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BEYOND THE COLLEGIUM: A CRITICAL ANALYSIS OF THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

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ABSTRACT

The mechanism by which India selects its constitutional judges has never been a settled question; it has instead been a running argument between three competing anxieties — executive capture, judicial insularity, and the absence of any democratically accountable check on either. The Constituent Assembly resolved this argument, provisionally, through Article 124, which vested the power of appointment in the President acting "in consultation with" the Chief Justice of India, deliberately withholding untrammelled discretion from either institution. The Emergency exposed the fragility of that compromise: supersession of judges, punitive transfers, and a judiciary bent toward executive convenience. In response, the Supreme Court, through the Second and Third Judges Cases, judicially re-engineered "consultation" into "concurrence," creating the Collegium — a body with no textual basis in the Constitution, composed entirely of sitting judges, and accountable to no one outside itself. Three decades of the Collegium's operation have produced a different but equally serious pathology: opacity, nepotism colloquially described as the rule of "uncle judges," and the absence of any external check on merit or integrity. Parliament's response, the Ninety-Ninth Constitutional Amendment and the National Judicial Appointments Commission Act, 2014, sought to introduce executive and lay participation into the process; the Supreme Court struck it down in 2015 as violative of the basic structure. This article argues that the Fourth Judges Case was likely correct in identifying the specific defect of the NJAC — an executive veto capable of blocking any recommendation — but wrong in treating that defect as proof that any institutional alternative to unchecked judicial primacy is constitutionally impermissible. Drawing on the constitutional history of Articles 124, 217, and 222, the doctrinal arc from S.P. Gupta through the

Fourth Judges Case, and comparative practice in the United Kingdom and South Africa, this article develops a structural alternative: a tiered, merit-based appointments framework, insulated from executive veto but open to non-judicial expertise, transparency obligations, and an accountability mechanism modelled on the long-dormant Judicial Standards and Accountability Bill, 2010. The choice facing India, this article contends, is not between judicial dominance and executive capture, but between an opaque status quo and a designed institution that can withstand both forms of capture at once.

Keywords: Collegium System, NJAC, Judicial Independence, Basic Structure Doctrine, Judicial Appointments, Constitutional Law, Separation of Powers.

I. INTRODUCTION

Few questions in Indian constitutional law have proved as durable, or as unresolved, as the question of who ought to choose the judges. The Constituent Assembly confronted the problem directly. Dr. B.R. Ambedkar rejected the two extremes available to the framers: the President could not be permitted to exercise a plenary power of appointment answerable to no one, and the Chief Justice of India, however eminent, could not be handed the final word either, for that would substitute the discretion of one man for the discretion of another without adding any institutional safeguard.¹ The compromise the Assembly settled on found its way into Article 124: judges of the Supreme Court would be appointed by the President "by warrant under his hand and seal" after consultation with the Chief Justice of India and such other judges as the President considered necessary. It was a scheme of shared, checked discretion — not executive supremacy, and not judicial supremacy either.

That equilibrium did not survive contact with the Emergency. When Chief Justice A.N. Ray retired, Justice H.R. Khanna — his senior-most colleague and the lone dissenter in the Habeas Corpus case — was passed over in favour of a judge who had ruled in the executive's favour.² High Court judges who had resisted the government during the Emergency found themselves transferred to distant courts as a matter of administrative convenience. The lesson the judiciary drew from this

¹Constituent Assembly Debates, Vol. VIII, May 24, 1949.

²Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press, 1999); Hartosh Singh Bal, *What the Judiciary Has Done to Itself*, THE CARAVAN, <https://caravanmagazine.in/law/what-judiciary-done-itself>.

experience was that "consultation," left in the President's hands, offered no real protection at all. Over the following two decades, the Supreme Court re-read Article 124 through a sequence of decisions — the First, Second, and Third Judges Cases — that transformed consultation into something the constitutional text never quite said: concurrence.³ The jurist Robin Cooke captured the scale of that transformation with characteristic economy: "It is still an easy thing how in less than half a century 'consultation' as the term presumably mentioned in constitution and has been understood by the Constituent Assembly has transmuted into 'concurrence.'"⁴

The resulting Collegium system solved the problem it was built to solve — executive interference — and, in solving it, created a different one. A body of sitting judges, selecting their own successors, operating without published criteria, without a right of appeal, and without any institutional actor positioned to ask hard questions about a candidate's integrity, produced precisely the kind of insularity that critics now describe, not unfairly, as a system of "uncle judges."⁵ It was this second-generation problem — not executive interference, but judicial self-perpetuation — that Parliament sought to address in 2014 through the Ninety-Ninth Constitutional Amendment and the National Judicial Appointments Commission Act. The Supreme Court struck down both in 2015, holding that any structure capable of diluting judicial primacy over appointments offended the basic structure of the Constitution.⁶

This article argues that the debate the NJAC judgment purported to settle is, in fact, still open. Part II traces the constitutional text governing appointments and the judicial reinterpretation that produced the Collegium. Part III examines the structure and stated rationale of the NJAC. Part IV analyses the Fourth Judges Case, including Justice Chelameswar's dissent, which this article treats as the more persuasive institutional diagnosis even where the majority's specific holding on the veto clause was correct. Part V draws on comparative practice in the United Kingdom and South Africa to identify design features — public interviews, mixed but judiciary-weighted membership, procedural rather than substantive executive involvement — that reconcile independence with

³S.P. Gupta v. Union of India, 1981 Supp. SCC 87 (India); Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 (India); In re Special Reference No. 1 of 1998, (1998) 7 SCC 739 (India).

⁴Robin Cooke, Fundamentals, N.Z. L.J. 158 (1994).

⁵Hartosh Singh Bal, What the Judiciary Has Done to Itself, THE CARAVAN, <https://caravanmagazine.in/law/what-judiciary-done-itself>.

⁶Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1 (India).

accountability elsewhere. Part VI sets out a structural proposal: regional and central appointment commissions operating on codified merit criteria, coupled with revival of the Judicial Standards and Accountability Bill, 2010, as the missing accountability half of the reform Parliament never completed.

II. THE CONSTITUTIONAL SCHEME AND ITS JUDICIAL RE-WRITING

A. Text and Original Design

Judicial appointments in India are governed by Articles 124 to 128 for the Supreme Court, Articles 217 to 224 for the High Courts, and Article 222 for the inter-court transfer of judges.⁷ Article 124 requires the President to appoint Supreme Court judges "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," with the Chief Justice of India's consultation being mandatory for appointments other than that of the Chief Justice.⁸ Article 217 similarly requires consultation with the Chief Justice of India, the Governor of the State, and — for appointments other than that of the Chief Justice of the High Court — the Chief Justice of that High Court.⁹ Article 222 governs the transfer of a High Court judge from one court to another, again "after consultation with the Chief Justice of India."¹⁰ It is worth noting, as a matter of legislative history rather than present law, that the Ninety-Ninth Amendment had substituted the National Judicial Appointments Commission for the Chief Justice's individual consultative role across each of these provisions before the Amendment itself was invalidated.¹¹

What is striking about the original text is how carefully it avoided vesting final authority in any single actor. Consultation, on any ordinary reading of the word, does not mean concurrence: it means being heard, not having a veto. That, at least, was the position the Supreme Court itself took in 1981.

⁷INDIA CONST. arts. 124–128, 217–224, 222.

⁸INDIA CONST. art. 124.

⁹INDIA CONST. art. 217.

¹⁰INDIA CONST. art. 222.

¹¹The Constitution (Ninety-Ninth Amendment) Act, No. 1 of 2015, INDIA CODE (2015); The National Judicial Appointments Commission Act, No. 28 of 2014, INDIA CODE (2014).

B. From Consultation to Concurrence: S.P. Gupta to the Third Judges Case

In *S.P. Gupta v. Union of India* (the First Judges Case), a High Court judge challenged his transfer, and the Court held that while the Chief Justice's views were entitled to weight, they did not bind the executive.¹² Decided at the tail end of the Emergency's institutional memory, the judgment nonetheless preserved executive primacy — a result critics at the time associated with a judiciary still recovering its nerve. Continuing controversy over transfers and appointments — culminating in the widely reported allegation that the executive was populating the higher judiciary with pliant appointees — set the stage for a reversal.¹³

In *Supreme Court Advocates-on-Record Association v. Union of India* (the Second Judges Case), a nine-judge bench overturned *Gupta* and held that the Chief Justice of India's recommendation, formed in consultation with the two senior-most judges of the Supreme Court, would bind the President; the executive retained only a limited power to seek reconsideration, and even a reiterated recommendation would then be binding.¹⁴ The judicially created Collegium was expanded five years later, in *In re Special Reference No. 1 of 1998* (the Third Judges Case), from three members to five — the Chief Justice and the four senior-most judges of the Supreme Court — in response to a Presidential Reference under Article 143.¹⁵ What had begun as an interpretive gloss on the word "consultation" had, within two decades, produced an institution with no direct textual anchor in the Constitution at all: a self-selecting body of judges, answerable to no external authority, exercising what was in substance the final word on who would join their own ranks.

III. THE COLLEGIUM'S UNRESOLVED DEFECTS

The Collegium was designed to solve one problem — executive interference — and it did. It was not designed to solve, and has not solved, a distinct set of institutional problems that surfaced once judicial primacy was secured. Three deserve particular attention.

First, the absence of published, binding criteria. Selection has proceeded, for most of the Collegium's history, without a codified memorandum of procedure specifying how merit, integrity,

¹²*S.P. Gupta v. Union of India*, 1981 Supp. SCC 87 (India).

¹³A.G. Noorani, *Judicial Appointments and the Constitution*, ECON. & POL. WKLY. (2000).

¹⁴*Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441 (India).

¹⁵*In re Special Reference No. 1 of 1998*, (1998) 7 SCC 739 (India).

or diversity are to be weighed, leaving virtually the entire process to the informal judgment of a handful of judges.

Second, professional and familial concentration. Repeated cycles of judges recommending candidates drawn from a narrow circle of professional and personal acquaintance — the phenomenon popularly, if imprecisely, labelled "uncle judges" — have produced a bench disproportionately drawn from a small number of legal families, at the expense of first-generation lawyers and litigants without comparable access.

Third, the absence of any external integrity check. The Collegium has neither the institutional capacity nor the mandate to conduct the kind of financial or background verification that agencies such as the Central Bureau of Investigation or the Enforcement Directorate routinely perform for other public appointments. The post-retirement career of Chief Justice A.M. Ahmadi is instructive here, not because it involves any finding of wrongdoing, but because it illustrates the structural blind spot: as Chief Justice, Ahmadi presided over the bench that in 1996 substantially diluted the culpable-homicide charge against the accused in the Bhopal gas disaster litigation, reducing it to a charge of death by negligence; following his retirement, he was appointed life chairman of the trust set up to manage the hospital established out of the Union Carbide settlement funds.¹⁶ Whatever the merits of the underlying judicial reasoning, no mechanism within the appointments or post-retirement framework existed to examine, disclose, or manage the resulting perception of conflict. A system built entirely around judicial self-governance has no natural mechanism for catching this class of problem, because catching it was never part of the design.

These are not the defects the NJAC judgment addressed, and they are not defects that reinstating unchecked judicial primacy can resolve. They are, instead, precisely the governance lacunae that made some form of external participation in the appointments process a serious institutional question rather than merely an executive grievance.

IV. THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

¹⁶A.G. Noorani, Judicial Appointments and the Constitution, ECON. & POL. WKLY. (2000); Hartosh Singh Bal, What the Judiciary Has Done to Itself, THE CARAVAN, <https://caravanmagazine.in/law/what-judiciary-done-itself>.

Parliament's response to this second-generation problem was the Constitution (Ninety-Ninth Amendment) Act, 2014, and the accompanying National Judicial Appointments Commission Act, 2014.¹⁷ The NJAC was to comprise six members: the Chief Justice of India as Chairperson, the two senior-most judges of the Supreme Court, the Union Minister of Law and Justice, and two "eminent persons" selected by a committee consisting of the Prime Minister, the Chief Justice of India, and the Leader of the Opposition (or, in the Leader's absence, the leader of the single largest opposition party).¹⁸ The Commission would also recommend the transfer of High Court judges, a function previously exercised through consultation between the Chief Justice of India and the executive. The government's stated justification rested on three claims: that the Commission would improve transparency by requiring recorded reasons for recommendations and rejections; that it would broaden accountability by bringing non-judicial actors into a process previously closed to outside scrutiny; and that it would reduce the perception, if not the reality, of a judiciary selecting itself.¹⁹ Critics, by contrast, focused on a single structural feature: the NJAC Act provided that the Commission would not recommend a candidate if any two of its six members objected — in effect, a veto capable of being exercised by the Law Minister acting together with one of the two eminent persons, neither of whom was a sitting judge.²⁰

V. THE FOURTH JUDGES CASE

In *Supreme Court Advocates-on-Record Association v. Union of India* (2015) — commonly styled the Fourth Judges Case — a five-judge Constitution Bench struck down both the Ninety-Ninth Amendment and the NJAC Act by a majority of four to one.²¹

A. The Majority

¹⁷The Constitution (Ninety-Ninth Amendment) Act, No. 1 of 2015, INDIA CODE (2015); The National Judicial Appointments Commission Act, No. 28 of 2014, INDIA CODE (2014).

¹⁸National Judicial Appointments Commission Act, No. 28 of 2014, INDIA CODE (2014), § 4.

¹⁹PRS Legislative Research, The National Judicial Appointments Commission Bill, 2014, <https://prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014>.

²⁰PRS Legislative Research, The National Judicial Appointments Commission Bill, 2014, <https://prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014>; Gautam Bhatia, The NJAC Judgment and Its Discontents, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Oct. 16, 2015), <https://indconlawphil.wordpress.com/2015/10/16/the-njac-judgment-and-its-discontents/>.

²¹*Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1 (India).

The majority held that primacy of the judiciary in the appointments process is an essential attribute of judicial independence, and judicial independence, in turn, forms part of the basic structure of the Constitution, placing it beyond the reach of even a constitutional amendment enacted with the requisite special majority.²² The two-member veto was treated as the decisive vice: it allowed non-judicial members, including a serving Cabinet minister, to block any recommendation without needing to persuade the Chief Justice or either of the two senior judges on the Commission. On the majority's reasoning, this was not merely participation by the executive in the appointments process — a feature present, in some form, in almost every comparable democracy — but a structural capacity to veto judicial primacy altogether, and it was this capacity, rather than executive involvement as such, that offended the basic structure.

B. Justice Chelameswar's Dissent

Justice J. Chelameswar dissented, and his opinion deserves to be read as something more than a lone dissent: it is the most sustained judicial articulation of the Collegium's own defects on record. He held that judicial independence does not require judicial appointments to rest exclusively with judges; it requires, instead, that the process be insulated from arbitrary or partisan interference, a condition that a transparent, multi-stakeholder mechanism could satisfy as well as, or better than, an opaque body of judges alone.²³ Justice Chelameswar's opinion did not defend the specific veto structure of the NJAC Act; it defended the proposition that the binary the majority had constructed — judicial primacy or unconstitutional executive capture — was false, and that the real institutional question was design, not participation.

VI. CRITICAL ANALYSIS: WHAT THE JUDGMENT SETTLED, AND WHAT IT LEFT OPEN

The majority's specific holding — that a two-member veto vested partly in a sitting Cabinet minister was constitutionally impermissible — is, on balance, defensible. A mechanism by which the executive could block any recommendation without the concurrence of a single judicial member did create a real risk that appointments unwelcome to the government of the day would simply never be made, achieving through procedural attrition what direct interference could no

²²Id.

²³Id. (Chelameswar, J., dissenting).

longer accomplish after the Second Judges Case. To that extent, the majority correctly identified a genuine constitutional vice.

Where the judgment is more vulnerable to criticism is in the inference it drew from that finding: that the specific design defect of one commission demonstrated the constitutional impermissibility of external participation in appointments as such. Four questions the judgment left substantially unaddressed illustrate the gap between the vice identified and the remedy imposed.

First, the Collegium itself has never operated under a settled, judicially enforceable procedure; when individual judges or candidates have alleged arbitrariness or favouritism in specific recommendations, no institutional mechanism inside the Collegium framework exists to examine that allegation, still less to correct it. Second, the Ninety-Ninth Amendment changed only the identity of the appointing authority; it left the underlying selection criteria — the qualities a commission, of whatever composition, should look for in a candidate — wholly unspecified, reproducing at one remove the very opacity it was meant to cure. Third, the government's preference for a wholly new constitutional body sat uneasily beside the existence of the Judicial Standards and Accountability Bill, 2010, an alternative reform vehicle addressing in-service conduct and accountability that had already been passed by the Lok Sabha once before lapsing on the dissolution of the fifteenth Lok Sabha, and which the judgment neither engaged with nor foreclosed.²⁴ Fourth, if political proximity is capable of compromising judicial performance — the concern ordinarily advanced to justify insulating appointments from the executive — the judgment offers no account of why that same concern does not extend with equal force to post-retirement appointments and assignments controlled by the very same executive, a pathway of influence the Collegium framework leaves entirely untouched.

The better reading of the Fourth Judges Case, then, is narrow rather than categorical: it invalidated one flawed design, not the field of institutional alternatives to unchecked judicial self-selection. What follows takes that narrower reading as its premise.

VII. COMPARATIVE PERSPECTIVES

²⁴Judicial Standards and Accountability Bill, 2010, PRS Legislative Research, https://prsindia.org/files/bills_acts/bills_parliament/2010/Judicial_standard_as_passed_by_LS.pdf; Supreme Court Observer, NJAC or JSAB?, <https://www.scobserver.in/journal/njac-or-jsab/>.

A. The United Kingdom

The Judicial Appointments Commission for England and Wales selects candidates for judicial office on the basis of published, merit-based criteria, and its recommendations are, in practice, treated as close to final; the Lord Chancellor's residual power to reject or ask the Commission to reconsider a selection is exercised sparingly and must be justified in writing.²⁵ The UK model is instructive less for its precise membership — which includes a mix of judicial, legal, and lay members — than for the sharper conceptual point it illustrates: independence can be secured procedurally, through published criteria, reasoned decisions, and a narrow, accountable executive role, without requiring that every participant in the process be a sitting judge. The Commission's function is closer to that of a professional selection body operating a transparent process than to a political veto point.²⁶

B. South Africa

South Africa's Judicial Service Commission, established under Section 178 of the Constitution of the Republic of South Africa, 1996, and the Judicial Service Commission Act 9 of 1994, offers a still more instructive comparator precisely because it is not judiciary-dominated.²⁷ Chaired by the Chief Justice, the JSC's roughly two dozen members are drawn in substantial part from the political branches — the President's nominees, members of the National Assembly, delegates of the National Council of Provinces, and the Minister of Justice — alongside judges, practising advocates and attorneys, and academics.²⁸ Candidates are interviewed in public sessions, with reasons for selection and rejection placed on the record and open to scrutiny by the legal profession and civil society. The South African experience does not suggest that political participation is costless — the JSC has itself faced criticism for the unwieldiness of a twenty-five-member body and for occasional politicisation of its interviews — but it demonstrates, contrary to the premise underlying much of the Fourth Judges Case, that a body in which sitting judges are a minority can

²⁵Appointments of Justices, U.K. SUPREME COURT, <https://supremecourt.uk/appointments-of-justices>.

²⁶Id.

²⁷S. AFR. CONST., 1996, § 178; Judicial Service Commission Act 9 of 1994 (S. Afr.).

²⁸Judicial Service Commission (South Africa), [https://en.wikipedia.org/wiki/Judicial_Service_Commission_\(South_Africa\)](https://en.wikipedia.org/wiki/Judicial_Service_Commission_(South_Africa)) (last visited Aug. 8, 2026).

operate for decades without collapsing judicial independence, precisely because independence is secured by public process and reasoned justification rather than by numerical judicial control.

C. Lessons for India

Neither comparator suggests that India ought to import a foreign model wholesale. What both suggest, more modestly, is that the Indian debate has too often been framed as a binary — judicial primacy or executive capture — when the operative variable in comparative experience is neither judicial numbers nor executive presence as such, but transparency of criteria, publicity of process, and the availability of reasoned justification for both selection and rejection. India's difficulty has never been the mere presence of non-judicial actors in the room; it has been the absence, under either the Collegium or the NJAC, of a process capable of being examined from outside.

VIII. TOWARD A STRUCTURAL ALTERNATIVE

Building on the diagnosis above, this article proposes a tiered, criteria-driven framework rather than a single national commission of the kind Parliament attempted in 2014.

First, regional appointment commissions should be constituted for defined clusters of States, each comprising the Chief Justice of the relevant High Court, its two senior-most judges, one nominee of the State government, and two members drawn from academia or the organised Bar — a composition that preserves a judicial majority while introducing external perspective, in contrast to the NJAC's six-member body in which judges held only three of six seats and no working majority. Second, selection should proceed against codified, published criteria — reported judgments, procedural conduct, research output, and a verified integrity check conducted by an independent agency — replacing the undocumented seniority-and-acquaintance practice that currently governs Collegium deliberations. Third, appointments to the Supreme Court should be drawn from a pool of High Court judges recommended by the regional commissions to a central commission constructed on the same judiciary-majority, mixed-membership principle. Fourth, a standing transparency and grievance unit, independent of both the regional and central commissions, should be empowered to receive and publish reasoned responses to specific complaints of bias or irregularity in individual recommendations — the accountability layer that neither the Collegium nor the NJAC ever built.

This structural reform is, moreover, incomplete without its accountability counterpart. The Judicial Standards and Accountability Bill, 2010, which lapsed with the dissolution of the fifteenth Lok Sabha, had proposed precisely the kind of oversight mechanism — a scrutiny panel, an investigation committee, and a mandatory declaration of judicial assets — that the appointments debate has consistently treated as a separate question when it is, in substance, the other half of the same institutional problem.²⁹ Restricting post-retirement appointments of Supreme Court and High Court judges to positions genuinely independent of executive patronage, permitting only district judiciary appointees to occupy government-constituted commissions after retirement, and establishing a secure, technology-enabled channel for verified complaints against sitting judges would together close the loophole that the Ahmadi episode illustrates: a system in which neither entry into, nor conduct within, nor exit from judicial office is subject to any check beyond the judiciary's own discretion.

IX. CONCLUSION

The NJAC judgment resolved a narrower question than it is often credited with resolving. It correctly identified that a six-member commission in which two non-judicial members could jointly veto any recommendation posed a genuine risk to judicial independence. It did not, and could not persuasively, establish that judicial independence is incompatible with any external participation in the appointments process — a proposition that the practice of the United Kingdom and South Africa, whatever their own imperfections, does not bear out. Three decades of Collegium practice have shown that judicial self-selection, left unaccompanied by codified criteria, external verification, or a working accountability mechanism, reproduces the very opacity that motivated the shift away from unchecked executive control in the first place — merely relocating the opacity from one branch to another. India's constitutional challenge, going forward, is not to choose between the Collegium and the NJAC as historically constituted, but to design an appointments framework that a judiciary-majority commission, operating on published criteria, in public view, and answerable through a genuine accountability mechanism, can deliver without surrendering the independence Article 124 was written to protect.

²⁹Judicial Standards and Accountability Bill, 2010, PRS Legislative Research, https://prsindia.org/files/bills_acts/bills_parliament/2010/Judicial_standard_as_passed_by_LS.pdf.