

Positive and Normative Perspectives on Independence in Judicial Appointments

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The Goal

“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

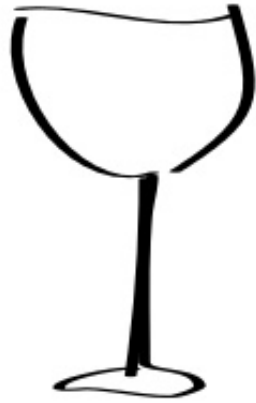
Constituent Assembly Debates, 24th May, 1949.

System of Judicial Appointments

	Type	Period
System I	Appointment by Clause	1950-1993
System II	Appointment by Collegium	1993-Present
System III	Appointment by Commission	Struck Down

Two Types of Systems

Fragile



Robust



Two Types of Threats

1. External Threats

- Members of the Executive

2. Internal Threats

- Senior Members of the Judiciary

Appointment by Clause (1951-93)

Articles 124(2) and Articles 217 (1)

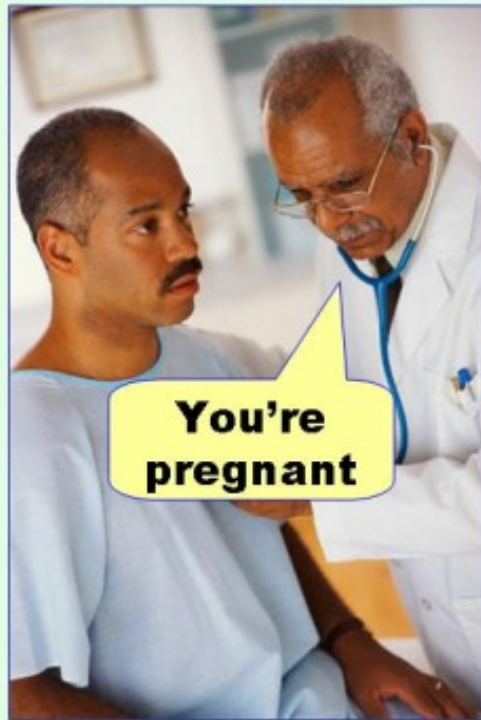
1. The power of appointment vests in the President.
2. This power is exercised in **consultation** with the Chief Justice of India (CJI), for Supreme Court appointments.
3. The power is exercised in **consultation** with the Governor of the concerned state, and the Chief Justice of the concerned High Court in addition to the CJI.

Threats to Judicial Independence

1. *Kesavananda Bharti v. State of Kerala*
 - Appointment of Justice AN Ray as Chief Justice of India
2. *A.D.M. Jabalpur v. Shivkant Shukla*
 - Appointment of Justice Beg as Chief Justice of India
3. Transfer of sixteen High Court Judges during Emergency for giving verdicts against the government.

Type I and Type II Error

Type I error
(false positive)



Type II error
(false negative)



Type I and Type II Error

**Type I Error
False Positives**

Chief Justice Ray

Chief Justice Beg

**Type II Error
False Negatives**

Justice Shelat

Justice Grover

Justice Hegde

Justice Khanna

Appointment by Collegium (1993–Present)

Second and Third Judges Cases

1. Creation of a collegium.
2. CJI shall consult his four senior most colleagues for Supreme Court appointments.
3. Consultation with the CJI is binding.

Selection by Collegium



*“Don’t spread it around, but on the really tough ones,
I just go with ‘eenie, meenie, minie, moe.’”*

Type I and Type II Error

**Type I Error
False Positives**

**Type II Error
False Negatives**

Justice Sen

Justice Dinakaran



Selection by Collegium



"Then we are agreed nine to one that we will say our previous vote was unanimous!"

Threats to Independence in Appointments

	External Threats from the executive	Internal Threats from the judiciary
System I (Appointment by Clause)	Fragile	Robust
System II (Appointment by Collegium)	Robust	Fragile

Appointment by NJAC

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 Minister for Law & Justice.
4. Two 'eminent persons'
 - (nominated 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).

Problems with the NJAC System

1. Eminent Persons
2. Delegated Legislation
3. Weak Procedural Safeguards

Threats to Independence in Appointments

	External Threats	Internal Threats
System I (Appointment by Clause)	Fragile	Robust
System II (Appointment by Collegium)	Robust	Fragile
System III (NJAC)	Vulnerable	Vulnerable

The Goal

“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.”

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Constituent Assembly Debates, 24th May, 1949

Assumptions

1. Methodological individualism.
2. Individuals pursue their self-interest *even in public office.*

Indian Framers

“I personally feel 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.”

BR Ambedkar

Constituent Assembly Debates, 24th May, 1949

Madisonian Solution

“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.”

James Madison

Federalist No. 51, 1788

Robust Systems

*Ambition must be made to
counteract ambition.*

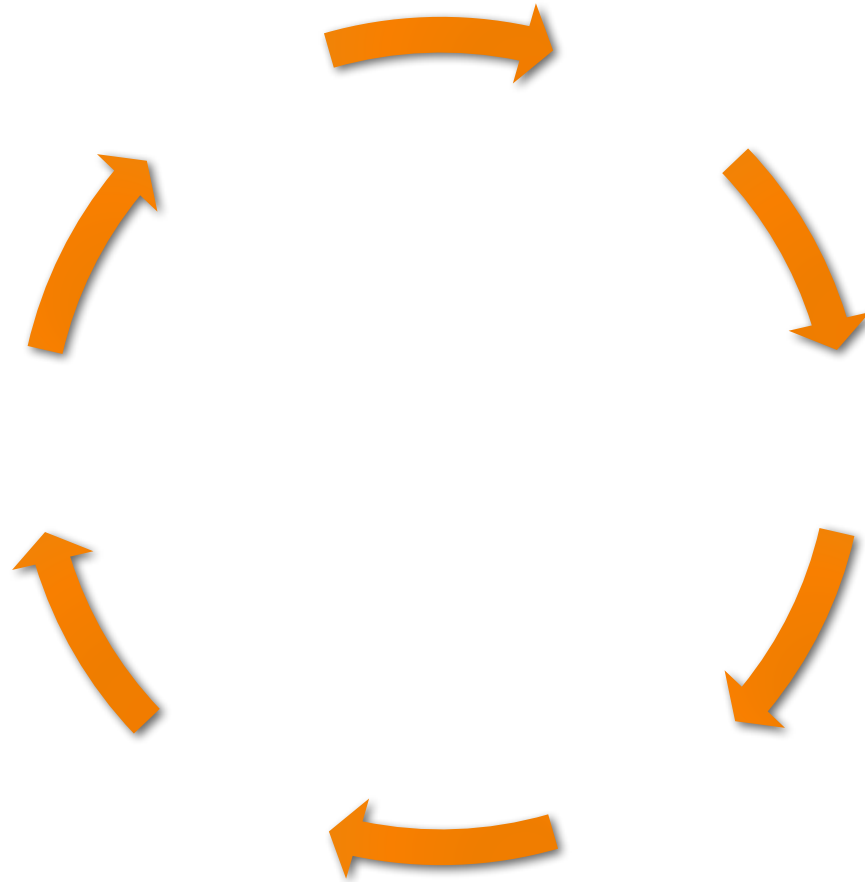
Composition

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 Minister for Law & Justice.
4. Leader of Opposition in the Lok Sabha.
5. Member of Rajya Sabha (elected by the RS).

Composition

1. Leader of Opposition in the Lok Sabha.
2. Member of Rajya Sabha (elected by the RS with a vote of not less than 50% of the total membership of the House).

Composition



Quorum

Quorum will be Chief Justice of India and four members.

Unanimity Condition

Motion to recommend a candidate to the president for appointment to the Supreme Court shall require the **unanimous vote** of those present and voting.

Unanimity Condition

- Eliminates tyranny of the majority.
- Every single member of the group has a veto.
- The voting rule that is the most robust to external and internal threats.
- Only Pareto improving decisions will be made.
- Preserve independence in appointments.

Disclosures

1. Individual members' disclosures

- Asset disclosures for period of service and for five years after.

2. Voting Disclosures

- Immediate disclosure of votes, with reasons for the vote to be made public after five years.

What about hold-outs?

- Dynamic decision-making experience fewer holdouts.
- Positive sum outcomes may experience fewer holdouts than zero sum outcomes. Repeated play may reduce holdouts.
- Open versus secret voting may reduce holdouts.

Benefits of Vote Trading

- Logrolling or vote trading can lead to efficient outcomes, and also prevent stalemate situations.
- Vote trading is a mechanism whereby individual self-interest can be channeled towards building consensus.
- Increase diversity on the bench.

What about collusion/corruption?

Prevent multi-dimension trading by using disqualifications and disclosures.

- Individual member disclosures
- Vote record disclosures
- Disqualify members of the judiciary from appointed office for five years.

Conclusion

1. To improve upon the weaknesses of the past systems and create a new and more robust system of judicial appointments.
2. Constitutional and procedural design must be created to constrain self interested individuals in positions of power.
3. Provide a procedural framework that can safeguard and realize Ambedkar's vision.