

**WHEN JUDGES CHOOSE JUDGES:
THE COLLEGIUM, THE NJAC, AND THE UNFINISHED
SEARCH FOR A CONSTITUTIONAL SETTLEMENT**

*A comparative and interdisciplinary enquiry into the appointment of judges
to the superior judiciary of India*

by

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1. ABSTRACT

The appointment of judges to the superior judiciary has remained the most contested question in Indian constitutional law since the supersession crisis of 1973. The Constitution provides for appointment by the President “after consultation” with certain judicial functionaries, but says nothing about who holds primacy when disagreement arises. That silence has produced four landmark decisions, a constitutional amendment struck down on basic-structure grounds, and a Memorandum of Procedure that remains unsigned after nearly a decade.

This paper examines the Collegium system and the National Judicial Appointments Commission, subjecting both to the same critical scrutiny rather than treating either as a self-evident good. Its central submission is that the NJAC failed because of identifiable design features specifically, the two-member veto, the reduction of judicial membership, the shift of initiation, and the removal of the Governor’s consultative role not because a judicial appointments commission is inherently incompatible with the basic structure. The paper deploys interpretive doctrine, the proportionality standard, and a structured comparison of four jurisdictions (the United Kingdom, the United States, France, and South Africa) to test this thesis. It then draws on principal-agent theory, institutional economics, and the sociology of judicial recruitment to explain why the Collegium’s structural deficits persist.

Keywords: Collegium system; NJAC; judicial appointments; basic structure; judicial independence; Article 124; Article 217; comparative constitutionalism; institutional design.

2. INTRODUCTION

There is a paradox at the heart of judicial appointments in India. Articles 124(2) and 217(1) speak of “consultation” with certain functionaries.¹² They do not speak of a collegium, of primacy, or of concurrence. Every structural detail of the present system has been supplied by judicial interpretation.

Dr. Ambedkar foresaw the difficulty. In the Constituent Assembly he rejected three proposals: appointment by the executive alone, confirmation by Parliament, and appointment with the concurrence of the Chief Justice.³ His concern was the same in each case absolute power in any single hand was dangerous.

That solution held for twenty-three years. In 1973 Justice A.N. Ray was appointed CJI superseding three senior puisne judges.⁴ In 1977 Justice H.R. Khanna was denied the Chief Justiceship for his dissent in *A.D.M. Jabalpur*.⁵ The committed-judges theory had arrived, producing the institutional conflict that culminated in the First, Second, Third, and Fourth Judges Cases.

The question is once again live. On 26 November 2025 CJI Surya Kant indicated that the Court would consider a petition seeking to revive the NJAC.⁶ On 17 May 2026 the Supreme Court’s sanctioned strength was expanded from thirty-four to thirty-eight by Ordinance, subsequently replaced by an Act of Parliament.⁷ As of 1 May 2026 nearly one-third of High Court judgeships remain vacant,⁸ seven High Courts function under Acting Chief Justices,⁹ and the Memorandum of Procedure governing the Collegium remains unsigned.¹⁰

¹INDIA CONST. art. 124, cl. 2.

²INDIA CONST. art. 217, cl. 1.

³Constituent Assembly Debates (Proceedings), Vol. VIII (May 24, 1949), available at <https://eparlib.nic.in/>.

⁴Justice A.N. Ray was appointed CJI on April 26, 1973, superseding Justices J.M. Shelat, K.S. Hegde, and A.N. Grover. See Anil Diwan, *A Trojan Horse at the Judiciary’s Door*, The Hindu, June 14, 2013.

⁵*A.D.M. Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207 (India).

⁶CJI Surya Kant indicated on Nov. 26, 2025 that the Court would consider the petition. See *The Wire* (Nov. 27, 2025).

⁷The Supreme Court (Number of Judges) Amendment Ordinance, 2026, promulgated May 17, 2026, under INDIA CONST. art. 123, amending § 2 of the Supreme Court (Number of Judges) Act, 1956; subsequently replaced by the Supreme Court (Number of Judges) Amendment Act, 2026.

⁸Dep’t of Justice, Gov’t of India, Sanctioned Strength, Working Strength, Vacancies of Judges in the Supreme Court of India and the High Courts, as on 01.05.2026, available at <https://www.doj.gov.in/>.

⁹As of July 20, 2026, seven of India’s twenty-five High Courts were run by Acting Chief Justices. See *Bar & Bench* (July 20, 2026).

¹⁰The Memorandum of Procedure was to be revised after the Fourth Judges Case. Disagreements on a “national security” clause and the secretariat’s composition have prevented finalisation since 2017.

3. RESEARCH QUESTIONS

RQ1. What was the original constitutional design for judicial appointments, and to what extent have the First through Fourth Judges Cases departed from it?

RQ2. Does the Collegium system satisfy the requirements of transparency, accountability, and operational efficiency?

RQ3. Were the provisions of the NJAC that attracted the basic-structure objection inherent in the concept of a commission, or were they defects of drafting?

RQ4. What structural features distinguish judicial appointment commissions that have survived in the United Kingdom, France, and South Africa from the NJAC that did not?

RQ5. Can judicial independence, democratic accountability, and institutional efficiency be reconciled within a single mechanism, and what design principles must it embody?

4. OBJECTIVES

1. To reconstruct the original understanding from the Constituent Assembly Debates and the Ad Hoc Committee Report of 1949. 2. To subject the Collegium's record to empirical scrutiny using Department of Justice vacancy data and the National Judicial Data Grid. 3. To anatomise the NJAC by isolating each contested provision and assessing whether the defect lies in the provision or in the concept. 4. To conduct a comparative analysis of four jurisdictions. 5. To deploy interpretive doctrine to construct the strongest available reading of "consultation." 6. To develop the interdisciplinary dimension. 7. To propose a reformed model.

5. LITERATURE REVIEW

The 121st Law Commission Report (1987)

The Commission proposed a National Judicial Commission whose composition a judicial majority with structured executive and academic participation anticipated the model this paper defends.¹¹

The 67th Amendment Bill (1990) and the Venkatachaliah Commission (2003)

These are distinct exercises that the literature sometimes conflates. The 67th Amendment Bill was a Parliamentary initiative introduced in 1990 and lapsed without enactment. The Venkatachaliah Commission (the National Commission to Review the Working of the Constitution), constituted in 2000, reported in 2003 with an independent recommendation for a National Judicial Commission. The Commission's significance lies in its recognition that the Collegium's expansion from three to five judges had partly achieved the purpose of a commission, but without the transparency or accountability a statutory body would bring.¹²

The Seventy-Ninth Report (2015)

The most empirically grounded official study. It documented that thirty-five to forty per cent of High Court posts remain unfilled in any given year.¹³

The Fourth Judges Case (2015)

The majority opinions constitute the most detailed judicial defence of the Collegium.¹⁴ Chelameswar J.'s dissent remains the most searching judicial critique.¹⁵

The Deep & Mishra Analysis (2018)

¹¹Law Comm'n of India, Rep. No. 121, A New Forum for Judicial Appointments (1987).

¹²The 67th Amendment Bill was introduced in Parliament in 1990; it lapsed. The Venkatachaliah Commission (NCRWC), constituted in 2000 and reporting in 2003, made a separate and independent recommendation for a National Judicial Commission. See Nat'l Comm'n to Review the Working of the Constitution, Report ch. 7 (2003). The two proposals share a family resemblance but are distinct legislative and advisory exercises.

¹³Dep't-Related Parliamentary Standing Comm. on Pers., Pub. Grievances, Law & Justice, Seventy-Ninth Report (Rajya Sabha Sec'y, Dec. 2015) [hereinafter 79th Report].

¹⁴Supreme Court Advocates-on-Record Ass'n v. Union of India, (2015) 11 Scale 1 (India) [hereinafter Fourth Judges Case].

¹⁵*Id.* (Chelameswar, J., dissenting), ¶ 60.

Their analysis draws careful attention to the distinction between the Second Judges Case (a conventional dispute with precedential value under Article 141)¹⁶ and the Third Judges Case (a Presidential reference under Article 143, carrying no binding force).¹⁷ This distinction is doctrinally critical.¹⁸

6. MAIN BODY

6.1 The constitutional text: Articles 124 and 217

The word that carries the entire weight is “consultation.” The Constitution does not use “concurrence,” “approval,” or “nomination.” The framers used these words elsewhere: Article 320(3) requires consultation with the UPSC;¹⁹ Article 148(1) provides for appointment of the CAG without any consultation.²⁰ The choice of “consultation” was therefore deliberate.

Two interpretive tools bear directly. *Noscitur a sociis* suggests that “consultation,” sitting alongside the President’s appointment power, is advisory.²¹ The purposive rule, however, pulls in the opposite direction: since the purpose is to secure judicial independence, consultation must mean something more than a formality the executive can disregard.²² The golden rule cautions against a literal reading that produces absurdity.²³ The First Judges Case resolved the tension in favour of the executive; the Second reversed it. Neither reading is compelled by the text.

6.2 The Constituent Assembly and the rejection of absolutism

Dr. Ambedkar rejected appointment with the concurrence of the CJI, saying that the Chief Justice “is also a human being after all, liable to err.”²⁴ The Ad Hoc Committee

¹⁶INDIA CONST. art. 141.

¹⁷INDIA CONST. art. 143. An opinion under Article 143 is advisory. *See In re Special Reference No. 1 of 1998*, (1998) 7 SCC 739, ¶ 1 (India).

¹⁸Anurag Deep & Shambhavi Mishra, *Judicial Appointments in India and the NJAC Judgement: Formal Victory or Real Defeat*, 3 *Jamia L.J.* 49 (2018).

¹⁹INDIA CONST. art. 320, cl. 3 (requiring consultation with the Union Public Service Commission).

²⁰INDIA CONST. art. 148, cl. 1 (appointment of the CAG by President by warrant, without any consultative requirement).

²¹*Noscitur a sociis*: “A word is known by the company it keeps.” *See* P. St. J. Langan, *Maxwell on the Interpretation of Statutes* 289 (12th ed. 1969).

²²The purposive rule was formulated in *Heydon’s Case*, (1584) 76 ER 637 (UK). In India, *see Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661 (India).

²³The golden rule: *see Grey v. Pearson*, (1857) 6 HL Cas 61 (UK); *Tirath Singh v. Bachittar Singh*, AIR 1955 SC 830, ¶ 7 (India).

²⁴Constituent Assembly Debates (Proceedings), Vol. VIII, at 258 (May 24, 1949) (statement of Dr. B.R. Ambedkar).

had separately recommended a panel of eleven members.²⁵ The doctrine that emerges is one of constitutional trust: each functionary acts in good faith, giving weight to the others' opinions.²⁶

6.3 The First Judges Case and executive primacy

S.P. Gupta v. Union of India held that “consultation” did not mean “concurrence” and that the executive retained the final say.²⁷ The decision was defensible on the literal rule.²⁸ But its practical consequences were devastating: transfers were used punitively, appointments were made over the objection of Chief Justices, and the committed-judges policy was given constitutional cover.

The Second Judges Case overruled *S.P. Gupta* through a nine-judge Bench. The principle that a larger Bench may overrule a smaller Bench rests on precedential hierarchy, not on Article 145(3) *per se*.²⁹

6.4 The Second Judges Case and the birth of the Collegium

In the *Second Judges Case* (1993), a nine-judge Bench held, 7:2, that the CJI's opinion, formed after consulting two senior-most puisne judges, had primacy.³⁰ The decision deployed harmonious construction (*ut res magis valeat quam pereat*)³¹ to read “consultation” as requiring decisive weight. If the CJI reiterated a recommendation with reasons, the appointment was to be made as a “healthy convention.”³² The executive could return a name with reasons.³³

²⁵*Id.* The Ad Hoc Committee unanimously recommended a panel of eleven members to nominate judges.

²⁶The doctrine of constitutional trust holds that constitutional powers are fiduciary. See *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388, ¶¶ 25, 34 (India).

²⁷*S.P. Gupta v. Union of India*, AIR 1982 SC 149 (India) [hereinafter *First Judges Case*].

²⁸The literal rule: see *Sussex Peerage Case*, (1844) 11 Cl & Fin 85 (UK); *Jugalkishore Saraf v. Raw Cotton Co.*, AIR 1955 SC 376 (India).

²⁹The doctrine that a larger Bench may overrule a decision of a smaller Bench rests on the principle of precedential hierarchy, not on Article 145(3) *per se*. See *Central Board of Dawoodi Bohra Community v. State of Maharashtra*, (2005) 2 SCC 673, ¶ 12 (India) (holding that a decision of a larger Bench is binding on a smaller Bench and can only be reconsidered by a Bench of coordinate or greater strength).

³⁰*Supreme Court Advocates-on-Record Ass'n v. Union of India*, (1993) 4 SCC 441 (India) [hereinafter *Second Judges Case*].

³¹*Ut res magis valeat quam pereat*: the doctrine of harmonious construction. See *CIT v. Hindustan Bulk Carriers*, (2003) 3 SCC 57, ¶ 20 (India).

³²*Second Judges Case*, (1993) 4 SCC 441, ¶¶ 439–40, 478 (India).

³³*Id.* ¶ 478.

6.5 The Third Judges Case and the formalisation of plurality

In *In re Special Reference No. 1 of 1998*, the Court expanded the collegium from three to five.³⁴ The CJI's opinion was to be "reflective of the opinion of the judiciary . . . with the element of plurality in its formation."³⁵ Seniority was to yield to merit where necessary.³⁶

6.6 The 99th Amendment and the NJAC: design and defect

Article 124A inserted a six-member Commission.³⁷ The NJAC's design contained four structurally objectionable features, and it is critical to distinguish these from the concept of a commission itself.

First, the two-member veto. Section 5 (second proviso) and Section 6(6) provided that no recommendation could be made if any two members dissented.³⁸ This meant that the two eminent persons who need not be lawyers could together block an appointment recommended by the CJI, both senior judges, and the Law Minister. The majority in the Fourth Judges Case specifically identified this as giving "extra-legal or non-judicial factors" the potential to dominate.

Second, the shift of initiation. Under the Memorandum of Procedure, the CJI initiated proposals. Under Section 4, the Commission as a body was the initiator. Goel J. specifically identified this as constitutionally significant.³⁹⁴⁰

Third, the composition. Judicial membership was reduced from five (under the Collegium) to three, while three non-judicial members were added. In a commission of six, the judiciary did not hold a majority.

Fourth, the removal of the Governor. The amended Article 217 removed the requirement of consultation with the Governor, divesting State constitutional machinery of a role it had held since 1950.⁴¹

³⁴*In re Special Reference No. 1 of 1998*, (1998) 7 SCC 739 (India) [hereinafter Third Judges Case].

³⁵*Id.* ¶ 6.

³⁶*Id.* ¶ 25.

³⁷INDIA CONST. art. 124A (inserted by the Constitution (Ninety-Ninth Amendment) Act, 2014), cl. 1.

³⁸The National Judicial Appointments Commission Act, 2014, § 5, second proviso; § 6(6) (India).

³⁹The National Judicial Appointments Commission Act, 2014, § 4 (India).

⁴⁰Fourth Judges Case, (2015) 11 Scale 1, at 932 (India) (Goel, J., concurring).

⁴¹The Constitution (Ninety-Ninth Amendment) Act, 2014, § 6 (amending Article 217(1) to remove consultation with the Governor).

The 99th Amendment was not merely a legislative initiative of the ruling party; it received one of the largest parliamentary majorities in recent constitutional history. The Constitution (Ninety-Ninth Amendment) Bill, 2014 was passed by the Lok Sabha with 367 votes in favour and none against, and by the Rajya Sabha with a two-thirds majority; it was subsequently ratified by more than twenty state legislatures.⁴² The democratic deficit argument directed at the NJAC must therefore be weighed against this degree of cross-party legislative consensus, which the Collegium's recommendations, however well-reasoned, can never themselves claim.

The critical question is whether these defects were inherent in the commission model or accidental to this particular design. The comparative evidence from the jurisdictions examined in this paper suggests the latter. The UK's Judicial Appointments Commission contains a lay chairman, a judicial component among its fifteen commissioners, a merit-based process, and no veto of the kind the NJAC contained. South Africa's Judicial Service Commission operates by majority vote and does not incorporate a minority veto mechanism comparable to that in the NJAC. Neither has been held to violate judicial independence. The NJAC's defects were defects of design, not of genus.

6.7 The Fourth Judges Case: anatomy of the majority and the dissent

Khehar J. (for the majority, with Lokur J.) relied on *Samsher Singh*⁴³ and *Sankalchand*.⁴⁵

His objections to the NJAC can be disaggregated into four distinct grounds, and each must be assessed independently to determine whether it was constitutionally fatal or merely a feature of the particular 2014 design.

The Law Minister objection. The majority held that the presence of the Union Law Minister introduced an institutional conflict of interest, since the Government is a litigant before the courts whose composition the Law Minister would help determine. This

⁴²'Lok Sabha Passes NJAC with 367 in Favour, None Against' (Bar and Bench, 2014) <<https://www.barandbench.com/news/lok-sabha-passes-judicial-appointments-commission-bill-367>> accessed 9 September 2026; 'Supreme Court Rejects NJAC Act, 99th Constitution Amendment Act: All You Need to Know' (India.com, 16 October 2015) <<https://www.india.com/news/india/supreme-court-rejects-njac-act-99th-constitution-amendment-act-all-you-need-to-know-about-them-635986/>> accessed 9 September 2026.

⁴³Fourth Judges Case, (2015) 11 Scale 1 (India) (Khehar, J., for the majority).

⁴⁴Samsher Singh v. State of Punjab, AIR 1974 SC 2192 (India).

⁴⁵Sankalchand Himatlal Sheth v. Union of India, AIR 1977 SC 2328 (India).

objection applies to any commission that includes the serving Law Minister *ex officio*. It is, however, answerable: South Africa includes the Minister of Justice in its JSC, and the conflict is managed through recusal norms. The objection is serious but not necessarily fatal to the commission concept.⁴⁶

The eminent-persons objection. The majority held that persons who need not be lawyers or judges could exercise, through the two-member veto, decisive influence over appointments. This objection is specific to the veto mechanism. In the UK's JAC, lay members form part of the commission but do not hold a minority veto. The objection is fatal to the veto, not to lay participation.⁴⁷

The initiation objection. The majority held that transferring initiation from the CJI to the Commission removed a constitutionally significant prerogative. This objection is specific to Section 4 of the NJAC Act. A commission that preserves the CJI's initiation power while adding a deliberative and confirmatory function would not attract this objection.⁴⁸

The composition objection. The majority held that reducing judicial membership from five to three, in a body of six, impaired judicial primacy. This objection goes to the particular arithmetic. A commission with a genuine judicial majority (not merely parity) would not attract it.

Kurian Joseph J., concurring, made the significant independent observation that “all is not well with the collegium system.”⁴⁹ This opened the door to the post-judgment transparency reform of October 2017.⁵⁰

Chelameswar J.'s dissent distinguished “basic feature” from “basic structure”: amendment of a basic feature “may or may not result in the destruction of the basic structure”

⁴⁶Fourth Judges Case (Khehar, J.), ¶¶ 398–402 (holding that the presence of the Law Minister in the NJAC introduced an institutional conflict of interest, since the Government is a litigant before the courts whose composition the Law Minister would help determine).

⁴⁷*Id.* ¶¶ 410–15 (holding that the two eminent persons, who need not be lawyers, could together block an appointment recommended by the CJI, both senior judges, and the Law Minister; this gave “extra-legal or non-judicial factors” the potential to dominate).

⁴⁸*Id.* ¶¶ 420–25 (holding that the shift of initiation from the CJI to the Commission under § 4 of the NJAC Act removed a constitutionally significant prerogative).

⁴⁹Fourth Judges Case (Kurian Joseph, J., concurring) (“All is not well with the collegium system. . . . It is time to improve the system of judicial appointments.”).

⁵⁰Supreme Court Collegium, Minutes on Transparency (Oct. 3, 2017).

depending on the context.⁵¹ His most pointed criticism: the Collegium's functioning had become "a joint venture in the subversion of the law."⁵² The basic-structure doctrine (*Kesavananda Bharati*) constrains outcomes but does not prescribe mechanisms.⁵³

Synthesis. Of the four grounds, only the composition objection is inherent in any commission that denies the judiciary a majority. The Law Minister objection is manageable through recusal. The eminent-persons objection is specific to the veto. The initiation objection is specific to Section 4. A redesigned commission that preserves a judicial majority, retains the CJI's initiation, removes the minority veto, and manages the ministerial conflict through structural safeguards could survive the *ratio* of the Fourth Judges Case.

A further structural difficulty deserves notice. The judges who adjudicated the Fourth Judges Case were themselves beneficiaries of the Collegium system whose constitutionality they were called upon to determine. This engages the foundational principle of natural justice *nemo iudex in sua causa*.⁵⁴ The observation is not an allegation of personal bias; it is a systemic point about institutional design.⁵⁵ Any institution that must adjudicate the validity of the mechanism by which its own members are appointed faces a structural conflict of interest that no recusal norm can fully cure. This reinforces the argument for a constitutionally embedded commission whose design is settled at the level of Article 368, rather than left to judicial interpretation.

6.8 The Memorandum of Procedure and the transparency deficit

Three problems have emerged. First, *delay*: appointment timelines exceeding eighteen months.⁵⁶ As of 1 May 2026, Allahabad HC has fifty-two vacancies and Calcutta HC has thirty.⁵⁷

⁵¹Fourth Judges Case (Chelameswar, J., dissenting), ¶ 78.

⁵²*Id.* ¶ 60.

⁵³*Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 SCC 225 (India).

⁵⁴*Nemo iudex in sua causa*: no one shall be a judge in his own cause. See *A.K. Kraipak v. Union of India*, AIR 1970 SC 150, ¶ 20 (India).

⁵⁵This structural concern is systemic, not an allegation of bias against any individual judge.

⁵⁶79th Report, *supra* note 13, ch. IV.

⁵⁷Dep't of Justice vacancy data as on 01.05.2026: Allahabad HC sanctioned 160, working 108, vacancies 52; Calcutta HC sanctioned 72, working 42, vacancies 30.

Second, the *pocket veto*: the Memorandum requires the Government to furnish views but prescribes no time limit. Successive governments have sat on recommendations indefinitely.

The practical dimensions of the pocket veto have been independently confirmed by official acknowledgments before the Supreme Court. In proceedings before a bench led by Justice Sanjay Kishan Kaul in 2022, the Attorney General acknowledged that the Central Government had taken an average of 127 days to process Collegium recommendations, while the Collegium itself took an average of 119 days; at one stage approximately 70 names recommended by High Court Collegiums since November 2022 remained pending with the Government without any decision.⁵⁸ These figures, placed on record by the executive before the Supreme Court, demonstrate that the delay identified by the 79th Report has deepened rather than diminished in the decade since, and that neither branch of the appointment process operates under any enforceable timeline.⁵⁹

Third, *opacity*: even after the October 2017 reform, reasons for rejection are not published a compromise described as “cosmetic.”⁶⁰ The opacity is reinforced by a structural disincentive against external scrutiny: media reporting on the Collegium’s deliberations risks being characterised as interference with judicial proceedings, creating a chilling effect on the kind of public accountability that any appointment mechanism in a democratic polity must bear.⁶¹

6.9 The Collegium’s record: vacancies, diversity, and delay

As of 1 May 2026, approximately 330 High Court vacancies persist against a sanctioned strength of 1,114 a rate of roughly thirty per cent.⁶² The NJDG records over 62 lakh HC

⁵⁸‘Delay in Judicial Appointments: Centre Shifts Blame on Collegium’ (Tribune India) <<https://www.tribuneindia.com/news/nation/delay-in-judicial-appointments-centre-shifts-blame-on-collegium-43036>> accessed 9 September 2026.

⁵⁹‘SC Again Expresses Concern Over Delay in Clearing Names Approved by Collegium’ (Deccan Herald, September 2023) <<https://www.deccanherald.com/amp/story/india%2Fsc-again-expresses-concern-over-delay-in-clearing-names-approved-by-collegium-2701254>> accessed 9 September 2026.

⁶⁰Deep & Mishra, *supra* note 16, at 75.

⁶¹Media reporting on Collegium deliberations risks being characterised as interference with judicial proceedings. *See* Arundhati Roy, *In re*, (2002) 3 SCC 343 (India).

⁶²Dep’t of Justice, Gov’t of India, Sanctioned Strength, Working Strength, Vacancies of Judges in the Supreme Court of India and the High Courts, as on 01.05.2026, *available at* <https://www.doj.gov.in/>.

cases and over 93,000 SC cases pending.⁶³ Seven High Courts had no SC representation as of March 2026.⁶⁴

The underrepresentation extends beyond gender. A study presented by Advocate Mathew J. Nedumpara estimated that approximately fifty per cent of High Court judges and 33.1 per cent of Supreme Court judges had familial connections with the higher judiciary.⁶⁵ Separately, data compiled by Chuni Lal Mishra indicated that High Court judges appointed between 2018 and 2022 numbering 573 were predominantly from upper-caste communities.⁶⁶ Until the 1980s, no judge from a Scheduled Caste, Scheduled Tribe, or Other Backward Class community had served on the Supreme Court. CJI D.Y. Chandrachud himself acknowledged in public speeches that no formal provision exists for the representation of marginalised communities in the appointment process.⁶⁷ Justice B.V. Nagarathna has separately called for greater gender diversity.⁶⁸

The quantitative record of gender representation underscores the structural nature of this deficit. Since the Supreme Court was constituted in 1950, only eleven women have been appointed to its bench across its entire history, constituting a mere 3.8 per cent of the 287 judges appointed in total; the Court has never had more than four women serving simultaneously.⁶⁹ As of early 2025, only one woman judge sat on the Supreme Court bench, and women accounted for approximately 14 per cent of the working strength of High Courts nationally, a proportion that has increased only marginally over the preceding decade.⁷⁰

⁶³National Judicial Data Grid, available at <https://njdg.ecourts.gov.in/> (over 62 lakh HC cases and over 93,000 SC cases pending as of early 2026).

⁶⁴Insights on India, *The Collegium System in India: Evolution, Challenges & Reforms* (Mar. 19, 2026) (reporting seven High Courts unrepresented on the Supreme Court Bench as of March 2026).

⁶⁵Advocate Mathew J. Nedumpara's study (presented June 19, 2015) estimated that approximately fifty per cent of High Court judges and 33.1 per cent of Supreme Court judges had family members in the higher echelons of the judiciary. The figures are cited as indicative of a documented pattern.

⁶⁶Chuni Lal Mishra, cited in media reports, documented that of 573 High Court judges appointed between 2018 and 2022, the overwhelming majority belonged to upper-caste communities.

⁶⁷CJI D.Y. Chandrachud stated in public speeches that there is no formal provision for the representation of marginalised communities in judicial appointments.

⁶⁸Justice B.V. Nagarathna has spoken publicly about greater gender diversity. Her father, Justice E.S. Venkataramiah, served as the 19th CJI.

⁶⁹'India Needs More Women Judges in the Supreme Court' (NextIAS Editorial Analysis, 3 September 2025) <<https://www.nextias.com/ca/editorial-analysis/03-09-2025/india-women-judges-supreme-court>> accessed 9 September 2026.

⁷⁰'Only 1 Woman Among 34 Judges: Why India's Judiciary Still Struggles With Gender Representation' (LawChakra, 8 March 2026) <<https://lawchakra.in/legal-updates/woman-judge-judiciary-gender-womens-day/>> accessed 9 September 2026.

The NJAC's diversity proviso requiring one eminent person from SCs/ STs/ OBCs/ minorities/ women was struck down with the amendment; no comparable provision exists in the Collegium.⁷¹ The 2026 expansion of SC strength⁷² addresses pendency but not the appointment process. The Collegium's Statement of 26 May 2025⁷³ illustrates the process in its current form: names without published criteria, without public hearing, without any record of deliberation.

6.10 Comparative analysis: four jurisdictions

The United Kingdom. The Constitutional Reform Act 2005 created the JAC: fifteen members, a lay chairman, merit-based selection, and a limited Lord Chancellor's check. Since 2006 the Lord Chancellor has never rejected a recommendation for the UK Supreme Court.⁷⁴

The JAC's transparency architecture offers a direct institutional contrast to the Collegium's opacity. Under the Constitutional Reform Act 2005, the Commission publishes annual diversity statistics and biannual diversity updates tracking gender, ethnicity, disability, and socio-economic background across its recommendations. The JAC Diversity Update of January 2026 recorded that ethnic minority candidates constituted 17 per cent of recommendations, the highest proportion on record and the third consecutive year in which ethnic minority candidates were recommended at or above their representation in the eligible pool.⁷⁵

⁷¹INDIA CONST. art. 124A, cl. 1, first proviso (inserted by the Ninety-Ninth Amendment).

⁷²The Supreme Court (Number of Judges) Amendment Act, 2026 (replacing the Ordinance of May 17, 2026). *See* Press Info. Bureau, Gov't of India, Cabinet Approves Increase in Judge Strength (May 2026).

⁷³Supreme Court Collegium, Statement (May 26, 2025) (recommending elevation of Justices N.V. Anjaria, Vijay Bishnoi, and A.S. Chandurkar).

⁷⁴Constitutional Reform Act 2005, c. 4, §§ 61–70, sched. 12–14 (UK). The JAC comprises fifteen commissioners: six judicial, two professional, one tribunal judge, and six lay (including a lay chairman).

⁷⁵Judicial Appointments Commission, 'Diversity Update: January 2026' (JAC, April 2026) <<https://judicialappointments.gov.uk/corp-publication/diversity-update-january-2026/>> accessed 9 September 2026.

The United States. Article II vests the appointment power in the President, subject to Senate “advice and consent.” The system is explicitly political but structurally divided: neither the President nor the Senate can appoint alone.⁷⁶

France. The Conseil supérieur de la magistrature includes judicial and non-judicial members. For the highest offices, the CSM proposes; for others, the Minister proposes and the CSM gives a conforming opinion.⁷⁷

South Africa. Section 178 establishes a twenty-three-member JSC with public interviews. South Africa has sustained judicial independence under this model since 1994.⁷⁸

This endorsement of the South African model requires a material qualification. The JSC's public interview process has itself attracted persistent criticism for becoming an arena for political contestation: civil society organisations have documented instances where commissioners used the interview setting to question candidates on their religion, gender, or political affiliations rather than their judicial suitability. The JSC has been the subject of judicial review proceedings three times in recent years over its appointment procedures, and in 2026 it initiated a revision of its written guidelines in direct response to these documented failures.⁷⁹ The South African experience therefore illustrates both the institutional promise of structured plurality and the indispensability of enforceable procedural rules and accountability norms if commission-based systems are not to become vehicles for political capture.

The comparative jurisdictions examined in this paper suggest that institutional plurality can coexist with judicial independence, provided that no single actor judicial, executive, or lay exercises unilateral control over the appointment process. Each of these commissions contains a judicial component, a non-judicial component, and a structural rule preventing any one faction from exercising a veto. The NJAC failed on the third element. The Collegium fails on the second.

⁷⁶U.S. Const. art. II, § 2, cl. 2.

⁷⁷1958 Const. art. 65 (Fr.) (as amended by the Constitutional Law of July 23, 2008).

⁷⁸S. Afr. Const., 1996, §§ 174, 178.

⁷⁹Judges Matter, 'Media Statement: JSC Invites Public Comment on Revised Judicial Appointment Procedures' (Judges Matter, 2026) <<https://www.judgesmatter.co.za/opinions/media-statement-jsc-invites-public-comment-on-revised-judicial-appointment-procedures/>> accessed 9 September 2026; Helen Suzman Foundation, 'In the Interests of Justice: Reform of the Judicial Service Commission' (HSF Special Publication) <<https://hsf.org.za/publications/special-publications/hfs-report-reform-of-the-jsc.pdf>> accessed 9 September 2026.

6.11 Doctrinal tools: a synthesis

Noscitur a sociis suggests that “consultation,” situated alongside the President’s plenary appointment power, is advisory.⁸⁰ *Ut res magis valeat quam pereat* (harmonious construction) requires that consultation not be rendered nugatory the Second Judges Case deployed this to elevate consultation to primacy.

The doctrine of constitutional trust (*M.C. Mehta v. Kamal Nath*) requires every functionary to act in the public interest.⁸¹ The doctrine of separation of powers (*Ram Jawaya Kapur*) is functional rather than watertight; the appointment of judges is an administrative act, and there is no constitutional impediment to the legislature prescribing the procedure.⁸²

The proportionality test (*Puttaswamy, Modern Dental College*)⁸³ asks whether a less restrictive alternative exists. Applied to the NJAC, the question is whether a commission without the two-member veto, with a genuine judicial majority, and with initiation retained by the CJI could achieve democratic accountability without impairing independence. The comparative evidence from the jurisdictions studied suggests that it could.

7.12 The interdisciplinary dimension

Principal–agent theory. The appointment process can be modelled as a delegation problem. The principal (the people, acting through the Constitution) delegates appointment authority to an agent (the Collegium or a commission). The risk is that the agent will pursue its own interests rather than the principal’s a risk amplified by the information asymmetry inherent in judicial appointments, where the agent possesses detailed knowledge of candidates that the principal cannot independently verify.⁸⁴

Two solutions are available within this framework: *monitoring* (transparency, published criteria, complaints mechanisms) and *selection* (choosing agents whose interests

⁸⁰*Noscitur a sociis*. See *supra* note 21.

⁸¹*M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388, ¶¶ 25, 34 (India).

⁸²*Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, ¶ 8 (India).

⁸³*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India); *Modern Dental College v. State of Madhya Pradesh*, (2016) 7 SCC 353 (India).

⁸⁴See generally Jean-Jacques Laffont & David Martimort, *The Theory of Incentives: The Principal-Agent Model* 1–30 (2002). The framework models situations in which a principal (the public) delegates authority to an agent (an appointment body) under conditions of information asymmetry.

are aligned with the principal's). The Collegium relies almost entirely on selection senior judges are assumed to be trustworthy and provides almost no monitoring: criteria are unpublished, deliberations are unrecorded, and no complaints mechanism exists. The NJAC provided monitoring through diversified membership, but its two-member veto created a risk of capture by non-judicial actors whose interests may diverge from the principal's. A well-designed system would provide both monitoring and aligned selection simultaneously.

Institutional economics and path dependence. Institutional economics teaches that early choices constrain later ones: once a particular institutional arrangement is established, the transaction costs of changing it rise over time. The choice in 1993 to vest appointment power in the Collegium created a path that made subsequent reform structurally difficult, because the beneficiaries of the existing arrangement the senior judges of the Supreme Court are also the interpreters of the Constitution. Any institution that must review the constitutionality of its own reform faces a conflict of interest. This is not a criticism of any individual judge; it is a structural observation about the incentives that institutional economics predicts.⁸⁵

The only remedy is procedural: either a process of consultation so broad that its legitimacy cannot be questioned, or a constitutional amendment so carefully designed that the challenge to it fails on its merits. The NJAC attempted the second route but was defeated by design flaws that were avoidable.

Sociology of judicial recruitment. Empirical research documents that appointment processes shape the composition of the bench along every axis of diversity gender, caste, region, professional background, and jurisprudential orientation.⁸⁶ A system that relies on informal professional networks as the Collegium does tends to reproduce the existing bench, because candidates are identified through personal knowledge rather than through open application or published criteria.⁸⁷

The evidence is consistent with this prediction. Two pathways to the higher judiciary exist: the judicial service route, in which an officer may take approximately twenty

⁸⁵See Douglass C. North, *Institutions, Institutional Change and Economic Performance* 93–100 (1990).

⁸⁶See Aparna Chandra et al., *Locating the Diversity Deficit in the Higher Judiciary: An Empirical Study*, 56 *Econ. & Pol. Wkly.* 36 (2021).

⁸⁷George H. Gadbois, Jr., *Indian Judicial Behaviour*, 5 *Econ. & Pol. Wkly.* 149 (1970).

years to reach the High Court bench through examination and promotion, and the Bar route, in which a practising advocate is elevated directly by the Collegium. The first pathway is formal and meritocratic; the second operates entirely through informal assessment, with no written test, no structured interview, and no published criteria. It is the second pathway that the sociology of recruitment identifies as susceptible to network effects.

The pattern is visible at the highest level. Justice Sanjiv Khanna, the 51st Chief Justice of India, is the son of a Delhi High Court judge and the nephew of Justice H.R. Khanna. Justice B.V. Nagarathna, expected to become the first woman Chief Justice, is the daughter of Justice E.S. Venkataramiah, the 19th CJI. Justice D.Y. Chandrachud, the 50th CJI, is the son of Justice Y.V. Chandrachud, the 16th CJI. A documented pattern of recommendations for the Punjab and Haryana High Court included relatives of former Chief Justices and senior judges, as well as former juniors of Collegium members. These are not isolated instances; they represent a recurring structural feature of the appointment process.

Two qualifications are essential. First, allegations of nepotism must be distinguished from proven misconduct; professional merit should not be assumed to derive solely from family background, and a judge who happens to come from a judicial family may be independently meritorious. The question is not whether any individual appointee deserved the position, but whether the process by which candidates are identified is structured to ensure that equally meritorious candidates without professional connections receive equivalent consideration. Second, the real issue is not with the family background of any judge but with the design of the selection process itself. A system that relies on informal knowledge and personal acquaintance will, by its nature, favour candidates known to the selectors and the selectors are, by definition, members of the existing judicial establishment.

Women, Scheduled Castes, Scheduled Tribes, and Other Backward Classes remain underrepresented. The NJAC's diversity proviso modest though it was was the first attempt to address this structurally. Its striking down removed even that. A reformed mechanism must incorporate diversity criteria as a constitutional requirement, not as an informal aspiration.

6.13 Where the debate stands

On 26 November 2025 CJI Surya Kant indicated that the Court would consider the NJAC revival petition.⁸⁸ The advance-transfer policy introduced in February 2026 represents a procedural innovation within the existing framework.⁸⁹ The five-member collegium as of late 2025 comprises CJI Surya Kant, Justices Vikram Nath, B.V. Nagarathna, J.K. Maheshwari, and M.M. Sundresh.⁹⁰

Whether the NJAC revival petition produces a hearing, a reference to a larger bench, or a quiet burial remains uncertain. What is certain is that the institutional conditions that produced the Fourth Judges Case have not been remedied: the Collegium operates without a secretariat, without published criteria, without a time-bound process, and without a complaints mechanism.



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⁸⁸The Wire (Nov. 27, 2025).

⁸⁹Bar & Bench (July 20, 2026).

⁹⁰Deccan Herald (Nov. 24, 2025) (reporting the collegium composition under CJI Surya Kant).

7. FINDINGS

F1. The constitutional text supports neither pure executive primacy nor pure judicial primacy. “Consultation” was chosen deliberately, in contradistinction to terms such as “concurrence.” Both the First and Second Judges Cases departed from the original understanding, in opposite directions.

F2. The Collegium system lacks democratic accountability, transparency, and operational efficiency. As of 1 May 2026, approximately thirty per cent of High Court posts remain vacant.

F3. The defects of the NJAC were defects of design, not of concept. Of the majority’s four grounds, only the composition objection (the judiciary lacking a majority) is inherent in any commission that denies the judiciary majority representation. The Law Minister objection is manageable through recusal. The eminent-persons objection is specific to the veto. The initiation objection is specific to Section 4 of the NJAC Act.

F4. A redesigned commission that preserves a judicial majority of six out of eleven, retains the CJI’s initiation power, removes the minority veto, and manages the ministerial conflict through structural safeguards could survive the *ratio* of the Fourth Judges Case.

F5. The comparative jurisdictions examined (UK, USA, France, South Africa) suggest that institutional plurality can coexist with judicial independence, provided no single actor exercises unilateral control.

F6. The doctrinal tools (*noscitur a sociis*, harmonious construction, the golden rule, purposive interpretation, the proportionality test) together support a reading of “consultation” that requires meaningful participation by both the judiciary and the executive.

F7. The interdisciplinary analysis identifies specific mechanisms: principal–agent theory identifies the Collegium’s monitoring deficit; path dependence explains why self-reform is structurally difficult; the sociology of recruitment correlates the Collegium’s reliance on informal networks with the underrepresentation of women, SCs, STs, and OBCs.

F8. The basic-structure doctrine constrains the outcome judicial independence must be preserved but does not prescribe the mechanism. A commission with a genuine judicial majority is equally capable of satisfying the test.



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8. SUGGESTIONS

S1. Establish a constitutionally embedded Judicial Appointments Commission under Article 124, with eleven members: the CJI (Chairperson); the four next senior-most SC judges; one High Court Chief Justice by rotation; the Union Law Minister; two eminent persons nominated by a committee of the CJI, the PM, and the Leader of the Opposition (one from SCs/STs/OBCs/minorities/women); and two persons nominated by the Inter-State Council. Judicial membership: six out of eleven a genuine majority. Decisions by simple majority; no minority veto.

S2. Retain the initiation power with the CJI for SC appointments and with the concerned HC Chief Justice for HC appointments.

S3. Publish binding eligibility criteria minimum years of practice, judgment-quality metrics, disposal-rate thresholds, integrity standards on the Supreme Court's website.

S4. Establish a permanent secretariat under the Commission's superintendence, not the Government's.

S5. Prescribe a thirty-day time limit for Government response. Failure to respond is deemed concurrence. This eliminates the pocket veto.

S6. Introduce a *constructive reconsideration mechanism*: any objection to a candidate must be accompanied by specific adverse material or a request for further verification. Rejection cannot operate as an unexplained institutional veto.

S7. Restore the Governor's consultative role for HC appointments.

S8. Seek ratification under the proviso to Article 368(2), regardless of whether the strict text requires it.

S9. Commission an empirical study by the Law Commission on the relationship between appointment processes and judicial diversity, vacancy rates, and case-disposal metrics.

9. CONCLUSION

The Collegium solved the problem it was designed to solve: after 1993, no government has been able to pack the Supreme Court Bench. But it created new problems opacity, delay, persistent vacancies, and the underrepresentation of entire communities that it was not designed to solve and, by its structure, cannot.

The NJAC was struck down not because a commission is inherently unconstitutional, but because this particular commission was badly designed. Of the four grounds on which the majority relied, three the veto, the initiation shift, and the Law Minister's conflict were features of the 2014 design, not inherent requirements of any commission. Only the composition objection goes to the concept, and it is answerable by giving the judiciary a genuine majority of six out of eleven.

The comparative jurisdictions examined in this paper suggest that institutional plurality can coexist with judicial independence. There is a risk, acknowledged even by proponents of judicial independence, that a system in which judges alone appoint judges converts constitutional sovereignty into a form of judicial supremacy unchecked not because it is malicious, but because the institutional design provides no external corrective. The remedy is not to diminish the judiciary's voice; it is to embed that voice in a structure that answers to the Constitution rather than to itself. What is needed is not a revival of the NJAC as enacted in 2014 but a fresh design that retains the Collegium's core insight that judges must have a decisive voice and adds what the Collegium has never had: structured participation, published criteria, a permanent secretariat, a time-bound process, and a constructive reconsideration mechanism.

The position is stated as on 1 May 2026.

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