RE-EVALUATING THE MECHANICS OF JUDICIAL APPOINTMENTS AND REMOVAL IN INDIA: A CRITICAL ANALYSIS OF CONSTITUTIONAL INTENT, JUDICIAL INTERPRETATIONS, AND INSTITUTIONAL REFORMS

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Doi: https://doi.org/10.5281/zenodo.21623621

Abstract: The doctrine of the independence of the judiciary forms a foundational pillar of the Indian constitutional framework. However, the process governing the selection, elevation, and removal of judges in the judiciary has historically been a site of intense friction among the Executive, the Legislature, and the Judiciary. This paper critically examines the trajectory of judicial appointments in India, tracing the shift from executive dominated consultation to the creation of the judge led Collegium system. It analyses key judicial precedents including the First, Second, and Third Judges Cases and assesses the constitutional validity and ultimate invalidation of the National Judicial Appointments Commission (NJAC) via the 99th Constitutional Amendment. Furthermore, the paper evaluates the operational mechanics of the Memorandum of Procedure and explores institutional accountability mechanisms, detailing judicial removal processes and legislative developments such as the Judicial Standards and Accountability Bill. Finally, it offers normative recommendations to achieve a balance between judicial independence and public accountability.

Keywords: Judiciary, Executive, Legislative, Judicial Appointment, Consultation, Collegium System, National Judicial Appointments Commission (NJAC), Memorandum of Procedure (MOP)

1. Introduction:

The doctrine of the independence of the judiciary forms a foundational pillar of the Indian constitutional framework. The framers of the Constitution of India designed a careful system of checks and balances among the Executive, the Legislature, and the Judiciary to ensure stable governance, uphold the rule of law, and protect fundamental liberties. However, the institutional mechanisms governing the selection, elevation and removal of judges in the higher judiciary have historically been a site of intense friction among these three branches of state.

Under Articles 124(2) and 217(1) of the Constitution, judges of the Supreme Court and High Courts are appointed by the President after "consultation" with judicial functionaries. While the Constituent Assembly explicitly rejected both executive exclusivity and judicial veto power for choosing a consultative model to ensure co-operative governance based on the functional interpretation of "consultation" has undergone a radical transformation over the past four decades. Through a series of landmark rulings known as the First, Second, and Third Judges Cases, the Supreme Court progressively re-interpreted constitutional provisions, ultimately establishing the Collegium system that has a unique, judge-led mechanism that effectively transferred the primary authority of judicial selection to the judiciary itself.

This paper provides an analytical study of the appointment and removal processes of judges in India. It traces the historical trajectory from early constituent intent to the contemporary Collegium framework. Furthermore, it critically examines the constitutional validity and subsequent invalidation of the National Judicial Appointments Commission (NJAC) via the 99th Constitutional Amendment, analyses the operational impasses surrounding the Memorandum of Procedure, and evaluates existing mechanisms for judicial accountability and removal. Finally, the paper offers normative suggestions to reconcile judicial independence with public accountability and transparency.

2. Historical Background and Constitutional Vision

2.1 The Vision of the Constituent Assembly

During the framing of the Constitution of India, the method for appointing judges to the higher judiciary was extensively debated to ensure both judicial independence and institutional competence. The Constituent Assembly evaluated three primary models:

1. Executive appointments made with the concurrence of the Chief Justice of India (CJI).
2. Appointments subject to confirmation by a two-thirds majority vote in Parliament.
3. Appointments made in consultation with the Council of States (Rajya Sabha).

In responding to these proposals, Dr. B.R. Ambedkar firmly rejected legislative involvement, noting that subjecting appointments to parliamentary approval would expose the judiciary to political pressures and create a cumbersome process. Similarly, the proposal to mandate the concurrence (veto power) of the CJI was rejected. Dr. Ambedkar observed that granting the CJI an absolute veto would effectively transfer total authority to an individual functionary, an outcome the assembly was unwilling to grant to either the President or the CJI.

Consequently, the Constituent Assembly adopted a balanced consultative framework under **Article 124(2)** (for Supreme Court judges) and **Article 217(1)** (for High Court judges). The text deliberately used the word **"consultation"** rather than **"concurrence,"** intending to create a participatory, co-operative process among high constitutional functionaries rather than granting absolute primacy to any single organ.

2.2 Pre-Constitutional and Post-Independence Reform Proposals (1945–1990)

Even prior to the adoption of the Constitution, as well as in the decades following 1950, various committees and commissions frequently evaluated the efficacy of the judicial appointment process:

- Sapru Committee Report (1945): Recommended that judges of the Supreme Court and High Courts be appointed by the Head of State in consultation with the CJI, and additionally with the High Court Chief Justice and Governor for state-level appointments.
- Ad Hoc Committee on the Supreme Court (Constituent Assembly): Suggested a panel system where the President would nominate judges in consultation with the CJI, subject to confirmation by a panel of eleven members comprising judges, legislators, and law officers.
- Fourteenth Report of the Law Commission of India (1958): Headed by M.C. Setalvad, this landmark report criticized executive influence in judicial appointments, observing that selections were

occasionally made based on political expediency or regional considerations rather than pure merit. It recommended reviving the requirement for CJI concurrence.

• Seventy-Ninth & Eightieth Reports of the Law Commission of India (1979): Recommended that while making recommendations, the CJI and High Court Chief Justices should formally consult their senior-most colleagues to ensure collective decision-making.

• One Hundred Twenty-First Report of the Law Commission of India (1987): Proposed the creation of a broad-based, 11-member National Judicial Service Commission representing judicial, executive, and legal academic interests.

• **Arrears Committee (Satish Chandra Committee):** Analysed four decades of judicial appointments and concluded that the system had been weakened by the violation of established constitutional conventions. It recommended amending Article 217 to substitute "consultation" with the "concurrence" of the CJI.

3. The Judicial Evolution: From Consultation to Collegium

The core point of friction in the appointment process of the higher judiciary has consistently been the interpretation of the word "consultation" in Articles 124(2) and 217(1) of the Constitution. Over four decades, the Supreme Court progressively re-interpreted this term through three landmark decisions collectively known as the Judges Cases which show the shifting the centre of power from executive primacy to total judicial primacy.

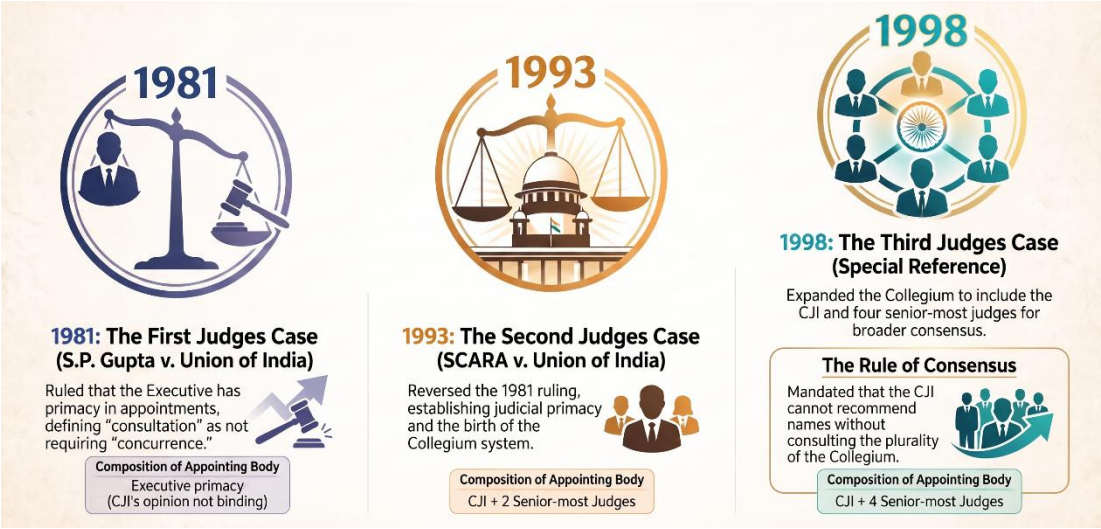


Figure 1: Three Judges cases

3.1. S.P. Gupta v. Union of India (1981) -The First Judges Case

In S.P. Gupta v. Union of India, a seven-judge Constitution Bench examined the validity of High Court judge transfers and the non-confirmation of additional judges. The majority held that:

• Literal Interpretation: The term "consultation" under Articles 124(2) and 217 does not mean "concurrence".

• Executive Primacy: The Central Government holds the ultimate power of appointment and can override the opinion of the Chief Justice of India (CJI) or other constitutional consultees, provided its decision is not based on extraneous considerations.

• Origin of the "Collegium": Although Justice P.N. Bhagwati referred to the desirability of a "collegium" to advise the CJI, the judgment effectively consolidated executive dominance in judicial appointments for over a decade.

3.2 Supreme Court Advocates-On-Record Association v. Union of India (1993) -The Second Judges Case

The correctness of S.P. Gupta was questioned in Subhash Sharma v. Union of India (1991), leading to a reference to a nine-judge Bench. In SCAORA (1993), the Supreme Court overruled S.P. Gupta in a 7:2 majority decision, fundamentally reshaping Indian constitutional law:

• Judicial Primacy**:** The Court held that in the consultation process, the opinion of the CJI holds primacy. This was justified on the grounds that the judiciary is best equipped to assess the legal acumen and suitability of candidates.

• Creation of the Collegium System**:** To prevent arbitrary individual decision-making, the Court ruled that the CJI's opinion must be formed in consultation with a collegium of senior colleagues. The CJI was required to consult the two senior-most puisne judges of the Supreme Court.

• Role of Executive: The executive's role was reduced primarily to verifying candidate antecedents and security clearances. If the executive raised objections regarding antecedents, but the Collegium unanimously reiterated its recommendation, the appointment became binding on the President.

3.3. The Third Judges Case (1998)

Following persistent operational confusion and doubts raised by President K.R. Narayanan regarding the consultation norms, the President made a reference to the Supreme Court under Article 143 of the Constitution.

A nine-judge Bench unanimously answered the reference, reinforcing judicial primacy while formalizing and expanding the structure of the Collegium:

1. Supreme Court Appointments & Transfers: The CJI must consult a Collegium consisting of the four senior-most puisne judges of the Supreme Court.

2. High Court Appointments: The CJI must consult a Collegium consisting of the two senior most puisne judges of the Supreme Court, alongside input from senior judges conversant with the parent High Court.

3. Written Opinions**:** All consultation responses among Collegium members must be recorded in writing and transmitted to the Government of India as part of the official record.

4. Binding Reiteration**:** If a recommendation is made without adhering to the Collegium consultation process, it is not binding on the executive.

3.4 Jurisprudence and Critique of the Transformation

The transition from S.P. Gupta to the Third Judges Case effectively altered the constitutional text without a formal legislative amendment under Article 368. Critics argue that the Judiciary created a mechanism where sitting judges appoint their successors—a structure unprecedented in other major constitutional democracies. Proponents, however, maintain that judicial primacy is an indispensable safeguard needed to protect the Independence of the Judiciary, which constitutes a basic feature of the Indian Constitution.

4. The NJAC and the Doctrine of Judicial Independence

In an attempt to introduce transparency and accountability into the judicial appointment process, the Indian Parliament enacted the National Judicial Appointments Commission (NJAC) Act alongside the 99th Constitutional Amendment. This legislative overhaul sought to dismantle the judge-led Collegium system and replace it with a more participatory framework involving both the executive and civil society.

4.1 Composition and Mechanics of the NJAC

The NJAC was structured as a six-member commission designed to balance judicial and non-judicial voices. The commission was to be composed of:

- The Chief Justice of India (ex-officio Chairperson).
- Two senior-most judges of the Supreme Court.
- The Union Minister of Law and Justice.
- Two "eminent persons".

The two eminent persons were to be selected by a high-level committee comprising the Prime Minister, the Chief Justice of India, and the Leader of the Opposition in the Lok Sabha. The primary function of the NJAC was to recommend candidates for the positions of Chief Justice of India, Judges of the Supreme Court, and Chief Justices and Judges of the High Courts, ensuring that appointments were based on ability, merit, and specified regulatory criteria.

4.2 The Veto Power Controversy

The core of the constitutional conflict surrounding the NJAC lay in its procedural mechanics, specifically Section 6(6) of the NJAC Act. This section mandated that if any two members of the commission did not agree with a recommendation, the NJAC was unauthorized to put forth that candidate's name. Because three out of the six members were non-judicial (the Law Minister and the two eminent persons), this provision essentially granted a veto power to the political class and civil society. Critics argued that this structural design made the selection process dangerously susceptible to political influence, allowing the executive to block judicial appointments on political considerations.

4.3 The Supreme Court Verdict and the Basic Structure Doctrine

In October 2015, a five-judge Constitution Bench of the Supreme Court struck down the 99th Constitutional Amendment and the NJAC Act, rendering them non-functional. The majority held that the NJAC violated the Basic Structure Doctrine of the Constitution, specifically by compromising the independence of the judiciary. The Court concluded that the primacy of the judiciary in the appointment process forms the essence of the Constitution and cannot be tampered with or diluted by

vesting veto powers in the executive or non-judicial members. Consequently, the Court applied the Doctrine of Revival to reinstate the Collegium system.

4.4 The Dissenting View of Justice J. Chelameswar

The judgment, however, was not unanimous. Justice J. Chelameswar provided the sole dissenting opinion, offering a significant critique of the majority's reasoning. He argued that "judicial independence" does not inherently mean "judicial primacy" in appointments. Addressing the severe flaws, opacity, and historical disasters associated with the Collegium system, he maintained that the participation of civil society and the executive was justified to eliminate institutional maladies. He further noted that the absence of strict guidelines in the original constitutional text did not render the design of a participatory commission defective. Ultimately, however, the majority perspective prevailed, legally codifying that structural judicial primacy is an inescapable prerequisite for maintaining judicial independence in India.

5. Comparative Analysis of Contemporary Mechanisms

The debate over judicial appointments in India is best understood not only through its internal constitutional history but also by comparing domestic proposals with established international frameworks. The structural evolution from the Collegium system to the National Judicial Appointments Commission (NJAC), and presently to the negotiations surrounding the Memorandum of Procedure (MoP), highlights a continuous search for equilibrium between judicial autonomy and democratic accountability.

5.1 Domestic Frameworks: Collegium, NJAC, and the MoP

Domestically, three primary mechanisms have dominated the discourse:

- **The Collegium System:** Characterized by absolute judicial primacy, this mechanism relies on closed-door consultations among the Chief Justice of India and senior puisne judges. While it successfully insulates appointments from executive interference, it suffers from a pronounced lack of transparency and an absence of formal eligibility criteria.

- **The NJAC:** This model attempted to integrate executive and civil society participation into the selection process, effectively establishing a joint-veto system. Although it promised greater accountability, it was judicially invalidated for threatening the independence of the judiciary.

- **The Memorandum of Procedure (MoP):** Following the invalidation of the NJAC, the Supreme Court directed the drafting of a revised MoP to reform the Collegium from within. The proposed MoP suggests the establishment of an institutional secretariat, formal criteria emphasizing seniority and merit, mechanisms for recording reasons in writing for overlooked candidates, and provisions allowing the executive to reject candidates on grounds of "national security".

5.2 Global Perspectives on Judicial Appointments

An analysis of global democratic practices reveals that no other major nation vests the power of judicial appointments exclusively within the judiciary itself. Other jurisdictions successfully employ diverse mechanisms to protect judicial independence while ensuring systemic transparency:

- **France:** Appointments are guided by a constitutional body, the Conseil Supérieur de la Magistrature. This body makes recommendations to the President and comprises a balance of the

President, the Minister of Justice, prominent public figures, and sitting judges, thereby ensuring judicial primacy without exclusivity.

• **The United Kingdom:** For appointments to the Supreme Court, the Lord Chancellor convenes a selection commission. This commission consults with judges and heads of jurisdiction before recommending a selection, which the Lord Chancellor then notifies to the Prime Minister.

• **Australia:** Judicial commissions emphasize transparency by inviting "expressions of interest" from members of the Bar through public advertisements, ensuring a wide, merit-based selection pool.

• **The United States:** Presidential nominees to the federal bench are subjected to rigorous confirmation hearings in the Senate. This legislative check ensures that nominees undergo extensive public scrutiny regarding their professional records and legal philosophies.

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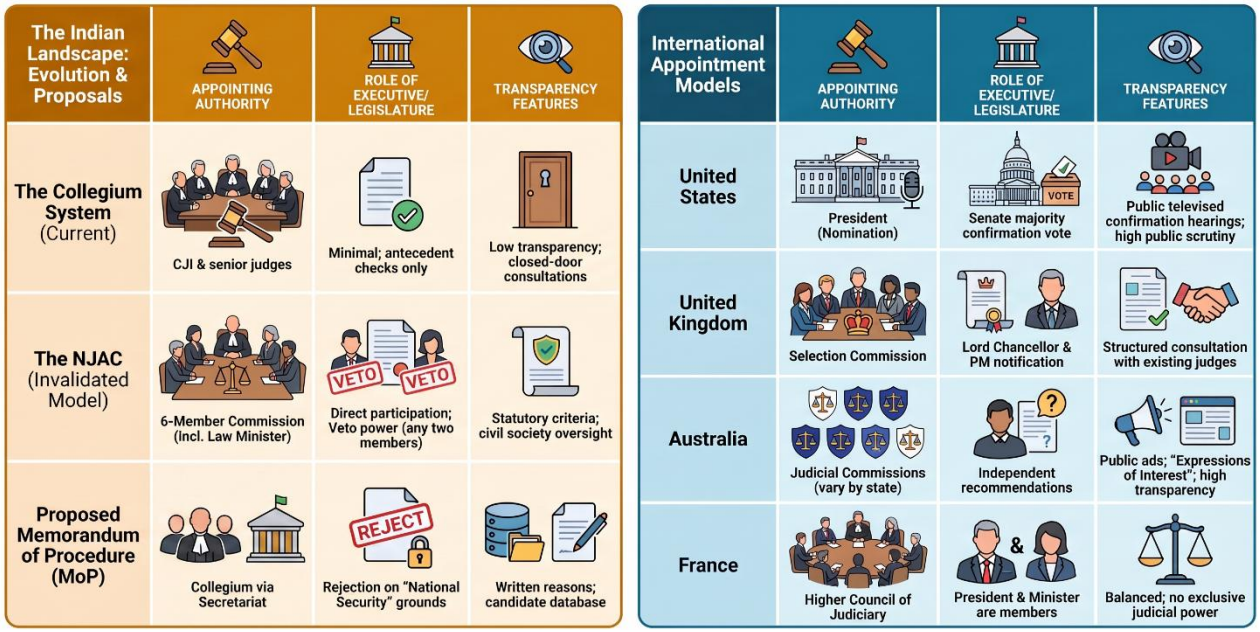


Figure 2: Comparative Analysis of Contemporary Mechanisms

5.3 Lessons for Institutional Reform

The Indian judiciary's total exclusion of executive and legislative input in the final selection of judges remains a global anomaly. The comparative analysis suggests that India's ongoing MoP reforms could benefit significantly from adopting international best practices. For instance, implementing an open application system similar to Australia's "expression of interest" model, coupled with the publication of clear selection criteria and reasons for appointment, could drastically improve the credibility of the Collegium system. Ultimately, a balanced framework must be achieved that respects the Supreme Court's mandate on judicial independence while integrating the transparency mechanisms standard in other modern constitutional democracies

6. Judicial Removal and Accountability

While the constitutional framework stringently protects the independence of the judiciary during the appointment process and throughout a judge's tenure, it also provides mechanisms to ensure accountability. The Indian Constitution does not explicitly use the term "impeachment" for judges, but it prescribes a rigorous procedure for their removal to address instances of judicial misconduct without compromising the institution's independence.

6.1 Constitutional Provisions

Under Article 124(4) (for the Supreme Court) and Article 217(1)(b) (for High Courts), a judge can only be removed from office by an order of the President. This presidential order must be preceded by an address presented by each House of Parliament in the same session. The Constitution restricts the grounds for such removal exclusively to **"proved misbehaviour or incapacity"**. Furthermore, the address must be supported by a special majority: a majority of the total membership of that House and a majority of not less than two-thirds of the members present and voting. Article 124(5) empowers Parliament to enact laws regulating the procedure for the investigation and proof of these grounds.

6.2 Statutory Framework: The Judges (Inquiry) Act, 1968

To operationalize the constitutional mandate, Parliament enacted the Judges (Inquiry) Act, 1968, which lays down a stringent, multi-step procedure for removal:

- **Initiation of Motion:** A removal motion must be signed by at least 100 members of the Lok Sabha or 50 members of the Rajya Sabha.

- **Admittance:** The Speaker or Chairman exercises discretion to either admit or refuse the motion after due consideration.

- **Investigation Committee:** Upon admittance, a three-member committee is constituted, comprising a Supreme Court judge, a High Court Chief Justice, and a distinguished jurist.

- **Adjudication and Vote:** The committee functions with the powers of a civil court to frame charges and investigate. If it finds the judge guilty, the report is laid before Parliament, and the motion is taken up for debate and voting by the requisite special majority.

6.3 Legislative Reforms: The Judicial Standards and Accountability Bill, 2010

Recognizing the laborious nature of the 1968 Act, the Judicial Standards and Accountability Bill, 2010, was introduced to enhance transparency. The Bill sought to replace the 1968 Act by establishing enforceable standards of conduct and requiring judges to declare their assets and liabilities. It proposed a National Judicial Oversight Committee, a Scrutiny Panel, and an Investigation Committee to allow citizens to file complaints regarding judicial misbehaviour. However, the Bill faced significant controversy over concerns that non-judicial members on the Oversight Committee might impinge upon judicial independence, and it ultimately lapsed.

6.4 Historical Instances of Impeachment Proceedings

The complexity of the removal process ensures it is used only in the rarest of cases as a deterrent. Historically, no judge in India has been successfully removed through this complete parliamentary process, though several have faced proceedings:

- **Justice V. Ramaswami (1993):** The first judge to face impeachment on charges of financial abuse. The motion failed in the Lok Sabha as it could not garner the required special majority.

• **Justice Soumitra Sen (2011):** Impeachment proceedings were initiated over the misappropriation of funds. The Rajya Sabha successfully passed the motion by a special majority (the first in Indian history), but Justice Sen resigned before the Lok Sabha could take up the matter, causing the motion to lapse.

• **Justice P.D. Dinakaran (2011):** Faced corruption charges but submitted his resignation to the President before the appointed Inquiry Committee could complete its investigation.

• **Chief Justice Dipak Misra (2018):** Opposition parties submitted an impeachment notice citing "misbehaviour" and misuse of authority in case allocations. The Rajya Sabha Chairman rejected the notice at the admission stage, citing a lack of verifiable facts and stating that the motion undermined the independence of the judiciary.

7. Conclusion and Policy Suggestions

7.1 Conclusion

The independence of the judiciary is an indispensable prerequisite for ensuring a free and fair democratic system and upholding the rule of law. However, the historical trajectory of judicial appointments in India reveals a continuous struggle to balance this independence with institutional accountability. Through the Three Judges Cases, the Supreme Court effectively re-wrote Articles 124(2) and 217 of the Constitution, introducing the "Collegium" system and the concept of judicial "primacy" terms and concepts entirely absent from the original constitutional text.

The Constituent Assembly explicitly rejected the term "concurrence" in favor of "consultation" to mandate a cooperative, consensual decision-making process between the executive and the judiciary. By interpreting "consultation" as binding concurrence, the judiciary usurped the appointment function, disturbing the delicate constitutional balance and shielding the process from public scrutiny. While the National Judicial Appointments Commission (NJAC) represented a legislative attempt to restore equilibrium, its invalidation by the Supreme Court on the grounds of violating the Basic Structure Doctrine means that the opaque Collegium system continues to hold the field. Ultimately, while judicial independence must be fiercely protected during the functioning of judges, extending this absolute exclusivity to the appointment process remains a global anomaly that demands urgent reform.

7.2 Policy Suggestions

To cure the systematic deficiencies of the current framework without compromising the independence of the judiciary, the following policy interventions are recommended:

• **Implement an Open Application Mechanism:** Drawing inspiration from the Australian model, the system should invite "expressions of interest" from members of the Bar through public advertisements. This would democratize the selection process and ensure a wider, merit-based talent pool.

• **Establish Transparent Evaluation Criteria:** The Collegium must transition from an informal evaluation process to one based on objective, published criteria (such as case disposal rates, landmark judgments, and integrity). The reasons for elevation—or for overlooking senior candidates—should be recorded and made accessible to the public, striking a balance between transparency and necessary confidentiality.

• **Institutionalize a Dedicated Secretariat:** As proposed in the Memorandum of Procedure (MoP) negotiations, establishing a permanent secretariat independent of the executive but holding parity with the Supreme Court Registry would streamline the vetting process and maintain a comprehensive database of candidates.

• **Design a Balanced Judicial Commission:** A future constitutional amendment should aim to establish a National Judicial Commission that incorporates international best practices, such as those seen in France or the United Kingdom. Such a commission should be broad-based, involving the judiciary, legal academics, and the executive, ensuring that the judiciary retains a dominant, but not exclusive, voice.

As the eminent jurist Soli Sorabjee observed, while it may be preferable to trust judges over the executive, the Collegium system must evolve to become more broad-based and transparent to retain public confidence. A reformed, transparent, and accountable appointment mechanism is not merely an administrative necessity; it is vital for the survival and flourishing of India's democratic ethos.

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