Positive and Normative Perspectives on Independence in Judicial Appointments

Shruti Rajagopalan
Assistant Professor of Economics,
Department of Economics,
State University of New York, Purchase College.

Research Fellow,
Classical Liberal Institute,
NYU School of Law.

Email: shruti.rajagopalan@purchase.edu

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"There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured."

BR Ambedkar, Constituent Assembly Debates, 24th May, 1949.

1. Introduction

Appointment of judges to the High Courts and the Supreme Court has been a subject of contention and the last seven decades have witnessed different methods of appointment with varied results. The primary concern is to foster independence in appointment of judges (which will thereby foster independent judicial decision-making) against threats from other branches of government, mainly the executive. There has been an ongoing conflict on the matter between the executive and the judiciary.

In this paper, I use the most basic conception of judicial independence. This is the idea that a judge ought to be free to decide a matter without fear or anticipation of extra-legal punishments or rewards. Appointments, salary, promotions, transfers, tenure, post-tenure appointments, dismissal, etc. can either be used as instruments of control, or can be designed to protect and enable judicial independence. The question, while designing political systems, is to evaluate the robustness of these different tools. In this note, I mainly consider the method of appointment, though tenure, promotions, and transfers also feature briefly.

In Section II, I evaluate the three main systems of appointment that have existed or are under consideration in India. The first is the system of appointment under the original Article 124(2), followed from 1951-1993 (System I). The second is the system of appointment by the Collegium, following the *Second Judges Case*[1] from 1993 until present times (System II). The third is the procedure for appointment by the National Judicial Appointments Commission (NJAC), which has not been implemented after being struck down by the Supreme Court in 2015[2] (System III). I

[1] *Supreme Court Advocate-on-Records Association v. Union of India*, (1993) 4 S.C.C. 441
[2] *Supreme Court Advocates-on-Record Association v. Union of India* Writ Petition (Civil) No. 13 (2015) [hereinafter *Fourth Judges Case*]

analyze the robustness of these three systems of judicial appointments to capture by interests within and outside the judiciary.

In Section III, I suggest a new procedure for judicial appointments to create a more robust framework for fostering independence in judicial appointments. In Section IV, I detail and explain the economic principles used for designing the new procedure in Section III. The main goal (in the design of the appointments procedure as laid out in Section III based on the principles outlined in Section IV) is to find a way to secure Ambedkar's vision of finding a system of judicial appointments that is independent from the executive interference, but also competent and capable of upholding constitutional values. In Section V, I conclude.

II Systems of judicial appointments in India

In evaluating judicial appointment systems, I consider two types of threats to judicial independence. The first is external threats, from other branches of government, that prevent judges from deciding matters freely and independently. The second is internal threats, mainly from within the judiciary, especially the actions of the Supreme Court Justices in the collegium, that prevent other judges in the Supreme Court and High Courts from acting freely and independently.

External threats to judicial independence come mainly from the executive. This threat was heightened during the Emergency where the authority provided to the executive under Article 124(2) and Article 217(1) was used to compromise independent judicial decision making. A second type of threat to judicial independence is internal to the judiciary. Since the formation of the collegium in the *Second Judges Case*, the Indian judiciary has been faced with certain outlier incidents of corruption and nepotism in judicial appointments. The judiciary has been captured by interests within the judiciary, leading to appointments and promotions being made based on service to these interests, as opposed to independent judicial decision-making at the bench.

Both systems of appointment have not been robust to outliers. While System I was not robust against external threats, it is quite robust to interests and threats internal to the working of the judiciary. System II, on the other hand, is not robust against internal threats from within the judiciary, because of the closed, highly opaque system of appointments, promotions, and transfers. But it is robust to external threats. System III has not been implemented, but will be evaluated on its potential vulnerability to these two types of threats.

1. *System I – Appointment by the executive (1951-93)*

System I refers to appointment of judges by the procedure prescribed in Article 124(2)[3] and Article 217(1)[4] of the Constitution. Under these articles, the power of appointment vests in the President. This power is exercised in consultation with the Chief Justice of India (CJI), for Supreme Court appointments. For High Court appointments, the power is exercised in consultation with the Governor of the concerned state and the Chief Justice of the concerned High Court in addition to the CJI. This original method of appointment of judges to the higher judiciary vests the power not completely, but primarily, with the executive.

Articles 124 and 217 do not establish clear procedures outlining the limits of power of the various offices. The consultative process described in these Articles is silent on whether the consultation with the CJI are binding, or merely suggestions; the precise limits of executive authority in ignoring the recommendations of the CJI, etc. The procedural gaps left by these Articles were filled by norms and conventions.

The provisions in Articles 124(2) and 217(1) are not robust to threats of outlier actions from the executive. This is because the procedure in these articles did not bind or constrain members of the executive by specifying the limits to the executive power or by specifying the extent of the judicial power. Where members of the executive bound themselves through norms and conventions, this led to outcomes in judicial appointments which largely preserved independence of the judiciary. However, given the absence of binding constraints, outliers in the executive could run havoc and threaten judicial independence.[5]

In addition to the procedure in these articles, some conventions were specifically established regarding the consultative process to appoint the CJI. The appointment of the senior-most judge of the Supreme Court as the CJI was the convention since the very beginning of the Indian Republic.[6]

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[3] Art. 124(2): "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal 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 for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted: ..."

[4] Art. 217(1): "Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years …"

[5] Concerns regarding the preservation of the independence of judicial decision-making, as well as the robustness of the provisions of judicial appointments in the Constitution were raised as early as 1958 in a Law Commission Report.

[6] The first Supreme Court bench as well as some state High Courts preceded the Republic of India. The first Supreme Court was the British Federal Court under a different name and Chief Justice Kania of the British Federal Court was appointed the first Chief Justice of the Supreme Court of India. When the CJI died in office, the senior-most judge on the Bench, Justice Sastri was appointed CJI. It is believed that Nehru personally preferred Justice MC Mahajan, who was

In appointing 25 CJIs, from 1950 until the *Second Judges Case* in 1993, this rule of seniority was broken only twice - both during Mrs. Indira Gandhi's tenure as Prime Minister - with the appointments of Chief Justices Ray, and Beg.

This convention was broken to create a committed judiciary by punishing independent judges. Immediately after the unfavorable judgement in the *Kesavananda Bharti v. State of Kerala*[7], Mrs. Gandhi's government broke the convention of seniority. Justice AN Ray, who had unequivocally supported the government and led the minority opinion, was appointed CJI. This appointment was made by superseding three senior judges in the Supreme Court who had supported the majority opinion against the government. Similarly after the unfavorable dissent by Justice HR Khanna in *A.D.M. Jabalpur v. Shivkant Shukla*[8] he was superseded for appointment as CJI. Instead the government appointed Justice Beg as the CJI, because he had given a favorable verdict to the government in the same case.

These threats to judicial independence did not affect only the appointment of the CJI. During the Emergency, sixteen High Court judges were transferred immediately after they gave verdicts unfavorable to the government. In addition, during the Emergency, Mrs. Gandhi attempted to stack the Supreme Court with judges favorable to the government policy. After unsuccessful attempts to completely commit the judiciary to government policy, Mrs. Gandhi changed course and decided to reduce the purview of the courts through constitutional amendment.[9] Before these changes could take effect, Mrs. Indira Gandhi lost the general elections after the Emergency and, by the end of 1977, another amendment was introduced in Parliament to undo the restrictions placed by her government on the judiciary.

Outlier events in the executive, like Mrs. Gandhi's second term followed by the Emergency, can and have changed the pattern of judicial appointments. The appointment procedure under Articles 124(2) and 217(1), as well as the transfer procedure in Article 222, are not robust to such outliers in the executive, and therefore very fragile in the face of external threats.

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also on the bench at the time. However, the Supreme Court judges threatened to resign if there was any executive interference by breaking the rule of seniority, and the government yielded (Gadbois 2011: 39).

[7] (1973) 4 S.C.C. 225

[8] (1976) 2 SCC 521

[9] The Forty-Second Amendment stripped the Supreme Court of jurisdiction to review state laws and stripped the High Courts of the states of the power to review central laws among other procedural changes. The Constitution (Forty-Second Amendment) Act, 1976 was the most comprehensive constitutional amendment and had important implications on the procedure to amend the constitution as well as on substantive rights.

This fragility of the system resulted in both Type I errors[10] (or false positives) as well as Type II errors[11] (or false negatives) in appointments under the original Article 124(2). In the context of judicial appointments; Type I errors occur when judges who "should not" have been appointed to the bench as per procedure, convention, or judicial standard, are in fact appointed to the bench. Type II errors occur when candidates who "should have" been appointed to the bench were not appointed. In the case of events during Mrs. Gandhi's second term as Prime Minister; the appointment of Justices Ray and Beg as the CJI, can be categorized as Type I error. The supersession of Justices Hegde, Shelat, Grover, and Khanna can be categorized as Type II errors.

Type I and Type II errors are much more difficult to identify for appointments and transfers, and easier to identify for promotions, within the Indian system. Such errors have certainly been made by the executive in appointments, promotions, and transfers over the years, though these errors may not be as obvious or grave as the events during the Emergency.

During this time, historical accounts perceive a high level of overall integrity and quality within the judiciary. And while the bench had always been a very collegial environment with many close bonds between judges and between judges and members of the bar; cases of corruption, nepotism, and scandal were relatively infrequent.[12] Aside from the consultative process in Articles 124(2) and 217(1) giving certain powers to the CJI, other senior judges had little formal role to play in appointments, promotions, and transfers; though informally senior judges in the Supreme Court were very influential. However, this system was still quite robust to internal threats from within the judiciary.

2. System II – Appointment by the Judiciary (1993 – Present)

The events during Mrs. Gandhi's second term as Prime Minister led to a shift in the meaning of judicial independence. Independence was now much more narrowly understood as the independence from executive dictating judicial appointments without the consent of the CJI. As a result of this shift, members of the bar and bench felt that independence of the judiciary could only be achieved by giving a more powerful position to the CJI to counter the excesses of the executive.

[10] Type I error, also known, as a "false positive" is the error of rejecting a null hypothesis when it is actually true.
[11] Type II error, also known, as a "false negative" is the error of not rejecting a null hypothesis when the alternative hypothesis is the true state of nature.
[12] One important exception is the initiation of impeachment proceedings against Justice Ramaswami for misuse of funds, misuse of his office, etc.

This led to a series of cases on judges' appointments and transfers. In the *First Judges Case*[13] the Court limited the unfettered power of the executive on judicial appointments and held that consultation with the CJI should be full and effective and his opinion should not ordinarily be disregarded. The Court also limited the role and power of the CJI as it held that held that the opinion of the CJI was not binding.

In this case, the Court gave a very traditional interpretation of the constitutional provisions, and attempted to read in some constraints to bind both branches of government. However, this still gave the primary power to the executive, with a meagre check of that power in the hands of the CJI. This was not a flaw of the judgement itself. The essential problem was one of poor procedural safeguards in the existing Articles 124(2), 217(1), and 222. Aside from a formal constitutional amendment, there was no easy way to shift the balance of power. Further, a constitutional amendment that curtailed the power of the executive was unlikely to be passed in the Indian setting, where separation of powers between the legislature and executive is quite weak.

This seemed insufficient protection for independence in judicial appointments according to members of the bar and the bench, and this led to a new case initiated by members of the bar, also known as the *Second Judges Case*. It established a collegium comprising the CJI and the senior most judges of the Supreme Court. The collegium now had the power to recommend judges for appointment to the President, and this recommendation of the collegium was *binding*. This was a huge leap in interpretation of the text of the Constitution.

If System I led to a balance of power in disproportionately in favor of the executive with very few checks from the judiciary; System II that followed after the *Second Judges Case* went to the other extreme. It led to a balance of power in disproportionately in favor of the judiciary, with very few checks from the executive. Additionally, the collegium system established in this case was as vague and weak on procedural safeguards, as the provisions under System I.

It took a Presidential reference to clarify the scope and procedures for the operation of the collegium in the *Third Judges Case.*[14] The Supreme Court clarified that the CJI shall consult his four senior most colleagues for Supreme Court appointments and his two senior most colleagues for High Court appointments. The combination of rules formulated in the *Second Judges Case* and *Third Judges Case* govern the system of judicial appointments at present.

[13] *S. P. Gupta v Union of India*, AIR 1982 SC 149.
[14] *Special Reference No.1 of 1998* (1998) 7 SCC 739.

This system has been effective in blocking external threats to independence in appointments from the executive, but it has not proved to preserve judicial independence, mainly from internal threats, i.e. the workings of the judiciary. The main internal threat is that appointments and transfers are made strictly on the preferences of the members of the collegium and not on any other standard of merit. This has resulted in behavior of potential candidates (both within court in their judicial decision-making as well as outside the court in their interactions with the collegium) changing to appease the members of the collegium. There are rumors, allegations, and examples of corruption and misconduct within the judiciary with virtually no method of identifying, confirming, or redressing the problem.

Since the establishment of the collegium, it has become quite difficult to identify Type I and Type II errors. Extreme cases like Justice Sen or Justice Dinakaran, where impeachment proceedings have been initiated, can be categorized as Type I errors made by the collegium. However, Type II errors, which are the instances of judges who should have been appointed but were not appointed, are almost impossible to discern. There are rumors and conjectures that judges like AP Shah, Former Chief Justice of Delhi, should have been elevated to the Supreme Court, based on merit, but were not elevated to the Supreme Court. However, this is subjective, and in the absence of clearly recorded proceedings, Type II errors are only a list of rumors. This is not because the judiciary has not potentially made Type II errors, but because the system is so opaque and closed, that it is impossible to identify these errors.

Recently, when Justice Chelameswar opted out of the collegium, it was revealed that the collegium has never maintained a record of the minutes of its meetings since its inception. This is a completely flagrant abuse of powers granted by the *Second Judges Cases*, as well as a complete rejection and disregard of the procedures laid down in the *Third Judges Case*, where the Court held: "Necessarily, the opinion of all members of the collegium in respect of each recommendation should be in writing. The ascertainment of the views of the senior-most Supreme Court judges who hail from the high courts from where the persons to be recommended come must also be in writing. These must be conveyed by the CJI to the Government of India along with the recommendation. The other views that the CJI or the other members of the collegium may elicit, particularly if they are from non-judges, need not be in writing, but it seems to us advisable that he who elicits the opinion should make a memorandum thereof, and the substance thereof, in general terms, should be conveyed to the Government of India." The opinion further clarified that only unanimous recommendations by all members of the collegium should lead to judicial appointments.

This system has not proved robust to internal threats and has led to allegations of corruptions, nepotism, and sub-standard appointments to the higher judiciary. The main reason is that the procedures to be used, even after clarification in the *Third Judges Case*, are partially vague. And where they are specific, there is no method of enforcement to ensure that the proper procedure is followed to make judicial appointments. Without checks and balances from individuals outside the judiciary, there is no simply way to improve the fragility of this system.

3. *System III – NJAC*

As a reaction to the problems posed by the collegium process; Parliament passed the Constitution (Ninety Ninth) Amendment Act, 2014 accompanied by the National Judicial Appointments Commission Act, 2014. Both the Constitution (Ninety Ninth) Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014 were an attempt to create a new system of appointments to remove the problems faced under systems I and II. In the *Fourth Judges Case*[15], the Supreme Court held both the Constitution (Ninety Ninth) Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014 unconstitutional.

Article 124A provides for the composition of the National Judicial Appointments Commission (NJAC). It comprises of: (1) The Chief Justice of India as Chairperson; (2) two other Judges of the Supreme Court next in seniority to the Chief Justice; (3) the Union Minster for Law & Justice; (4) two 'eminent persons' to be nominated as members of the NJAC by a committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the House of the People or where no such Leader of Opposition, then, the Leader of the single largest Opposition Party in the House of the People.

The NJAC essentially tried to create a system that would be robust to both internal and external threats. The main idea was to have individuals from different branches of government in the appointments commission. However, poor drafting and gaps created a system that is vulnerable to capture by interests in the executive and/or the judiciary. There are three main problems in the NJAC created by the Constitution (Ninety Ninth) Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014.

The first problem is that of the NJACs composition. Two members of the collegium are to be eminent persons chosen by Prime Minister, the Chief Justice of India and the Leader of the Opposition. No qualifications or requirements for persons holding such a post have been detailed in

[15] *Supreme Court Advocates-on-Record Association v. Union of India* Writ Petition (Civil) No. 13 (2015)

the law. One position has been reserved for a women or minority candidate. Further, there are no disclosure requirements for these eminent persons. Members of Parliament have to follow the rules, procedures, and code of ethics associated with holding office. According to the rules formulated by the Election Commission of India and the Supreme Court judgement in *Union of India v. Association for Democratic Reforms*[16] elected members also have asset disclosure requirements. Eminent persons are not required to follow any such codes or disclosures. It is also not clear if these eminent persons can sufficiently oppose the interests of the members of the judiciary and executive to create a robust system. In the process of adding members to the collegium chosen from "outside the political system", the provisions have created a weaker NJAC.

The second problem with the constitutional amendment and the NJAC Act, is that they under-specify constitutional requirements, and leave too much to legislation. Legislation, unlike constitutional amendments, can be changed/ repealed with simple majority in Parliament. For instance, the qualifications mentioned in Article 124(3) for Supreme Court judges, can be changed/clarified by ordinary legislation. The legislation further delegates important functions to the NJAC, which has the power to formulate rules (Section 12). Rules and regulations that are delegated by legislation only need to be laid before the House, and do not require approval even by simple majority. Further, such delegated legislative power extends to extremely important procedural issues. For instance, formulating the criteria and the procedure to transfer judges is delegated to the collegium. This is a very expansive power delegated by Section 12 of the Act, and leaves the door wide open for manipulation and interest group capture that can compromise independence judicial decision-making.

The third problem that plagues the Constitution (Ninety Ninth) Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014 is the lack of procedural safeguards or weakness of such safeguards, even where present. In an even numbered collegium, the law does not specify the member with the casting vote. Nor does the law specify the quorum requirement for constituting a meeting. The lack of a quorum requirement makes it vulnerable to perverse action singularly initiated by the executive or within the judiciary to the exclusion of other branches. With the CJI as the chairman of the commission, without a specified quorum requirement, it is quite easy to convene meetings without members outside the judiciary, and create rules that can serve their interests. In the absence of simple procedural safeguards, the NJAC may not improve upon the current collegium system.

[16] (2002) 5 SCC 294

Since the NJAC has not been constituted since the verdict of the *Fourth Judges Case*, it cannot be judged on its robustness or fragility. However, it is certainly vulnerable to manipulation by interests in the executive, and the judiciary. It is also vulnerable to capture by interests of eminent persons, that are completely unconstrained by elected or appointed office.

4. Evaluation of independence in judicial appointments of the three systems

Table 1: Threats to independence in judicial appointments

	Method of Appointment	**External Threats**	**Internal Threats**
System I	Appointment by Clause 124 (2)	Fragile	Robust
System II	Appointment by Collegium	Robust	Fragile
System III	NJAC	Vulnerable	Vulnerable

All three systems are not robust to preserve independence in judicial appointments. There can be different views on the better of the three systems. This judgement depends on how one views the tradeoff between internal and external threats to independence in appointments. But all three systems fail because of weak procedures that do not adequately safeguard the system from interests of the members.

III Judicial Appointments Commission – A Robust Framework for Independence in Judicial Appointments

This section seeks to outline a more robust framework for judicial appointments, which address the problems in Systems I-III detailed in the previous section. This is a structural framework for appointment of judges to the High Court and Supreme Court.

Composition:

(1) The Judicial Appointments Commission shall consist of:

a. the Chief Justice of India as its ex officio Chairperson;

b. the two senior-most Judges of the Supreme Court as ex officio Members;

c. the senior-most minister in the Ministry of Law and Justice as an ex officio Member;

Provided that if no minister holds an appointment in the Ministry of Law and Justice, the Cabinet Secretariat shall, for the purposes of this Act only, allocate the business of the said Ministry to another member of the Council of Ministers.

d. the Leader of the Opposition[17] in the House of the People as an ex officio Member;
e. A member of Council of States as an ex officio Member, elected by the Council of States, with a vote of not less than 50% of the total membership of the Council of States. The member shall be appointed for a term of three years, and subject to reelection by the Council of States, and for a maximum of two terms.

Quorum:

(2) The quorum to constitute a meeting of the Commission shall be the Chief Justice of India and four members. Provided that;
   a. If the senior-most minister in the Ministry of Law and Justice unable to attend the meeting, he/she provides a written waiver to the CJI to conduct the meeting in his/her absence, as long as the quorum is not less than five members; and
   b. if any post in the commission is vacant, the CJI may, constitute a meeting, as long as the quorum is not less than five members.

Voting:

(3) The Commission shall follow the procedure below to consider and recommend candidates to the President for appointment.
   a. The consideration of a candidate may be initiated by any member of the commission.
   b. Motion to consider a candidate shall require 50% of the votes of those present and voting.
   c. Motion to recommend a candidate to the president for appointment to the Supreme Court shall require the unanimous vote of those present and voting.

Appointment of Chief Justice of India:

(4) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India.

[17] 'Leader of the Opposition' shall have the meaning ascribed to it under section 2 of the Salary and Allowances of Leaders of Opposition in Parliament Act, 1977 (3 of 1977) as the said section applied to the House of the People.

a. The Commission may override the decision to recommend the senior-most Judge of the Supreme Court for appointment as the Chief Justice of India, only if there is a unanimous vote against the appointment of such senior-most judge. In this instance, a vote by the five members of the commission, other than the judge under consideration, shall qualify as a unanimous vote.
b. In case of a successful motion under 4(a), the Commission shall recommend for appointment the judge next in seniority as the Chief Justice of India. To veto the candidacy of the judge, the Commission shall follow the procedure in 4(a).

Procedure for appointment of High Court Judges and High Court Chief Justices:

(5) Candidates may be recommended for appointment using any of the following three methods.
    a. The CJI, on behalf of the Commission, shall request candidates for consideration from the Chief Justice of the High Court, and the Minister of Law and Justice for the State/States. Candidates recommended by the Chief Justice of the High Court and the Minister of Law and Justice for the State shall be considered for recommendation by the Commission under the procedure in 3(b) and 3(c).
    b. Any candidate recommended unanimously by the Chief Justice of the High Court, and the next two senior judges of the High Court, and the Minister of Law and Justice for the State, shall be recommended for appointment by the Commission, unless the motion is vetoed in a unanimous vote against the appointment.
    c. The consideration of a candidate may be initiated independently by any member of the JAC. Provided the candidacy is supported by Chief Justice of the High Court and the Minister of Law and Justice for the State, and unanimously accepted by the Commission following the procedure in 3(b) and 3(c).

Note: In the case of High Courts shared by more than one state, the CJI shall require recommendations from the Minister of Law and Justice of all the concerned states.

Qualifications:

(6) The Commission shall
    a. only consider candidates, who fulfill the requirements in Article 124(3) for appointment to the Supreme Court.

b. only consider candidates, who fulfill the requirements in Article 217(2) for appointment to High Courts.

Commission members' disclosure requirements:

(7) Each member of the Commission shall fulfill the following personal disclosure requirements.
   a. Each member of the commission shall fulfill the asset disclosure requirements for as prescribed by the Election Commission and the Supreme Court.[18]
   b. These disclosures shall be made annually from the date of joining the commission until a period of five years from the date on which they cease to be members of the commission.

Commission proceedings disclosure requirements:

(8) The voting record of the members of the Commission, on every single candidate and every single motion, must be disclosed to the public immediately after the meeting.
   a. For motions that fail to gather unanimous vote of the Commission, individual members shall submit in writing the reasons their vote to the President within one month of the vote. These letters shall be confidential for a period of five years from the date of the vote, and disclosed on a date no later than six years from the date of the vote.
   b. For motions that gather unanimous vote, the reasons may be submitted by the CJI, on behalf of the Commission, to the President. These letters shall be confidential for a period of five years from the date of the vote, and disclosed on a date no later than six years from the date of the vote.
   c. The minutes of each meeting shall be submitted to the President of India. The minutes shall be confidential for a period of five years from the date of the vote, and disclosed on a date no later than six years from the date of the vote.

Post-Tenure Disqualifications:

[18] *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294.

(9) Any judge who is a member of the Commission shall not, for a period of five years from the date on which they cease to hold office, accept any employment either under the Central Government or under any State Government.

IV Principles informing the design of JAC

The foundational assumption for the economic analysis of rules is *methodological individualism*. This is the basic notion that only individuals choose, and only individuals act; and therefore, the understanding and analysis of social processes must be based on choice behavior of individuals participating in the social process (Buchanan 1990). The central feature in this analysis is individual behavior, with the assumption that individuals are pursuing their self-interest, though self-interest is not narrowly defined.[19]

This analysis is a departure from the existing narrative analyzing judicial appointments in India, where the emphasis is on analyzing institutions, as if separable from individuals comprising the institutions. The existing narrative has led to normative policy demands, such as the primacy of the judiciary or the primacy of the executive. In the present analysis, all normative implications extending to institutions follow from positive analysis rooted in methodological individualism.

The positive analysis describes the consequences of individual interests operating in different institutional settings for appointments to the judiciary. This type of positive analysis can inform normative decisions. By using such analysis, from a policy perspective, one must find institutional arrangements that align individual self-interest with social interest.

This idea has not only existed in the economic analysis of politics by academics, but has also found recognition in many key moments in constitutional history. Two are particularly relevant for our purpose. The first is BR Ambedkar's discussion in the Constituent Assembly (1949) on concentration of power in the hands of any one office for judicial appointments.

> "With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel

[19] Self-interest only requires that the interest of an individual's opposite number in the exchange be excluded from consideration. The individual legislator, judge, bureaucrat, or political entrepreneur can be motivated by various reasons. The motivation for the rule change may be that the individual truly believes in a different distribution of resources. But the pursuit of the rule change as an end would be characterized as pursuing his self-interest. See Buchanan and Tullock (1962).

> no doubt that the Chief Justice is a very eminent, person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that is also a dangerous proposition."

The second is James Madison's crucial insight in Federalist No. 51 (1788). The idea that to prevent such concentration of powers, structures must be created, that not only distribute powers, but also balance and check them in a way to minimize the sometimes perverse consequences of self-interested individuals in power.

> "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

1. *Separation of Powers and composition of the JAC*

These two principles outlined by Ambedkar and Madison are the cornerstone of the proposed composition of the JAC. The two threats to judicial independence arise in India from the executive and from within the judiciary. Therefore, the composition of the JAC has members from different branches of government, while ensuring that their interests are sufficiently opposed.

The JAC comprises of three senior most members of the Supreme Court, with individual votes and veto powers. One member of the JAC is from the executive. To ensure that both the judiciary and the executive are appropriately opposed and balanced, and this JAC is not simply a stalemate between the executive and the judiciary, there are two more positions in the JAC. One of these is the Leader of Opposition, whose interests will provide opposition to the interests of the executive. This member has the additional advantage of having low time discounting, thereby protecting the future from the decisions of the collegiums, as members of opposition today are also potential members of future governments. The final member of the JAC is an individual elected by the Council of States. The most important reason for the inclusion of such individual in the JAC is that the election and majority cycle of Council of States is not pro-cyclical with the House of the

People. Due to the staggered nature of elections to this House, it is both possible, and common, to have a majority from groups other than the ruling party in government. The provision to have a member elected by the Council of States provides a further check to the power of the executive.

The first, and most important, benefit of such a composition is that interests of individual members within the JAC are naturally opposed. This makes the concentration of power in any single member, as well as collusion of all members, highly unlikely. A secondary benefit of this composition is that both the starting and ending dates, as well as the length of the terms of the individual members is staggered. This is an important consideration for individual *time discounting*. Individuals will have different discount functions, and thereby different discount rates, while they serve on the JAC. Not all individual members will be driven by short term political exigencies in their decision-making. Even if they are driven by such short term exigencies, these are not likely to coordinate concurrently. This would make it difficult to predict, and therefore manipulate, in advance, the votes and of different JAC members, and the outcome of the vote.

2. *Unanimity Rule*

Majority, as a voting rule, fails to protect minorities, and therefore constitutions explore and detail different voting requirements for different purposes. The essence of the collective-choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they cannot prevent and for which they cannot claim compensation. Ex-ante, it is unclear who occupies the minority position on any single issue, thereby making it more generally beneficial to create voting rules that protect such minorities. Therefore, as individuals make these decisions within a group setting, the first principle in normative constitutional analysis is to protect minorities.

The rule of unanimity makes collective decision-making voluntary in one sense. Under the unanimity rule, there can be no collective action that is detrimental to any individual or minority within the group. Another way to describe the unanimity rule is that every single member of the group has a veto.

Knut Wicksell (1958 [1896]) was the first scholar to examine the attractive normative properties of unanimity as a voting rule. Following Wicksell, a number of scholars have examined the efficiency properties of unanimity rule. If one were to ignore transaction costs, the unanimity rule ensures that all Pareto-superior proposals will be enacted. Most notable is the analysis of the unanimity rule in Buchanan and Tullock's *Calculus of Consent* (1962).

The main concern, in the narrative of the last 70 years on judicial appointments, has been the protection of the judiciary from external threats, mainly from the executive. Threats to the independence of the judiciary during the Emergency precipitated the new system of appointments by the collegiums that is currently in place. The unanimity requirement for judicial appointments completely eliminates such a threat. Unanimous decision making will prevent the tyranny of the executive over the judiciary, as witnessed during the Emergency, because the members of the judiciary and opposition can veto such choices. The normative value of the unanimity rule is that it gives the members of the judiciary veto powers, without concentrating all the power in their hands. Therefore, the unanimity requirement also protects judicial independence from internal threats, such as senior members of the judiciary making decisions based on lobbying, favoritism, nepotism, etc. to the detriment of independent judicial decision-making in lower levels or benches. The three members outside the judiciary, will be able to block proposals that are beneficial to the individual voting members of the judiciary, at the expense of other members and the system of judicial independence.

3. Simple versus Absolute Unanimity Requirement

Simple unanimity rule is one where the motion passes if and only if the Ayes > 0 and the Nays = 0. However, this allows for a possibility where Ayes < N, where N is the group size. Simple unanimity rules can be obtained by having no minimum quorum requirement, resulting in the motion passing with the consent of only those present and voting, but not necessarily all voters. Simple unanimity also allows for abstentions, because abstentions do not get counted, allowing the motion to pass without requiring the entire group to agree.

An absolute unanimity rule is where Ayes = N and Nays = 0. This requires the agreement of all members of the group, either by laying down a high quorum requirement, or a not allowing for abstentions, only Ayes and Nays. Absolute unanimity offers greater protection to minorities and is also more likely to maintain status quo. It also imposes higher decision-making costs.

There are trade-offs between costs imposed by the majority over the minority relative to the costs of decision-making. In these trade-offs, these two different types of unanimity rules serve different ends. Since the primary concern of the Indian judicial appointments system has historically been about potential capture by the executive, the JAC design is based on absolute unanimity rule, with a high quorum requirement of five members and provisions to ensure that meetings are not convened in a hurry, and/or without the consent of all members. This rule also protects the

executive, since only a single member serves from the executive on the JAC. Therefore, no meetings and voting can be convened without the explicit consent of the executive.

Similarly, for the appointment of CJI, the rule followed will be seniority of the judge. The seniority convention is not a rule robust to errors or outliers. However, it provides stability to the leadership in the judiciary, and is a rule that cannot be easily manipulated (since it is determined by date of birth and of joining the judiciary). Therefore, only in exceptional situations should the rule of seniority be violated. A unanimous veto by five members of the JAC (other than the judge under consideration) provides such a mechanism. This is a case where absolute unanimity, though costly, provides the requisite protections, both to candidates under consideration, and also to the judiciary from outlier candidates.

The unanimity requirement is relaxed for motion to consider candidates, mainly as a device to broaden the selection base and also reduce Type II errors. The unanimity rule in the JAC is only required for recommending appointment of candidates.

4. *Unanimity and Logrolling*

If one disregards transaction costs, the unanimity requirement will only pass motions that are Pareto improving i.e. only those motions where at least one individual is better off without making any individual within the group worse off. Where side-payments are allowed, outcomes under the unanimity rule will also satisfy the Kaldor-Hicks efficiency criterion of compensation i.e. the group will only make decisions that create gains sufficiently large to off-set corresponding losses.

Given that the direct buying and selling of votes is typically objectionable in political processes, more indirect and subtle political exchanges might develop. Logrolling is typically the form of political exchange that leads to welfare increasing outcomes, especially when combined with the unanimity requirement.

Logrolling or vote trading can develop in any type of voting rule, not just unanimity rules. However, in any voting rule requiring less than unanimity, vote trading will lead to coalitions that do not include all individuals within the group. Riker (1962) argues that any given vote-trading coalition will contain the fewest voters possible to gain passage of its desired motion, and therefore some members will be left out of the coalition. The benefit of the unanimity rule is that such a coalition must contain all its members. The JAC composition as well as high quorum and unanimous voting and veto requirements ensure that coalitions are not formed to the detriment of any member representing a branch of government.

Logrolling or vote trading can lead to efficient outcomes, and also prevent stalemate situations and help in the passage of motions by creating coalitions in time as well as coalitions over time for repeated plays. Vote trading is a mechanism whereby individual self-interest can be channeled towards building consensus.

Vote trading, or logrolling within the committee decisions will also result in some specific benefits for judicial bench composition. The original constitutional framework envisaged a consultative process, where the decisions for judicial appointments are not made by any branch of government in isolation, but by building consensus between branches of government. Logrolling is one such consensus building device. Consequently, through this process of logrolling, members from the executive and legislature may support the candidates preferred by the judiciary in exchange for members of judiciary supporting candidates preferred by the legislature and/or executive. Secondly, this type of logrolling may lead to a more diverse and balanced bench. This is not simply a question of diversity in region, religion, caste, etc. but also diversity in the style and type of judicial decision-making.

Vote trading can take place along a single dimension or across multiple dimensions. For instance, vote trading may be limited to the single issue of simply exchanging votes to support candidates. Or vote trading can take place on different dimensions such as supporting a candidate in exchange for a favor relating to post-tenure appointments. For the JAC, one must be careful not to let this type of vote trading spill to dimensions that may threaten judicial independence. For instance, vote trading on candidacy should ideally not extend to trades that can compromise independent decision-making on a particular case. Nor should the vote trading extend to selling votes in exchange of explicit payment. Given the unanimity requirement, voting along single dimensions instead of multiple dimensions also makes it less likely to change positions or votes after bluffing or posturing (Aksoy 2011).

There are two provisions that prevent logrolling along multiple dimensions. The first is the individual member disclosure requirement. Each member of the JAC must disclose assets while serving on the commission and for five years thereafter. This will monitor, and thus help reduce, the potential for vote trades for pecuniary benefits. The second is the restriction on members of the JAC holding any appointments in state or central governments for a period of five years. This will reduce vote trading along multiple dimensions, such as post tenure appointments, that threaten the quality of judicial decision-making.

5. Unanimity and Hold-Outs

The main criticism of using the unanimity requirement is that decision-making costs become so high that the voting rule is not practically usable. In the case of unanimity voting with logrolling, individuals are merely taking a stronger bargaining position in order to extract a larger portion of the surplus generated by the Pareto superior outcome. Each member may withhold their vote in order to force others to make concessions. This greater level of posturing creates additional decision costs. This may lead to a situation where Pareto superior outcomes are not chosen. This is also known as the paradox of unanimity (Parisi and Klick 2003).

To solve this problem, voting rules move toward an "almost unanimity" rule. Buchanan and Tullock (1962) model constitutional decision-making behind the veil of uncertainty as an optimization of external costs and decision-making costs. The greater the external costs imposed by a potential majority over a minority in the future, the closer the voting rule to the unanimity requirement. This is reflected in constitutional rules, where the voting requirements to amend the constitution, or impeach judges, is at a higher requirement than the voting requirement for passing ordinary legislation. However, these rules are "almost unanimity" rules, never requiring agreement of every single member. This is in order to reduce decision-making costs.

Extreme cases regarding high decision costs are those involving holdouts. A holdout is a case where even though the group decision will make everyone in the group better off, an individual voter, withholds his vote, strategically, to extract a better exchange from other members of the group.

There is a vast scholarship on the bargaining problem including situations where individuals with vetoes have to bargain over the group decision. In particular, these models usually have individuals bargaining over sharing of a fixed surplus. Following Rubinstein (1982), there are many models that show that bargaining with veto power does not always result in a deadlock. There are models specifically on political processes and decision-making that explore the unanimity voting requirement. Some of the experimental results show that unanimity rules of voting need not always lead to a holdout problem (Laing and Slotznick 1991; Walker et.al. 2000; and Doughtery et. al. 2014).

In comparing unanimity voting to majority voting over group decision, many models assume that the group is voting to a fixed pie or surplus and assume static situations (Baron and Ferejohn 1989). In these circumstances, majority voting, or majority voting with veto power, exhibit superior results to unanimity voting. The problems of unanimity voting described in these models are greatly reduced in a different setting, where there is dynamic decision-making process. Constitutional

matters rarely if ever focus on static situations. Political processes are ongoing so that agreements reached today can sometimes be enforced by punishments applied tomorrow (Chen and Ordeshook 1998). In case of groups that are (1) not dividing a fixed surplus/pie; and (2) are not playing a one shot game; strategic posturing and bluffing will reduce. In these cases, there will be vote trading, however, because of the ongoing nature of the decision-making, and the repeated nature of the player interactions; strategic posturing will be punished in future rounds of decision-making.

Chen and Ordeshook (1998) argue that although a veto may yield deadlock in one period, the unanimity rule may be little more than a device for upgrading the strategic capabilities of minorities so that they are better equipped to protect their rights over the long term. Thus, the unanimity rule merely sets the stage for bargaining among groups, where the consequences of bargaining is a continual stream of outcomes that may or may not be Pareto efficient and that may or may not satisfy various criteria of fairness and equity.

What may be expected in these dynamic and repeated interactions is that while the unanimity rule may lead to a holdout in any one period, it is unlikely to be the predominant nature of the decision-making. Each individual voter will be rewarded for logrolling and participating in other members' welfare enhancing proposals. However, the individual voter will also be punished for successive or multiple holdouts by rejecting their proposals in the future. Because strategic posturing and bluffing is so costly, such behavior will reduce over repeated interactions.

An important characteristic of the JAC is the perpetual nature of the commission. Members enter the JAC in a staggered fashion, and the commission is never dissolved. Since all votes are regarding the candidacy of judges, and given the uncertainty on outcomes regarding judge selection, their position on the bench in the future, etc. - it is unclear that there is a "fixed" pie or surplus generated from the voting outcome. More likely, there is a dynamic nature to the decisions of the commission, thereby creating different margins for bargaining. Due to these factors, holdouts, while not impossible, may not be the mainstay of such a committee.

Finally, the dynamic, and repeated nature of this interaction, ensures that there will be no single, stable, predictable outcome of this interaction, which may be rigged or manipulated in advance. The churning nature of both, the JAC and its members, as well as the voting, will leave very little room for political manipulation ex ante.

It is important to note that not all vetoes are holdouts. Vetoes may result because the outcome under consideration is not a Pareto superior outcome and leaves the individual member worse off. This however implies that the unanimity rule will maintain the status quo. Having veto

power under the unanimity voting rule empowers individuals to stand firm during negotiations. Thus, overall fewer position changes are observed under the unanimity voting rule than under the majority voting rule. This protects minorities by placing them in a better bargaining position than under any other voting rule. The unanimity requirement also enables the individual members to stand firm in their positions. Therefore, efficient vetoes will exist as part of the process.

6. Unanimity with secret versus disclosed voting

When the decision process in a committee is secretive, a key outcome is that committee members conform to preexisting biases in the decision making process. On the other hand, when a committee becomes transparent, it is more likely to accept reforms or radical decisions (see Levy 2007).

Further, each individual member faces the reputations costs of posturing or bluffing hold-outs, within the group as well as outside in the public eye. This is likely to reduce deadlocks and holdouts that are strategic in order to extract the greatest surplus. Instead only vetoes, that block welfare decreasing changes, will prevail.

The JAC is designed to disclose the individual member votes for each motion immediately after the vote. This will help impose reputational costs both within and outside the committee. However, the minutes of the meeting and discussions on individual candidates are not disclosed for a period of five years. This will help protect the privacy of the candidates under consideration, especially candidates who are already sitting judges in lower courts.

7. Federalism

In India the union judiciary exercises a significant amount of control over the state judiciary due to the quasi-federal nature of the Indian system. One concern with the design and structure of JAC is that it can compromise federalism, unless there are procedural checks and balances to protect the states' interests. Specifically, since the members from the union legislature and executive, now have decision-making power over the appointments to state judiciary.

To prevent a complete control by the union over the states, and ensure the protection of the quasi-federal nature of the Indian republic, the procedure to appoint members to High Courts is the most detailed and complicated. There are three different methods to consider and recommend candidates to High Courts. The first is for JAC to vote on candidates recommended by the state judiciary and/or executive. In these cases, the JAC must invite the opinion from the states and then

consider the candidates before confirming them unanimously. However, if there is overwhelming support for a candidate in the state, with unanimous approval from all four members of the state judiciary and the state executive; the JAC must recommend the candidate, unless it unanimously vetoes the candidate. While the union is focally more powerful for appointment to High Courts, the opinions of the state judiciary and executive, cannot be completely ignored, and become binding in certain cases.

5. Conclusion

I analyze the three different methods of appointing judges in India. The first system of appointment by executive in consultation with the CJI under Article 124 has historically proven fragile to outliers from the executive. The second system of appointment by a collegium since 1993 protects against interference of the executive, but is fragile to outliers in the judiciary. And the third system of appointment through NJAC, though not yet implemented, is vulnerable in its present design to threats from both the executive and the judiciary. The reason for the problem of each system caused by poorly designed procedural safeguards.

Positive analysis of rules and procedures can be used to describe past events analytically, as well as predict the consequences of rules in the future. Rooting the analysis in methodological individualism, instead of analyzing institutions, helps understand the importance of procedural safeguards. Procedural rules tend to be more robust than substantive rules because when designed appropriately they involve a designation of who can exercise political power. Thus, they give rise to an additional mechanism that also aids enforcement. Violation of a procedural rule implies diminishing or ignoring the prerogatives of actors who are empowered by it. Even if these actors agree with the underlying purpose of the violation, they are unlikely to accept it because it undermines their basis of influence. Therefore, well designed procedural rules that create checks and balances can lead to a mechanism where opposing interests enforce these rules.

To improve upon the weaknesses of the past systems, and to create a new and more robust system of judicial appointments, I describe rules and procedures that will prove robust to capture by different interests. The principles on which this JAC is designed is rooted in the fundamental idea that individuals are self-interested, and constitutional and procedural structures must be created to constrain individuals in positions of power. The attempt is to give procedural life to Madison's call to counter ambition with ambition, in order to create a system that can preserve independence in judicial appointments.

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