judicial decision-making, which can enhance the quality and inclusiveness of judgments.

7. Implement regular and detailed reporting on judicial appointments, similar to the annual reports published by the UK's JAC. These reports should include statistics on applications, selections, and diversity metrics. Regular reporting provides transparency and allows for public and parliamentary scrutiny of the appointment process. It ensures that the commission remains accountable and responsive to any emerging issues or biases in the selection process.

8. Introducing a structured feedback and appeals mechanism will enable candidates to receive feedback on their applications and challenge decisions if necessary. This mechanism promotes fairness, allowing candidates to understand and enhance their applications, and ensures that the appointment process is perceived as just and open to scrutiny.

9. If appointments to the Indian constitutional courts are viewed as a service, then it is important to provide suitable candidates with the opportunity to apply for vacant positions. Candidates should then be assessed based on their merits by an independent commission. Implementing this approach would encourage a more diverse pool of applicants, eliminating the potential for favouritism and nepotism.

10. Although outlined in Article 312(1)[392], the All-India Judicial Service has yet to be implemented. Despite discussions over the 75 years of independence, we are yet to see tangible steps taken towards its implementation.A national-level examination can be conducted to select candidates for the higher judicial service, with the provision for posting successful candidates in their native state. This initiative would

---

[391] Constitutional Reform Act 2005, § 64 (UK).
[392] INDIA CONST. art 312,Cl.1

help overcome language barriers within the judiciary and minimize the frequent and unnecessary transfers of judicial officers.

To address the shortcomings in the current system, India could consider adopting a judicial commission model similar to that of the UK's JAC. The JAC prioritizes judicial independence and accountability by ensuring the appointment process is transparent and free from political influence. It aims to create a merit-based and inclusive judiciary by encouraging applications from individuals from diverse social and economic backgrounds, leading to increased representation of women and minority groups. Implementing a similar model in India could ensure equal representation for all groups, fostering a judiciary that upholds fairness and integrity and is able to meet the diverse needs of the Indian populace. Such a reform would be a significant step toward a more transparent, accountable, and representative judicial system.

Judicial reform in India has recognized that simply having ideas has yet to lead to substantial change. The current focus is on translating these ideas into action and driving improvements. This perspective is gaining momentum and is anticipated to reshape the justice delivery system in the coming years. Reforms take time to demonstrate results, so it is important to maintain patience. Some initial reforms have already shown a positive impact, and there is optimism that the next few years will transform India's justice delivery system.

BIBLIOGRAPHY

Articles

1. Abdullah Fakhry Ansary, "Saudi Judicial Reform and the Principle of Independence," Carnegie Endowment for International Peace, May 5, 2009.
2. Abhinav Shakula and Shailesh N Hadli, "Judicial appointments in India- A critical analysis towards amelioration," Journal of Emerging Technologies and Innovative Research (JETIR), May 2021, Volume 8, Issue 5.
3. Akkas, Sarkar Ali, "Appointment of Judges: A Key Issue in Judicial Independence," Bond Law Review, Vol. 16, Issue 2, Article 8, University of Rajshahi, Bangladesh.
4. Ananda, D., "Judges Appointments: Collegium System versus National Judicial Appointments Commission," GNLU JL Dev. & Pol., 13, p.53, 2023.
5. Anurag Deep and Shambhavi Mishra, "Judicial appointments in India and NJAC Judgment: formal victory or real defeat," Jamia Law Journal, 2018, Vol:3.
6. Bandyopadyay, Sabita, "Reforms in Judiciary-A Loud Thinking," Journal of All India Reporter 23 (2000).
7. Bulmer, Elliot, "Judicial appointments," in International IDEA, Constitution - Building primer 2d ed. (2017) (International IDEA) Second edition.
8. Chakrabarty, B., "BR Ambedkar and the History of Constitutionalizing India," Contemporary South Asia, 24(2), pp.133-148, 2016.
9. Chandrachud, Chintan, "Judicialisation of Judicial Appointments? A Response from the UK," A Sengupta and R Sharma (eds), Appointment of Judges to the Supreme Court of India (OUP 2018), April 18, 2018.
10. Chaudhuri, A.K., "Judicial Appointments in High Courts," The Indian Journal of Political Science, 1977.
11. Clark, Mary L., "Advice and Consent vs. Silence and Dissent - The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments," 71 LA. L. REV. 451 (2011).
12. Elliot Bulmer, "Judicial appointments," in International IDEA, Constitution -

Building primer 2d ed. (2017) (International IDEA) Second edition.

13. Gadgil, S., "Judicial Appointments: Of Collegiums and More," Supremo Amicus, 2020, 18, p.792.
14. Gagrani, H., "Appointment or Disappointment: Historical Backdrop and Present Problems in the Appointment of Judges of Indian Judiciary," NLIU Law Review, 2009, Forthcoming.
15. Harish Verma, "Concept and History of Judicial Independence in India," 8 INDIAN J.L. & JUST. 33 (2017).
16. Indira Jaising, "National Judicial Appointments Commission: A Critique," Economic and Political Weekly 49, no. 35 (2014): 16–19.
17. Jay Vinayak, O. and Sengupta, A., "Judicial Appointments in India: From Pillar to Post," Constitutional Court Review, 2020.
18. Jay Vinayak, O. and Sengupta, A., "Judicial appointments in India: from pillar to post," Constitutional Court Review, 10(1), pp.43-64, 2020.
19. Jodhta, B.K., "Indian Judiciary: A Tool for Good Governance and Promoting Democracy," Indian J. Integrated Rsch. L., 3, p.1 (2023).
20. Kadri, Dr. Harunrashid A., "Judicial Appointments Mechanism in India and Independence of Judiciary - A Critical Analysis," National Capital Law Journal, Vol. 16, 2017, December 30, 2017.
21. K. Malleson, "Creating a judicial appointments commission: which model works best?" Public Law, 102-121, 2004.
22. Malleson, Robert & Kate, "The Politics of Judicial Independence in the UK's Changing Constitution," 14 U. Pa. J. Const. L. 637 (2012).
23. Misra, S. and Nair, R., "Independence of the Judiciary: Appointments of Judges to the Supreme Court and High Courts of India," South Asia Judicial Barometer, 2017.
24. Omdutt, "Role Of Judiciary In The Democratic System Of India (Judicial Activism Under The Supreme Court Of India)," Golden Research Thoughts, Sept. 2012.
25. Peter H. Solomon, "Courts and Judges in Authoritarian Regimes," World Politics,

60: 122 (2007).

26. Peter L. Fitzgerald, "Constitutional Crisis over the Proposed Supreme Court for the United Kingdom," 18 Temp. Int'l & comp.l.j.233, 235 (2004).
27. Plascencia, Iveth A., "Judicial Appointments: A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around the World," Law School Student Scholarship, 2015, 666.
28. Poonam Kataria, "Judicial Independence in India: An Overview," International Journal of Applied Research, 1: 397-400 (2015).
29. Roger Smith, "Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance," 32 Journal of Law and Society 187, 189 (2005).
30. Rishika Singh & Akanksha Tiwari, "The Debate around NJAC and Collegium System," 3 Supremo Amicus 480 (2018).
31. Singh, V, "Collegium system vis-à-vis national judicial appointments commission: a critical appraisal," International Journal of Research in Economics and Social Sciences, 2016, 6(1), pp.348-354.
32. Srishti Maheshwari & Ojasvi Chhabra, "A Critique on the NJAC Judgment," Jindal Law School, Indian Journal of Law and Legal Research, Vol III Issue 1, ISSN: 2582-8878.
33. Suhrith Parthasarathy, "By Appointment Only - Is the Supreme Court Collegium Compromising Judicial Independence," Lexis Nexis, 2016.
34. Upadhyay, R., "NJAC Judgement," Indian JL & Legal Rsch., 2, p.1, 2021.
35. Uday Shankar & Srichetha Chowdhury, "Representative Judiciary in India: An Argument for Gender Diversity in the Appointment of Judges in the Supreme Court," 2 ILI Law Rev. 200 (Winter 2019).

Books

1. Abhinav Chandrachud, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India.

2. Arghya Sengupta, Independence and Accountability of the Indian Higher Judiciary, Cambridge University Press, 2019.

3. Arghya Sengupta & Ritwika Sharma, Appointment of Judges to the Supreme Court of India, Oxford University Press, 2018.

4. Arvind Datar, Commentary on the Constitution of India, Lexis Nexis, New Delhi, 2007.

5. Bipin Chandra, Modern India, New Delhi: Publication Department, NCERT, 1990.

6. D.D. Basu, Shorter Constitution of India.

7. Granville Austin, Working Democratic Constitution: The Indian Experience, Oxford University Press.

8. H.R. Mukhi, Ancient Indian Political Thoughts and Institutions.

9. J.L. Mehta, History of Medieval India: Mughal Empire, Sterling Publishers Pvt. Ltd., 1st ed., 1981.

10. Janak Raj Jai, Commission and Omission in the Administration of Justice, New Delhi: Regency, 2003.

11. M. Rama Jois, Legal and Constitutional History of India, N.M. Tripathi Pvt. Ltd., 1990.

12. M.P. Singh, Outlines of Indian Legal & Constitutional History, Universal Law Publishing, 2006.

13. P.M. Baxi, The Constitution of India.

14. P.V. Kane, History of Dharmasastra, Vol III.

15. Robert Stevens, The English Judges: Their Role in the Changing Constitution, 2002.

16. Roger Smith, Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance, 2005.

17. S.D. Sharma, Administration of Justice in Ancient India, Harman Publishing House, 1988.

18. S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, New Delhi: Oxford University Press, 2007.

19. S.P. Tripathi, Indian and Constitutional History, Central Law Publishing, 3rd ed., 2011.

20. V.D. Kulshreshtha, Landmark in Indian Legal and Constitutional History, 10th ed.,

1992.

21. Zia Mody, 10 Judgements That Changed India, Penguin Books India, 2013.

Legislation

1. The Constitution of India
2. The Constitution of South Africa
3. The constitutional reforms act 2005
4. The Constitution of Argentina
5. The Constitution of U.S.A.
6. Constitution of Paraguay

Newspaper

1. The Hindustan Times
2. Times of India
3. The Hindu
4. Frontline
5. The Economic Times

Reports

1. Judiciary of the United Kingdom. Judicial Diversity and Inclusion Update 2023. Judiciary of the United Kingdom. https://www.judiciary.uk/wp-content/uploads/2024/01/Judicial-Diversity-and-Inclusion-Update-2023.pdf (Last accessed on June 4, 2024)
2. Ministry of Justice. (2023). Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2023 Statistics. UK Government. https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics#fn:1(Last accessed on June 4, 2024)
3. Ministry of Justice. (2015, January 19). Judicial Appointments Commission: Triennial Review Report. https://assets.publishing.service.gov.uk/media/5a7dc91540f0b65d8b4e37d3/jac-triennial-review.pdf (Last accessed on June 4, 2024)

4. National Judicial Data Grid, Vacancy Reports (Jan. 2024), https://njdg.ecourts.gov.in. (Last accessed on Jun10,2024)
5. Law Commission of India, 245th Report, Arrears and Backlog: Creating Additional Judicial (wo)manpower (2014) https://satyamevajayate.info/wp-content/uploads/2017/08/Law-Commission-report-245.pdf (Last accessed on Jun10,2024)
6. Vidhi Centre for Legal Policy, State of the Indian Judiciary (2023), https://vidhilegalpolicy.in. (Last accessed on Jun10,2024)
7. Law Commission of India, *The Method of Appointment of Judges,* 80th Report, Ministry of Law and Justice, Government of India (1979).
8. Law Commission of India, *14th Report,* Ministry of Law and Justice, Government of India (1958).
9. Law Commission of India, *214th Report on Proposal for Reconsideration of Judges Cases I, II and III – S.P. Gupta v. Union of India,* Ministry of Law and Justice, Government of India (2002).
10. Fourth Report, "Ethics in Governance," Second Administrative Reforms Commission.
11. Courts and Tribunals Judiciary, "Annual Diversity Statistics 2001," available at https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2001/
12. DCA Consultation Paper, CP 11/03.
13. DCA Consultation Paper, CP 10/03.
14. DCA Consultation Paper, CP 13/03.
15. Constitutional Affairs Committee, "Report on Judicial Appointments and a Supreme Court (Court of Final Appeal)," 2003-4, H.C. 48-1, at 27-28 (U.K.) [hereinafter Judicial Appointments Report 1].

Websites

1. https://africanlii.org/
2. https://www.barandbench.com/
3. https://www.barcouncil.org.uk/
4. https://www.concourt.org.za/

5. https://home.heinonline.org/

6. https://judicialappointments.gov.uk/

7. https://www.jstor.org/

8. https://lawcommissionofindia.nic.in/

9. https://lawmin.gov.in/

10. https://www.lexisnexis.com/en-us/gateway.page

11. www.livelaw.in

12. www.manupatrafast.in

13. https://www.scobserver.in/

14. https://www.sci.gov.in/

15. https://www.supremecourt.uk/

16. https://www.judiciary.uk/

17. https://www.ssrn.com/

APPENDIX

CERTIFICATE OF PLAGIARISM CHECK

The Dissertation titled **A COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT SYSTEM IN INDIA AND THE UNITED KINGDOM** submitted by **SRI MATHURA S**, Reg. No: **LM0123016** in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law has been checked for plagiarism in Grammarly on 20-06-2024 and the similar content identified is found to be less than 8%.

Dr Jacob Jospeh
Assistant Professor,
NUALS,Kochi
(Supervisor)

Sri Mathura S
Reg no:**LM0123016**
LL.M (Administrative & Constitutional Law)
NUALS,Kochi

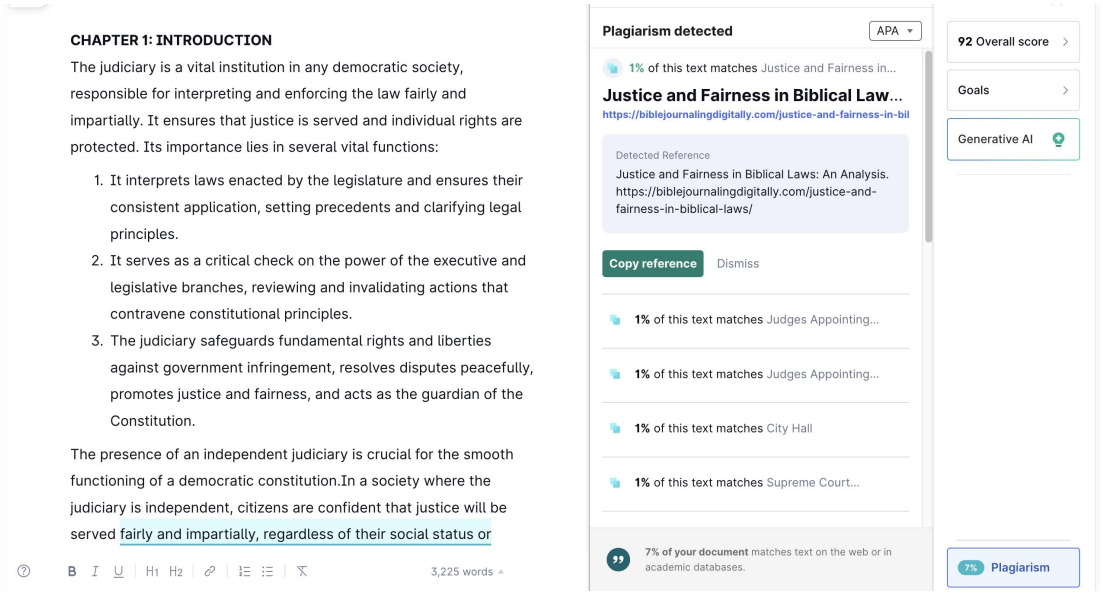
PLAGIARISM CHECK REPORT

1.	Name of the Candidate	Sri Mathura S
2.	Title of Thesis/Dissertation	A Comparative Analysis of Judicial Appointment system in India and the United Kingdom
3.	Name of the Guide and Supervisor	Dr Jacob Joseph
4.	Similar Content (%) Identified	7%(Chapter 1), 12%(Chapter 2), 8% (chapter 3), 9% (chapter 4), 12% (chapter 5), 1 % (chapter 6), 5% (chapter 7)
5.	Software Used	Grammarly
6.	Date of Verification	20.06.2024

Name and Signature of the Candidate : Sri Mathura S

Name and Signature of the Supervisor : Dr Jacob Joseph

Chapter 1 - 7%



CHAPTER 1: INTRODUCTION

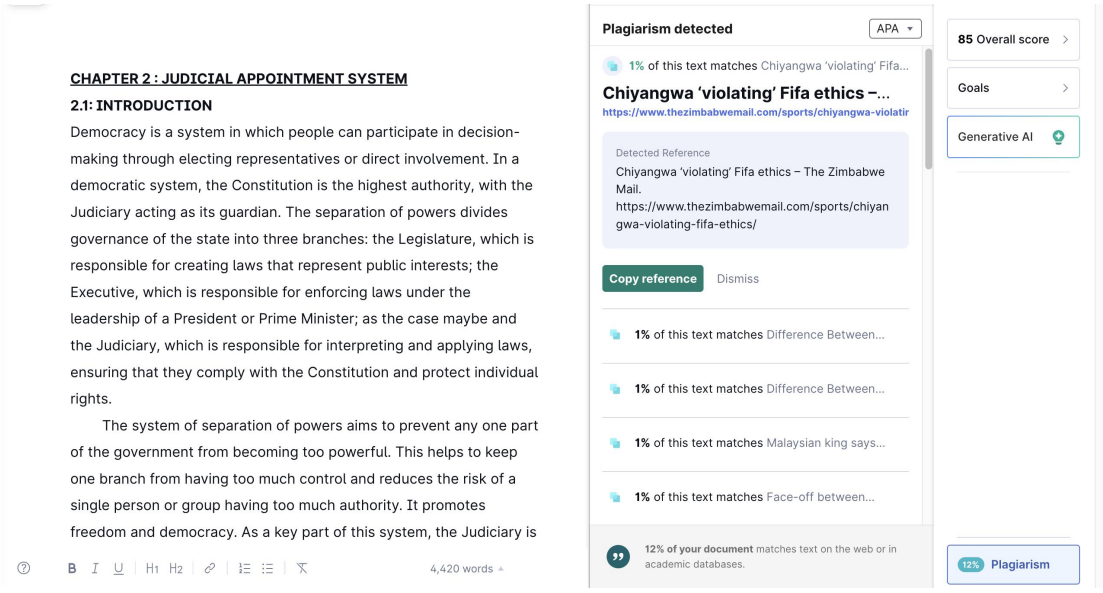
The judiciary is a vital institution in any democratic society, responsible for interpreting and enforcing the law fairly and impartially. It ensures that justice is served and individual rights are protected. Its importance lies in several vital functions:

1. It interprets laws enacted by the legislature and ensures their consistent application, setting precedents and clarifying legal principles.
2. It serves as a critical check on the power of the executive and legislative branches, reviewing and invalidating actions that contravene constitutional principles.
3. The judiciary safeguards fundamental rights and liberties against government infringement, resolves disputes peacefully, promotes justice and fairness, and acts as the guardian of the Constitution.

The presence of an independent judiciary is crucial for the smooth functioning of a democratic constitution.In a society where the judiciary is independent, citizens are confident that justice will be served fairly and impartially, regardless of their social status or

3,225 words

Chapter 2 - 12%



CHAPTER 2 : JUDICIAL APPOINTMENT SYSTEM

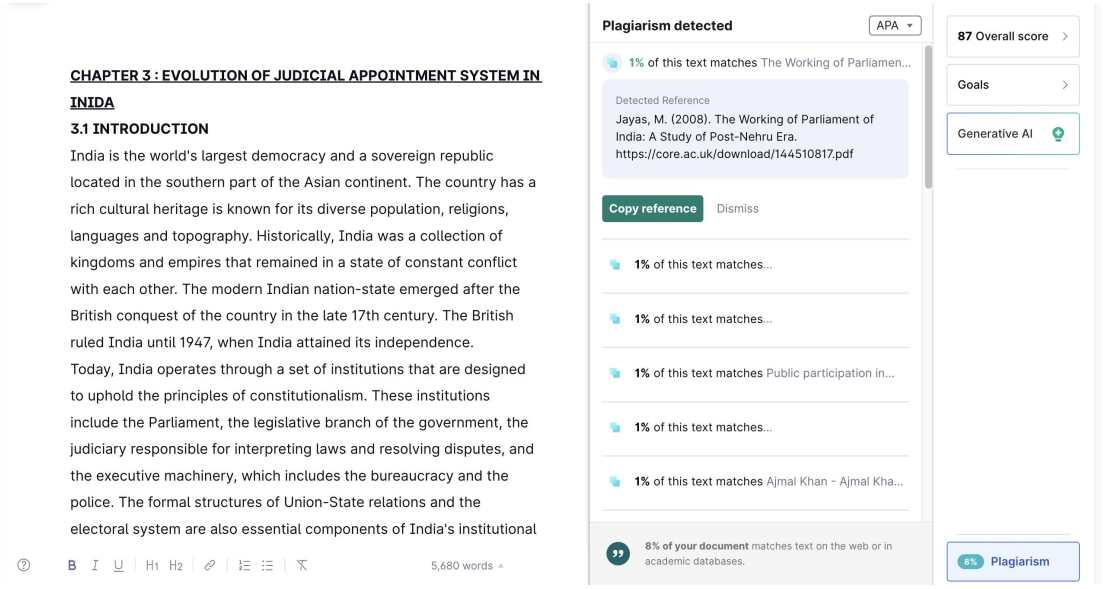
2.1: INTRODUCTION

Democracy is a system in which people can participate in decision-making through electing representatives or direct involvement. In a democratic system, the Constitution is the highest authority, with the Judiciary acting as its guardian. The separation of powers divides governance of the state into three branches: the Legislature, which is responsible for creating laws that represent public interests; the Executive, which is responsible for enforcing laws under the leadership of a President or Prime Minister; as the case maybe and the Judiciary, which is responsible for interpreting and applying laws, ensuring that they comply with the Constitution and protect individual rights.

The system of separation of powers aims to prevent any one part of the government from becoming too powerful. This helps to keep one branch from having too much control and reduces the risk of a single person or group having too much authority. It promotes freedom and democracy. As a key part of this system, the Judiciary is

4,420 words

Chapter 3 - 8%



CHAPTER 3 : EVOLUTION OF JUDICIAL APPOINTMENT SYSTEM IN INIDA

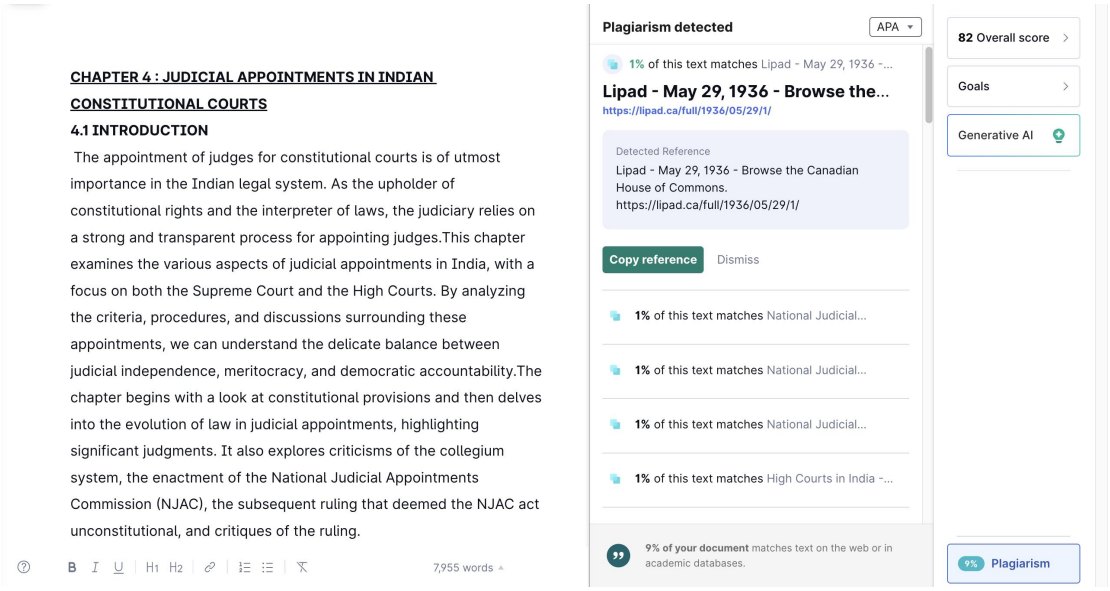
3.1 INTRODUCTION

India is the world's largest democracy and a sovereign republic located in the southern part of the Asian continent. The country has a rich cultural heritage is known for its diverse population, religions, languages and topography. Historically, India was a collection of kingdoms and empires that remained in a state of constant conflict with each other. The modern Indian nation-state emerged after the British conquest of the country in the late 17th century. The British ruled India until 1947, when India attained its independence.

Today, India operates through a set of institutions that are designed to uphold the principles of constitutionalism. These institutions include the Parliament, the legislative branch of the government, the judiciary responsible for interpreting laws and resolving disputes, and the executive machinery, which includes the bureaucracy and the police. The formal structures of Union-State relations and the electoral system are also essential components of India's institutional

5,680 words

Chapter 4 - 9%



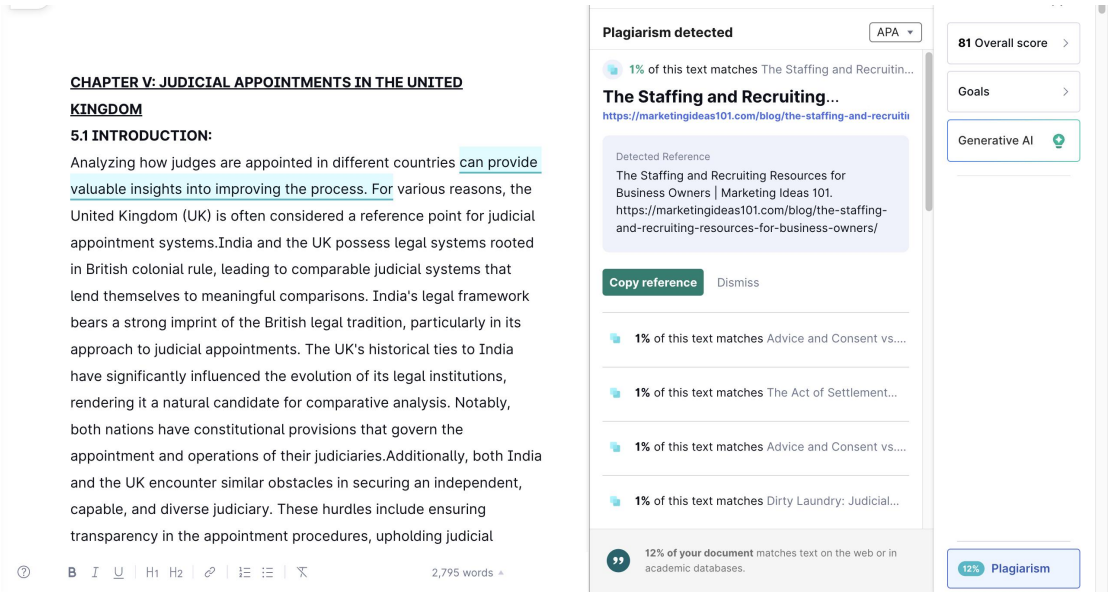
CHAPTER 4 : JUDICIAL APPOINTMENTS IN INDIAN CONSTITUTIONAL COURTS

4.1 INTRODUCTION

The appointment of judges for constitutional courts is of utmost importance in the Indian legal system. As the upholder of constitutional rights and the interpreter of laws, the judiciary relies on a strong and transparent process for appointing judges.This chapter examines the various aspects of judicial appointments in India, with a focus on both the Supreme Court and the High Courts. By analyzing the criteria, procedures, and discussions surrounding these appointments, we can understand the delicate balance between judicial independence, meritocracy, and democratic accountability.The chapter begins with a look at constitutional provisions and then delves into the evolution of law in judicial appointments, highlighting significant judgments. It also explores criticisms of the collegium system, the enactment of the National Judicial Appointments Commission (NJAC), the subsequent ruling that deemed the NJAC act unconstitutional, and critiques of the ruling.

7,955 words

Chapter 5 - 12%



CHAPTER V: JUDICIAL APPOINTMENTS IN THE UNITED KINGDOM

5.1 INTRODUCTION:

Analyzing how judges are appointed in different countries can provide valuable insights into improving the process. For various reasons, the United Kingdom (UK) is often considered a reference point for judicial appointment systems.India and the UK possess legal systems rooted in British colonial rule, leading to comparable judicial systems that lend themselves to meaningful comparisons. India's legal framework bears a strong imprint of the British legal tradition, particularly in its approach to judicial appointments. The UK's historical ties to India have significantly influenced the evolution of its legal institutions, rendering it a natural candidate for comparative analysis. Notably, both nations have constitutional provisions that govern the appointment and operations of their judiciaries.Additionally, both India and the UK encounter similar obstacles in securing an independent, capable, and diverse judiciary. These hurdles include ensuring transparency in the appointment procedures, upholding judicial

2,795 words

Plagiarism detected — APA

1% of this text matches The Staffing and Recruitin...

The Staffing and Recruiting...

https://marketingideas101.com/blog/the-staffing-and-recruiti

Detected Reference

The Staffing and Recruiting Resources for Business Owners | Marketing Ideas 101. https://marketingideas101.com/blog/the-staffing-and-recruiting-resources-for-business-owners/

Copy reference | Dismiss

1% of this text matches Advice and Consent vs....

1% of this text matches The Act of Settlement...

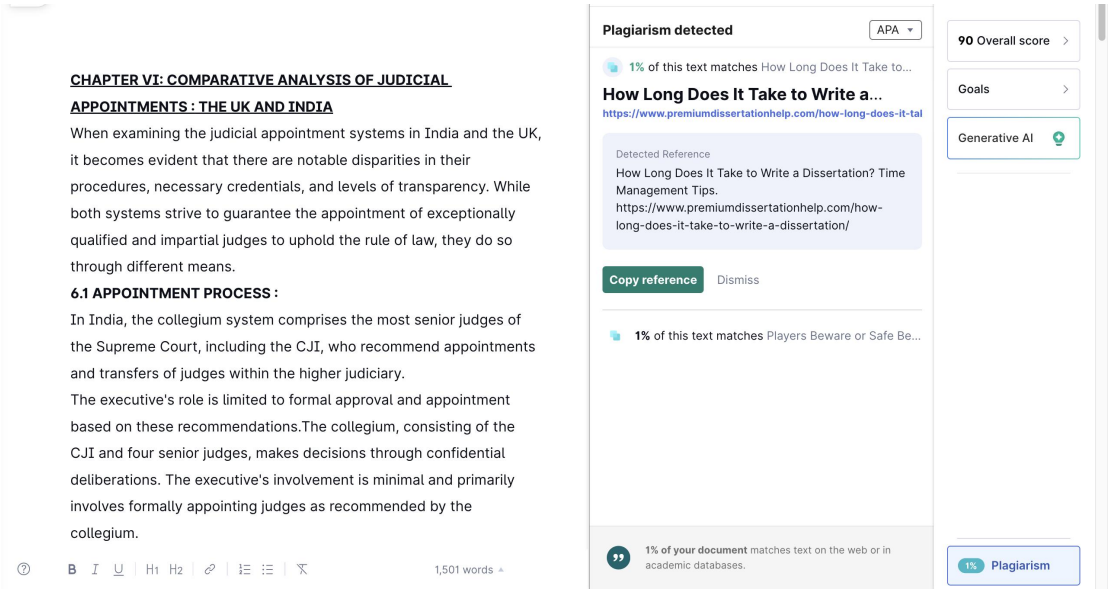
1% of this text matches Advice and Consent vs....

1% of this text matches Dirty Laundry: Judicial...

12% of your document matches text on the web or in academic databases.

81 Overall score | Goals | Generative AI | 12% Plagiarism

Chapter 6 - 1%



CHAPTER VI: COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENTS : THE UK AND INDIA

When examining the judicial appointment systems in India and the UK, it becomes evident that there are notable disparities in their procedures, necessary credentials, and levels of transparency. While both systems strive to guarantee the appointment of exceptionally qualified and impartial judges to uphold the rule of law, they do so through different means.

6.1 APPOINTMENT PROCESS :

In India, the collegium system comprises the most senior judges of the Supreme Court, including the CJI, who recommend appointments and transfers of judges within the higher judiciary.

The executive's role is limited to formal approval and appointment based on these recommendations.The collegium, consisting of the CJI and four senior judges, makes decisions through confidential deliberations. The executive's involvement is minimal and primarily involves formally appointing judges as recommended by the collegium.

1,501 words

Plagiarism detected — APA

1% of this text matches How Long Does It Take to...

How Long Does It Take to Write a...

https://www.premiumdissertationhelp.com/how-long-does-it-tal

Detected Reference

How Long Does It Take to Write a Dissertation? Time Management Tips. https://www.premiumdissertationhelp.com/how-long-does-it-take-to-write-a-dissertation/

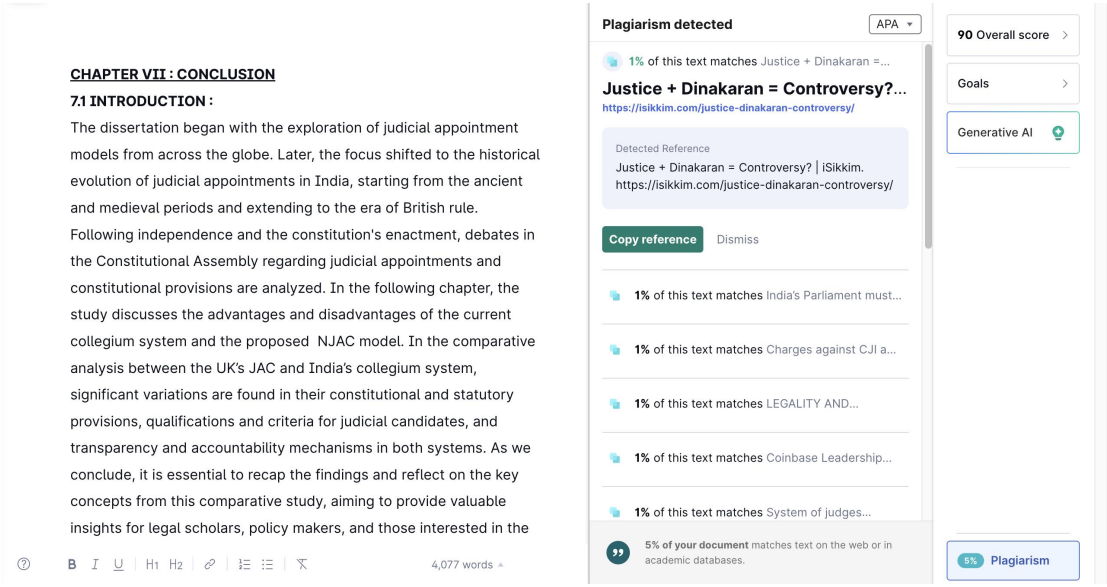
Copy reference | Dismiss

1% of this text matches Players Beware or Safe Be...

1% of your document matches text on the web or in academic databases.

90 Overall score | Goals | Generative AI | 1% Plagiarism

Chapter 7 - 5%



CHAPTER VII : CONCLUSION

7.1 INTRODUCTION :

The dissertation began with the exploration of judicial appointment models from across the globe. Later, the focus shifted to the historical evolution of judicial appointments in India, starting from the ancient and medieval periods and extending to the era of British rule. Following independence and the constitution's enactment, debates in the Constitutional Assembly regarding judicial appointments and constitutional provisions are analyzed. In the following chapter, the study discusses the advantages and disadvantages of the current collegium system and the proposed NJAC model. In the comparative analysis between the UK's JAC and India's collegium system, significant variations are found in their constitutional and statutory provisions, qualifications and criteria for judicial candidates, and transparency and accountability mechanisms in both systems. As we conclude, it is essential to recap the findings and reflect on the key concepts from this comparative study, aiming to provide valuable insights for legal scholars, policy makers, and those interested in the

4,077 words

Plagiarism detected

APA

1% of this text matches Justice + Dinakaran =...

Justice + Dinakaran = Controversy?...

https://isikkim.com/justice-dinakaran-controversy/

Detected Reference

Justice + Dinakaran = Controversy? | iSikkim.
https://isikkim.com/justice-dinakaran-controversy/

Copy reference Dismiss

1% of this text matches India's Parliament must...

1% of this text matches Charges against CJI a...

1% of this text matches LEGALITY AND...

1% of this text matches Coinbase Leadership...

1% of this text matches System of judges...

5% of your document matches text on the web or in academic databases.

90 Overall score

Goals

Generative AI

5% Plagiarism