

Judicial appointments in India and other countries

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Introduction

For the past few months, we are constantly witnessing a tussle between the judiciary and the centre on the matter of judicial appointments. While the centre advocates on becoming part of the collegium, the judiciary opines this as an intrusion into its area and terms the centre's view as opposed to the doctrine of '[Separation of Powers](#)' which is a part of the basic structure of the [Indian Constitution](#). This article is an attempt to trace how judges' appointments take place in India and other major countries of the world.

Judicial appointment in India

While almost all processes and procedures in the Indian polity are borrowed from different countries, the process of judges' appointment is the result of judicial innovation and is not a borrowed one. In India, judges are appointed as per the collegium system, which is the result of the '[Three Judges Case](#)' adjudicated by the Supreme Court. Until 1993, judges (of the Supreme Court and high courts) were appointed by the President of India after seeking consultation from the Chief Justice of India and two senior-most judges of the Supreme Court. Once the collegium system replaced this process, the President became only a nominal appointing authority. This collegium is entrusted with the work of appointment and transfer of judges in the higher judiciary of India. It is pertinent to mention here that our Constitution is silent on the present prevailing collegium system.

To understand what the Constitution says about the procedure of judges' appointment, we need to refer to [Article 124\(2\)](#) which postulates that the Supreme Court judges shall be appointed by the head of the executive, that is, the President after consultation with such a number of Supreme Court and High Courts judges, as he may deem necessary. Article 124(2) also states that while the President is appointing a judge other than the Chief Justice of India, the Chief Justice shall be mandatorily consulted by the President.

Composition of collegium

The collegium is composed of the Chief Justice of India along with the four senior-most judges of the Supreme Court. This collegium makes recommendations to the President concerning the appointment of judges to the Supreme Court. The collegium, therefore,

consists of a total of five judges. However, presently, this collegium has six members. This is so because it is mandatory to have the prospective Chief Justice in the collegium but none of the four judges in the collegium would be elevated as the Chief Justice. The recommendations by the collegium can be categorised into two types:

1. Firstly, when judges serving the high courts are to be appointed as Supreme Court judges, and
2. Secondly when there is a direct appointment of senior advocates as the judges in the Supreme Court.

The composition of the collegium changes when judges are to be appointed to the high courts. Instead of five, the collegium here consists of three judges, namely, the Chief Justice of India, and two senior-most judges of the Supreme Court. In high courts as well, a collegium system operates which sends its recommendations to the Supreme Court Collegium. The high court collegium is composed of the respective high court's chief justice along with two senior-most judges of that high court.

This collegium sends recommendations about the appointment of judges in the high court to the state government, which further sends these recommendations to the centre along with its inputs. The names of recommended judges are given to the Intelligence Bureau (IB) to conduct extensive background checks. IB on completion of background checks forwards its reports to the Supreme Court Collegium (here collegium is of the Chief Justice of India plus two senior-most Supreme Court Judges). The Supreme Court collegium, after considering the report by IB, sends a list of recommended judges for appointment to the centre.

The centre on receiving recommendations can either accept the appointments or can send the recommendations back to the Supreme Court collegium for reconsideration. The collegium here has the power to again recommend names of those who were required to be considered by the centre. If a name is presented by the Supreme Court collegium to the centre, the centre has to accept the recommendations and thus make appointments. The same procedure is exercised when appointments for Supreme Court judges are to be made. In the case of the Supreme Court's judges' appointment, the first recommendation comes from the Supreme Court Collegium directly and here collegium is of the Chief Justice of India plus four senior-most Supreme Court judges.

Judges appointing Judges

It is ideal to note that the judicial appointment system that is followed in India currently can be idealised as "judges appointing judges". The opinion of the Supreme Court of India majorly being minimal interference of the executive in the judicial appointment and judiciary not sharing the burden of the same with any other wing of the government, comes with exceptions as well. It is noteworthy to mention that while the Apex Court had struck down NJAC ([National Judicial Appointment Commission](#)), it had figured out certain flaws that are attached to the collegium system of India. The contentions that the system is a closed-door one with little or no transparency, have been frequent while talking about the collegium system.

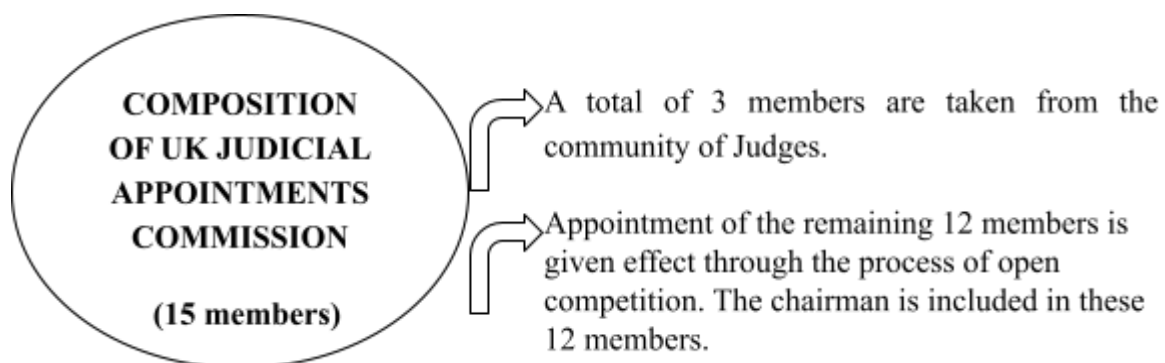
While this view remains one side of the coin, the other side which has thought of implementing a pro-executive judicial model has to necessarily look into the factors that can cause harm to judicial independence (if any) which is inclusive of the independence of judges in their decision-making. The presence of Article 124 in the Indian Constitution, even before the introduction of the collegium system, as has been discussed previously, is a reflection of the legislators' intention of including executive opinion in the process of judicial appointment. This system was underlined with the intention of ensuring checks and balances in the process of judicial appointment. One thing that cannot be forgotten is that the Constitution has not forgotten to incorporate provisions mandating judicial independence and reliance solely on the executive for the purpose of removing judges is also a cumbersome task.

Ideally, the doctrine of separation of power was introduced with the idea of keeping the organs of the government separate from each other but also contributing in the smooth functioning of each other. A perfect example of this uniquely designed model can be seen in the case of the United States. It is the President who is vested with the responsibility of appointing judges of the Federal Court, which *ipso facto* needs to be approved by the majority voting of the Senate.

Scenario of judicial appointment in the United Kingdom (UK)

There exists a Judicial Appointments Commission (JAC) in the UK consisting of a total of fifteen members which is tasked to shortlist persons who would hold judicial offices in various courts and tribunals. This commission works autonomously. In the United Kingdom, the appointment of judges follows a system of checks and balances, that is to say, a body that goes by the name of '[Judicial Appointments Conduct and Ombudsman](#)' is constituted to deal with the complaints lodged against appointments made by the 'Judicial Appointments Commission'.

This body also deals with complaints relating to wrongful conduct exhibited by judicial officers. The JAC is like the National Judicial Appointments Commission (NJAC) which was proposed in India through the [99th Constitution Amendment Act, of 2014](#) but was struck down by the Supreme Court of India in 2015. [An illustration showcasing the system of judicial appointment in the UK have been provided hereunder:](#)



Judicial appointment in the United States of America (USA)

In America, the President is bestowed with the power to nominate judges. The names of prospective nominees are put forth by the members of the Senate. The Senate is having a 'Judicial Committee' which undertakes confirmation hearings for every prospective nominee. A systematic assessment of qualifications to be possessed by the judicial nominees is provided to the 'Senate Judicial Committee' by a standing committee of the [American Bar Association](#).

One peculiar feature of judicial appointments in the United States is that the federal courts' judges occupy offices during good behaviour, unlike in India wherein judges of the Supreme Court hold office till the age of 65 years while the judges of the high courts hold office till the age of 62 years.

Another point of difference between Indian and United States judicial appointments is that, while in India collegium of judges is responsible for judicial appointments, in the United States the executive and legislature are responsible for judicial appointments.

Judicial appointment in other nations of the world

As we have got an idea about judicial appointments in India, USA and UK, it is now necessary to have a look into the other nations so as to get an idea about how India stands at par with the world or instead provides an ideal example of judicial appointment to the world which the latter should take inspiration from.

Russia

There are two types of courts functioning in Russia, namely, the federal courts and the Court of the Objects of the Russian Federation. Just like in India, Russia has a system of collegium performing the functions of selection, appointment, and promotion of judges. The matter of the discipline of judges is also handled by such a collegium. The collegium of Judges in

Russia is constituted through a process of elections. The judicial community from amongst their representatives elect judges who would become part of the collegium. Here, the manner of composition of the collegium is distinguished from the way the collegium is formed in the Indian judiciary. Indian judiciary conducts no election to constitute a collegium body, rather the Chief Justice of India along with four senior-most Supreme Court judges make up the collegium body. Also, the list of prospective judges prepared by the collegium in Russia is forwarded to the President of Russia.

The Russian President can refuse to appoint the recommended candidate as the judge. The Russian President is at complete liberty to give an unreasoned order of refusal. Therefore, the Russian President is far more powerful than the collegium, unlike the Indian President, when it comes to the appointment of judges.

France

In France, the executive has a major role to play in judges' appointments. Some even term judicial appointments process in France as a bureaucratic affair. A body, [The High Council of the Judiciary](#), consisting of twenty members from the judiciary itself appointed by the head of the state, that is the President, sends recommendations to the President concerning judicial appointments. 'The High Council of Judiciary' is presided over by the President of France and the Minister of Justice in France is its ex-officio Vice-President.

There exists a blend of judiciary and executive in France to give effect to the process of judges' appointments. In India, the list of prospective judges comes from the collegium and then is forwarded to the executive. In India, while the Supreme Court is regarded as the 'Guardian of the Constitution', In France, a 'Constitution Council' exists which is bestowed with the review powers of parliamentary legislation. This body, in France, is termed as the 'Guardian of the Constitution'.

Latin America

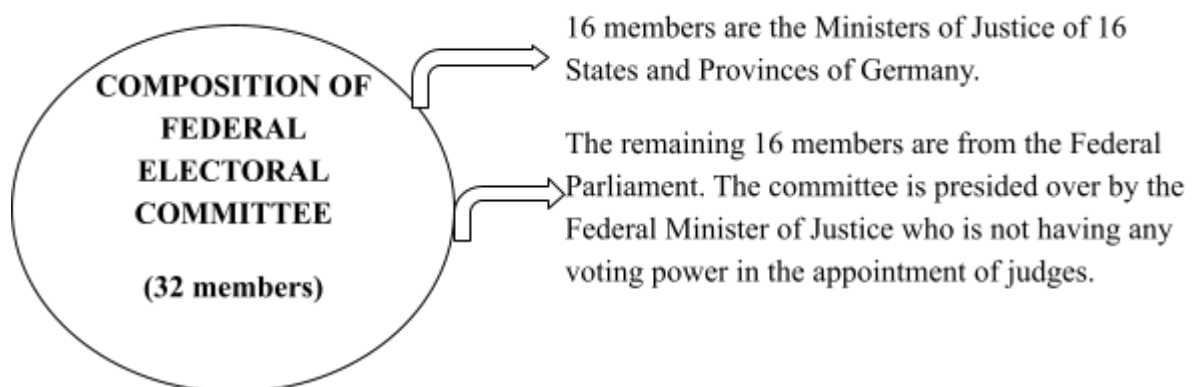
In the majority of Latin American countries, the President of the country generally nominates judges to be appointed in courts. Once the nomination has been made, the concerned Senate then approves the nomination made by the President. The role of the executive and legislature in judges' appointments, thus is quite significant. Such a process is followed in countries like Brazil, Argentina, etc. Judges themselves do not take part in their appointment and the executive has the entire say in their appointment. These countries differ in the judicial appointments process in India as Indian judicial appointments are made through a collegium system while in most Latin American countries the concept and process of the collegium are absent.

Germany

In Germany, the appointment of judges is made by the executive and legislature. A certain degree of participation is made by the judiciary too. This participation by the judiciary is made possible through two types of bodies namely, 'Judicial Electoral Committees' and 'Advisory Bodies'. Germany's judiciary is composed of 'The Federal Constitutional Court' and a total of five 'Federal Courts'. Sixteen judges are appointed in the 'Federal

Constitutional Court'. Eight of these judges are elected by the upper chamber of Germany's parliament. The appointment of the remaining eight judges is taken care of by the lower chamber of parliament. The Federal Minister of Justice in Germany prepares two lists of prospective judges. One list consists of judges from the federal courts while another list is composed of persons recommended by the political parties in the German parliament.

In the lower chamber, a parliamentary committee is formed with a total of twelve members. These members make decisions as to the appointment of judges. The appointment of judges is finalised with a majority vote of two-thirds. The judges of five federal courts are appointed by the 'Federal Electoral Committee'. This committee is composed of thirty-two members.



Therefore, in Germany, judicial appointments are given effect by the executive and legislature. The role of the judiciary is only advisory in nature. The existing judges can opine on the personality traits and aptitude level of the candidates short-listed to be appointed as judges but the final say is of the executive. In India, the judicial collegium is not advisory but rather has much more overpowering value in comparison to the executive.

South Africa

In South Africa, the President nominates the judges after seeking consultation from the 'Judicial Services Commission'. This commission is made up of 23 members. These members come from the community of judges, advocates, members of parliament, and legal professors, and certain eminent members are also nominated by the President as members of 'The Judicial Services Commission'. This commission is somewhat similar to the 'National Judicial Appointment Commission' which was struck down in 2015 by the Indian Supreme Court. While in India, the executive has no power to oust any collegium member, in South Africa, the members of the Judicial Services Commission hold office during the pleasure of the parliament.

Italy

The Federal Constitutional Court is the highest judicial court in Italy. This court is composed of 15 judges. One-third of these 15 judges are appointed by Italy's President, another one-third by the parliament, and the remaining judges are appointed by the ordinary and administrative courts. The parliament conducts a joint session for the appointment of judges. So, Italy's judicial appointments have an active role of parliament and the executive, unlike India, where the executive plays a passive role in judicial appointments.

China

The highest court in China is the Supreme People's Court wherein the judges' appointment is by the National People's Congress. In other lower courts like Local People's Courts and Military Courts, appointments are made by a 'Judicial Commission' set up by the Chinese Government. To oversee the behaviour of judges and to either promote or remove them is the responsibility of the Standing Committee set up by the People's Congress. So, in China, the judges' appointment is the responsibility of the legislature and the judiciary has no role to play in it. The appointment of judges in China is a lopsided process wherein existing judges and other stakeholders have no role- neither binding nor advisory.

Conclusion

After analysing the processes of judicial appointments in almost all major countries, we can safely say that judicial appointments are effectuated with an active role of legislature and executive. There is no strict application of the principle of 'separation of powers' when it comes to judicial appointments. The only exception here is India wherein, though it is very difficult to find instances where separation of powers is strictly applied when it comes to the appointment of judges, the said principle is aptly placed. An attempt was made to bring the judicial appointments mechanism at par with other countries in the year 2014 when the parliament passed the Constitution (99th Amendment) Act, 2014 for the creation of the National Judicial Appointment Commission which would have been composed of the Chief Justice of India as chairperson, two senior-most judges of the Supreme Court, the law Minister of India and two eminent individuals. The two eminent individuals were to be chosen by a committee consisting of the Prime Minister, the Chief Justice of India and the leader of the opposition. However, this attempt was struck down by the Supreme Court as being unconstitutional.

The present regime constantly emphasises introducing the active role of the legislature in judicial appointments to ensure a system of checks and balances. Many experts opine that the present system of judicial appointments prevailing in India is based on the expression- "You scratch my back, I will scratch yours". It would be pertinent to see how such a deadlock between the centre and judiciary is resolved.

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