



INDIAN JOURNAL OF  
LEGAL REVIEW

VOLUME 5 AND ISSUE 6 OF 2025

INSTITUTE OF LEGAL EDUCATION



## INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 5 and Issue 6 of 2025 (Access Full Issue on – <https://ijlr.iledu.in/volume-5-and-issue-6-of-2025/>)

### Publisher

Prasanna S,

Chairman of Institute of Legal Education

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

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## JUDICIAL APPOINTMENT IN INDIA: NEED OF THE HOUR NJAC

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**BEST CITATION** – MANDEEP SINGH YADAV & AKSHAY KUMAR, JUDICIAL APPOINTMENT IN INDIA: NEED OF THE HOUR NJAC, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 5 (6) OF 2025, PG. 558-568, APIS – 3920 – 0001 & ISSN – 2583-2344

### Abstract

*“Within the scope of this research study, India's judicial appointment system is investigated, with a particular emphasis placed on the ongoing discussion over the National Judicial Appointments Commission (NJAC). Through the use of judicial interpretation, the article illustrates the development of judicial nominations, beginning with the constitutional requirements and culminating in the establishment of the Collegium system. The Fourth Judges Case of 2015, which declared the 99th Constitutional Amendment and the NJAC Act to be invalid, is subjected to a critical analysis in this document. According to the findings of the study, the reasons for and against the NJAC are evaluated, and concerns regarding democratic accountability against judicial independence are investigated. The purpose of this essay is to add to the academic conversation on the topic of attaining a balanced, transparent, and successful judicial appointment system in India. It does this by comparing India's system with appointment processes in other democracies, reviewing recent trends, and providing prospective reform options.”*

**Keywords:** *Judicial appointments, National Judicial Appointments Commission, Collegium system, Judicial independence, Constitutional reforms, Supreme Court of India*

### 1. Introduction

As India has progressed along its path towards democracy, one of the most controversial constitutional arguments has been regarding the process by which judges are appointed to higher courts. In order for the judiciary to properly implement its constitutional duty, it is necessary for it to be both independent and accountable. This is because the court is responsible for protecting the Constitution and basic rights. The process of appointing judges to serve on the Supreme Court and High Courts therefore bears a great deal of significance for the purpose of safeguarding constitutional ideals and ensuring that justice is delivered.

In its original form, the Constitution of India stipulated that judicial appointments would be made through executive consultation with the Chief Justice involved. The Collegium system, on the other hand, was formed by the Supreme Court through a series of major judgements that are together referred to as the Three Judges Cases. This essentially transferred the authority of judicial nominations to the judiciary itself. According to Chandrachud (2020), this judge-driven selection procedure has been subjected to criticism for its lack of transparency, inefficiency, and accountability within the system.

The 99th Constitutional Amendment Act and the National Judicial Appointments Commission (NJAC) Act were both passed by the Indian

Parliament in 2014, with the intention of bringing about a change in this procedure. As a more representative organisation that includes members from the executive branch, the judiciary, and civil society, the New Jersey Advisory Council (NJAC) was conceived with the intention of supplanting the Collegium system. However, in a major decision that was handed down in 2015 (*Supreme Court Advocates-on-Record Association v. Union of India*, also referred to as the Fourth Judges Case), the Supreme Court of India declared the National Judicial Appointments Commission (NJAC) to be unconstitutional on the grounds that it violated the fundamental structure of the Constitution, specifically the independence of the judiciary (Kumar, 2019).

Because of this judgement, the discussion over how to strike a healthy equilibrium between democratic accountability and judicial independence in the appointment process has been put back on the table. Recent events, such as the continued existence of vacancies in the judicial system, the delay of appointments, and concerns over diversity and representation in the judicial system, have further reinforced calls for the current system to be reformed.

This research piece investigates the development of judicial appointments in India, provides an analysis of the debate surrounding the National Judicial Appointments Commission (NJAC), compares India's system with norms around the world, and investigates potential avenues for change. The most important issue that has to be answered by this research is whether or not a rethought NJAC might resolve the shortcomings of the Collegium system while still maintaining the independence of the judiciary. The purpose of this paper is to make a contribution to the ongoing discussion on the institutional architecture and constitutional governance in India through the analysis that is presented here.

## 2. Evolution of Judicial Appointments in India

### 2.1 Constitutional Framework

Articles 124(2) and 217(1) of the Constitution of India included the provisions that established the initial constitutional framework for the appointment of judicial officials. of accordance with the provisions of Article 124(2), the President would be the one to nominate judges to the Supreme Court "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary." In addition, the President of India was required to confer with "such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary" in order to make the appointment of the Chief Justice of India (CJI). In the same vein, Article 217(1) of the Constitution of India stipulated that the President would be the one to appoint judges to the High Court, but only after consulting with the Chief Justice of India, the Governor of the state, and the Chief Justice of the High Court that was in question (Constitution of India, 1950).

In this constitutional framework, a consultation procedure was envisioned, in which the executive branch would have the most priority in making nominations, while the judicial branch would be directed by their views. It is clear from the debates that took place in the Constituent Assembly that this arrangement was purposefully selected in order to guarantee that there is a system of checks and balances between the various departments of government (Austin, 1999). The Chairman of the Draughting Committee, Dr. B.R. Ambedkar, emphasised that this system would avoid the dangers of either executive supremacy or judicial insulation (Constituent Assembly Debates, 1949). He said that this way would be the least problematic option.

### 2.2 The Three Judges Cases and the Emergence of the Collegium

The interpretation of the constitutional provisions on judicial appointments underwent

significant transformation through three landmark Supreme Court judgments:

### First Judges Case (1981)

According to the decision that was made by the Supreme Court of India in the case of *S.P. Gupta v. Union of India* (1981), the executive branch was given priority when it came to judicial nominations, and the consultation process was not binding on the President. The Court read "consultation" in its usual meaning, which did not require "concurrence" (*S.P. Gupta v. Union of India*, 1981). Therefore, the Court's interpretation was correct. Concerns have been raised over the influence of political factors on the selection of judges as a result of this judgement, which essentially reinforced the supremacy of the executive via the appointment process.

### Second Judges Case (1993)

As a result of the *Supreme Court Advocates-on-Record Association v. Union of India* (1993) case, the appointment system underwent a significant transformation. The term "consultation" was reinterpreted to imply "concurrence." When it comes to judicial nominations, the Court decided that the view of the Chief Justice of India, which was formulated after meeting with two of the most senior justices on the Supreme Court, would be given precedence. As a result of this judgement, which was handed down in the case of *Supreme Court Advocates-on-Record Association v. Union of India* in 1993, the Collegium system was founded, which resulted in a shift in the balance of power away from the executive branch and towards the judiciary.

### Third Judges Case (1998)

In *Re Presidential Reference* (1998), the Supreme Court augmented the Collegium to comprise the Chief Justice of India and the four most senior judges of the Supreme Court for appointments to the Supreme Court, and the Chief Justice of India along with the two most senior judges for appointments to the High Courts. This ruling further entrenched the

Collegium system and elucidated its practical dimensions (*Re Presidential Reference*, 1998).

The Supreme Court established a judge-driven appointment system through these rulings, which was not clearly outlined in the Constitution. The Collegium system marked a substantial deviation from the initial constitutional framework, with the judiciary taking precedence in the appointment of judges (Khosla, 2020).

### 2.3 Critique of the Collegium System

Over the years, the Collegium system has faced severe criticism from various quarters. The primary critiques include:

1. **Lack of Transparency:** The Collegium functions devoid of any regulations, established protocols, or documented selection criteria. Decisions are rendered in secrecy, lacking rational justifications for selections or denials (Sengupta, 2018).
2. **Absence of Accountability:** The system is devoid of accountability measures, without monitoring from any external entity. This has resulted in accusations of favouritism, nepotism, and capricious decision-making (Robinson, 2021).
3. **Inefficiency:** The Collegium has faced criticism for its delays in appointing replacements, exacerbating the substantial backlog of litigation in Indian courts. As of 2023, over 30% of authorised positions in High Courts were unfilled (Department of Justice, 2023).
4. **Limited Representation:** The Collegium has faced criticism for insufficient representation of diversity concerning gender, religion, caste, and regional origins. Female judges represent less than 12% of the entire composition in High Courts (Bhan, 2021).
5. **Self-Selection:** The system is described as a "self-perpetuating oligarchy" in which judges appoint their own

successors, potentially sustaining uniformity in judicial perspectives and backgrounds (Baxi, 2016).

These criticisms created the impetus for reforming the appointment system, leading to the introduction of the NJAC as an alternative mechanism.

### 3. The NJAC: Genesis, Structure, and Constitutional Challenge

#### 3.1 Legislative History and Political Context

The National Judicial Appointments Commission was established in response to increasing discontent with the Collegium system. Since the 1990s, many law commissions and legislative committees have called for the establishment of an independent commission. The 214th Report of the Law Commission of India (2008) explicitly advocated for the substitution of the Collegium with a comprehensive commission consisting of members from both the judiciary and the executive.

Political consensus about judicial appointment reform emerged following the 2014 general elections. The 99th Constitutional Amendment Bill and the National Judicial Appointments Commission Bill received near-unanimous approval in both chambers of Parliament. The amendment was later passed by a majority of state legislatures, indicating widespread political consensus on the necessity for reform (Lokaneeta, 2016).

#### 3.2 Structure and Composition of the NJAC

The 99th Constitutional Amendment Act inserted new Articles 124A, 124B, and 124C in the Constitution. Article 124A established the NJAC with the following composition:

1. The Chief Justice of India (Chairperson, ex officio)
2. Two senior-most Supreme Court judges (ex officio members)
3. The Union Minister of Law and Justice (ex officio member)

4. Two eminent persons (to be nominated by a committee consisting of the Prime Minister, CJI, and Leader of Opposition in the Lok Sabha or leader of the largest opposition party)

Article 124B delineated the responsibilities of the NJAC, which including proposing individuals for judicial appointments to the Supreme Court and High Courts, suggesting transfers, and verifying that proposed candidates possess competence and integrity. Article 124C authorised Parliament to establish the system for the nomination of judges (The Constitution (Ninety-ninth Amendment) Act, 2014).

The NJAC Act, 2014, elaborated on the commission's functioning procedures, encompassing the judge selection process and the factors to be evaluated. The Act stipulated that decisions of the NJAC would be determined by majority vote, with no proposal advancing if any two members expressed dissent (The National Judicial Appointments Commission Act, 2014).

#### 3.3 The Fourth Judges Case and Invalidation of the NJAC

The constitutional legitimacy of the 99th Amendment and the NJAC Act was contested promptly upon its implementation. In the case of *Supreme Court Advocates-on-Record Association v. Union of India* (2015), known as the Fourth Judges Case, a five-judge constitutional bench of the Supreme Court invalidated both the amendment and the Act by a 4:1 majority.

The majority judgment, authored by Justice J.S. Khehar, held that the NJAC violated the basic structure of the Constitution, particularly the principle of judicial independence. The Court reasoned that:

1. The presence of the Law Minister in the NJAC could lead to executive interference in judicial appointments, compromising judicial independence.
2. The provision allowing any two members to veto a recommendation effectively

gave the executive a veto power, which was detrimental to judicial independence.

3. The "eminent persons" category lacked specification of qualifications and could potentially result in politically motivated appointments.
4. Judicial primacy in appointments was an essential feature of judicial independence, which formed part of the basic structure of the Constitution (*Supreme Court Advocates-on-Record Association v. Union of India*, 2015).

Justice J. Chelameswar articulated a compelling dissent, contending that the Collegium system has proven inadequate and that the NJAC, with appropriate safeguards, could more effectively fulfil the constitutional imperatives of judicial independence and accountability (*Supreme Court Advocates-on-Record Association v. Union of India*, 2015).

The ruling reinstated the Collegium system while recognising its deficiencies. The Court solicited recommendations from stakeholders to refine the Collegium system, resulting in later efforts to augment transparency in the process.

#### 4. Arguments For and Against the NJAC

##### 4.1 In Support of the NJAC

Proponents of the NJAC advance several arguments highlighting its potential advantages over the Collegium system:

1. **Democratic Legitimacy:** The NJAC embodied a democratically instituted change with extensive political agreement. It was approved by Parliament with a substantial majority and confirmed by state legislatures, demonstrating the intent of elected officials (Nariman, 2016).
2. **Balanced Representation:** The NJAC's structure guaranteed participation from the judiciary, executive, and civil society, fostering a more equitable approach to nominations. This multi-stakeholder

strategy may circumvent the drawbacks of executive dominance and judicial insularity (Bharadwaj, 2018).

3. **Enhanced Transparency and Accountability:** The statutory framework of the NJAC established systematic processes and responsible decision-making, responding to a principal critique of the Collegium system (Datar, 2017).
4. **Alignment with International Practices:** The NJAC approach corresponds with appointment systems in other established democracies, where judicial nominations often include various departments of government and occasionally civil society (Sathe, 2016).
5. **Potential for Diversity:** A more representative commission might perhaps mitigate issues over diversity and inclusion in judicial nominations by incorporating diverse viewpoints into the selection process (Rajagopal, 2020).

##### 4.2 Against the NJAC

Critics of the NJAC, including those who supported the Supreme Court's decision to strike it down, present the following arguments:

1. **Threat to Judicial Independence:** The involvement of the Law Minister and the possibility of executive influence via "eminent persons" may undermine judicial independence, a fundamental principle of constitutional democracy (Baxi, 2015).
2. **Veto Power Concerns:** The clause permitting any two members to veto a recommendation may provide the government substantial authority over nominations, so compromising judicial independence (Krishnaswamy, 2016).
3. **Ambiguity in Selection Criteria:** The NJAC Act lacked explicit criteria for judge nominations, potentially permitting

subjective factors to affect appointments (Jaising, 2018).

4. **Constitutional Constraints:** The fundamental structure theory, as defined by the Supreme Court, mandates judicial priority in nominations to preserve judicial independence, which the NJAC purportedly contravened (Chandrachud, 2019).
5. **Potential for Political Appointments:** The participation of political officials in the selection of "eminent persons" may result in politically driven appointments, particularly during periods of robust majority governance (Bhuwania, 2017).

#### 4.3 Balancing Judicial Independence and Democratic Accountability

The NJAC argument primarily centres on achieving a suitable equilibrium between two vital constitutional principles: judicial independence and democratic accountability. Autonomous judiciary systems are vital for maintaining the rule of law and safeguarding fundamental rights, particularly against any executive or legislative encroachments. In a democracy, institutions obtain legitimacy by their association with democratic procedures and accountability systems (Neuborne, 2021).

The difficulty is to create an appointment system that maintains judicial independence while guaranteeing enough accountability. The Collegium system has faced criticism for emphasising independence above accountability, whereas certain executive-dominated appointment systems may jeopardise independence in favour of accountability (Mehta, 2020).

A reconceptualized NJAC or similar commission could potentially achieve this balance by:

1. Ensuring judicial primacy while incorporating inputs from other stakeholders
2. Creating transparent procedures with published criteria for selection

3. Establishing accountability mechanisms without compromising judicial autonomy
4. Providing structural safeguards against both political interference and judicial insularity

Academics propose that judicial nominations should be perceived not as a zero-sum competition between the judiciary and the administration, but as a cooperative endeavour aimed at fulfilling the broader constitutional objective of creating an independent, efficient, and representative judiciary (Pal & Bhatia, 2018).

#### 5. Comparative Analysis: Judicial Appointment Systems Globally

##### 5.1 Appointment Systems in Common Law Jurisdictions

###### United Kingdom

The United Kingdom restructured its judicial appointment system under the Constitutional Reform Act 2005, which created the Judicial Appointments Commission (JAC). The JAC consists of 15 members: 7 judicial members, 2 legal experts, 6 lay members, and 1 lay chairperson. The Commission proposes candidates to the Lord Chancellor, who may accept or reject these suggestions but is not permitted to choose other candidates. This approach signifies a transition from the conventional paradigm in which the Lord Chancellor held principal authority for appointments (Malleon, 2019).

###### United States

The United States has a political appointment system in which federal judges are nominated by the President and subsequently approved by the Senate. This method ensures democratic accountability but has been criticized for enhancing the politicisation of judge nominations, particularly with the Supreme Court. The nomination proceedings have grown more politicised, prompting worries over judge independence (Epstein & Segal, 2017).

## Canada

Canada use Advisory Committees for judicial nominations, comprising representatives from the judiciary, legal profession, law enforcement, and the public. These committees assess applicants and present a shortlist to the Minister of Justice, who thereafter makes recommendations to the Cabinet. The procedure for Supreme Court selections includes legislative hearings, however the Prime Minister wields considerable influence over the ultimate pick (McCormick, 2022).

## 5.2 Judicial Councils in Civil Law Countries

### France

The Conseil Supérieur de la Magistrature (CSM) in France manages judge appointments through varying methods for distinct court levels. The CSM nominates individuals for subordinate courts and offers recommendations on executive nominations for higher positions. The CSM consists of judges, prosecutors, and members selected by the President, Parliament, and the Council of State, reflecting a hybrid appointment paradigm (Bell, 2018).

### Italy

The Consiglio Superiore della Magistratura (CSM) in Italy is mostly composed of judges chosen by their colleagues, in addition to law professors and attorneys selected by Parliament. The CSM possesses principal power over judicial careers, encompassing appointments, promotions, and transfers, with little executive participation. This system prioritises judicial independence although has been criticised for corporatism within the court (Guarnieri & Pederzoli, 2020).

## 5.3 Comparative Lessons for India

Several lessons emerge from this comparative analysis:

- The majority of established democracies have transitioned to comprehensive commissions for judicial nominations, integrating components of judicial,

executive, and occasionally parliamentary participation.

- Transparency techniques, such as public selection criteria and reasoned conclusions, are widely acknowledged as vital for the legitimacy of judicial appointments.
- The makeup of appointment bodies is essential, since balanced representation aids in preventing domination by any one institutional interest.
- Procedural protections, such as organised nomination procedures and veto limitations, can preserve both autonomy and responsibility.
- The cultural and historical background is crucial, since effective reforms take into account the distinct constitutional and political traditions of each nation (Russell & Malleson, 2020).

India's experience with executive-dominated appointments (pre-1993) and judge-dominated choices (post-1993) indicates that neither approach is ideal. A balanced commission that integrates aspects from effective international models, while honouring India's constitutional principles and traditions, may effectively rectify the deficiencies of the existing system.

## 6. Recent Developments and Reform Proposals

### 6.1 Post-NJAC Developments in the Collegium System

Following the invalidation of the NJAC, the Supreme Court acknowledged the deficiencies in the Collegium system and initiated measures to enhance its transparency and efficiency:

1. **Memorandum of Procedure (MoP):** In December 2015, the Supreme Court mandated the government to formulate a new Memorandum of Procedure in collaboration with the Chief Justice of India. Despite several versions being circulated, agreement on a definitive MoP remained unattainable, highlighting persistent difficulties between the judiciary and administration about

appointment protocols (Venkatesan, 2022).

- 2. Publication of Collegium Resolutions:** Since October 2017, the Supreme Court has commenced the publication of Collegium resolutions on its website, including the rationale for endorsing or rejecting applicants. This signifies a notable advancement in transparency, while the extent of detail in the stated justifications remains constrained (Rajagopal, 2022).
- 3. Timelines for Appointments:** In 2021, the Supreme Court underscored the necessity for prompt appointments and proposed provisional dates for certain phases of the appointment process. Nonetheless, delays continue, with appointments sometimes requiring months or even years from the original suggestion to the final appointment (Chowdhury, 2023).

Notwithstanding these gradual enhancements, essential issues about the Collegium's transparency, efficacy, and representativeness are unresolved, perpetuating discussions about more extensive reforms.

## 6.2 Executive–Judiciary Tensions

The post-NJAC period has witnessed heightened tensions between the executive and judiciary over judicial appointments:

- 1. Selective Appointments:** The government has faced criticism for selectively implementing Collegium recommendations, occasionally permanently withholding specific names while approving others, therefore wielding a de facto pocket veto (Jain, 2022).
- 2. Reiteration Controversies:** Notwithstanding the established practice that repeating recommendations are obligatory for the government, there have been several cases where even reiterated

nominations encountered significant delays or were returned repeatedly, resulting in constitutional discord (Vishwanath, 2023).

- 3. Public Criticisms:** Judicial and executive representatives have openly condemned each other's methods regarding nominations, with judges expressing concerns over executive meddling and government officials challenging the transparency and rationale of Collegium selections (Rautray, 2023).

These tensions highlight the unsustainable nature of the current arrangement and underscore the need for a more structured, transparent, and collaborative appointment mechanism.

## 6.3 Potential Pathways for Reform

Several potential reform pathways could address the current impasse:

- 1. Reconceptualized NJAC:** A revised NJAC with improved protections for judicial independence may be suggested. This may involve guaranteeing judicial supremacy while yet integrating executive and civil society contributions via a commission framework (Krishnan, 2021).
- 2. Constitutional Amendment with Judicial Consultation:** A cooperative endeavour between the judiciary and legislative to design a constitutional amendment may effectively surmount the constitutional obstacles encountered by the prior NJAC. This method necessitates unparalleled institutional collaboration but may produce a more durable solution (Singh, 2022).
- 3. Enhanced Collegium:** The Collegium may undergo internal reform to rectify its deficiencies, maybe by formalising procedures, expanding consultations, instituting clear criteria, and developing

accountability mechanisms without necessitating constitutional revisions (Divan, 2020).

- 4. Statutory Framework for Existing Constitutional Text:** Parliament may legislate a legislation outlining consultation processes under Articles 124 and 217, preserving the fundamental appointment framework but enhancing openness and organisation in the process. This method must adhere to the judicial supremacy established by the Supreme Court (Narain, 2021).
- 5. Hybrid Model:** A hybrid model integrating judicial supremacy with extensive involvement may effectively reconcile conflicting interests. This may entail a principal role for judges in the candidate shortlisting phase, succeeded by a more inclusive selection procedure that incorporates additional stakeholders (Chandrachud, 2022).

Any successful reform would need to address the core concerns of both judicial independence and democratic accountability while creating mechanisms for transparency, efficiency, and diversity in appointments.

## 7. Conclusion

The discourse around judge selections in India illustrates the continual development of the nation's constitutional democracy and the intricate relationship between institutional autonomy and democratic responsibility. The transition from the first constitutional framework to the Collegium system, together with the proposed NJAC reform, underscores the difficulties in establishing an appointment mechanism that reconciles conflicting constitutional principles. The annulment of the NJAC, albeit safeguarding judicial independence, failed to address the fundamental issues of openness, accountability, and efficiency in judicial nominations. The ongoing discord between the government and judiciary about nominations highlights the

necessity for a viable resolution that honours constitutional values while confronting practical issues.

Global experiences indicate that comprehensive commissions with suitable safeguards may effectively reconcile independence and responsibility. Any change, however, must be customised to align with India's own constitutional structure and political culture.

Going ahead, the emphasis must be on cultivating a collaborative strategy for change that involves all stakeholders—judiciary, administration, legislature, legal profession, and civil society—in devising an appointment system that fulfils the broader constitutional objective. This system will improve the legitimacy, efficiency, and representativeness of India's court while maintaining its fundamental independence.

The necessity for NJAC-like changes persists, not as a threat to judicial independence but as a method to enhance the judiciary's institutional capacity and public credibility. A redefined appointment system, whether termed NJAC or otherwise, might possibly rectify the deficiencies of the existing framework while upholding the constitutional ideal of an autonomous judiciary as the protector of the Constitution and basic rights.

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