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SAFEGUARDING THE GUARDIAN: A COMPARATIVE PERSPECTIVE ON JUDICIAL INDEPENDENCE

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I. ABSTRACT

Progressing from the question 'Why is the independence of the judiciary necessary?' to 'How to make the judiciary independent?' The constitutional discourse has rightly shifted to 'How to keep the judiciary independent?' The Aristotelian idea of separating functions has, to some extent, protected the independence of the judiciary vis-à-vis the executive and the legislature, but in the present, threats to the judiciary's independence have become more varied and eclectic. These threats not only arise from the other two organs of government but also from the people and the nation's politics. Modern constitutions around the world have acknowledged this and sought to insulate the judiciary from pernicious influences. A comparative study of different constitutional mechanisms enables us to identify both common and country-specific threats to the independence of the judiciary and learn from their experiences in mitigating them. This paper compares the constitutions of India, Thailand, Germany, and France, utilising the geographical and institutional diversity of their systems to achieve a richer comparison. The paper analyses the Constitutional texts, Relevant Legal statutes, Key committee reports, and various Case laws to get an objective view of the issue, untainted by the opinionated debates surrounding it. The end goal is to contribute to the rich discourse on the subject by identifying the glaring issues and the best practices for their resolution. In India, debates over the opacity of the collegium system, post-retirement appointments, and judicial accountability have intensified. Focusing on India, the paper will suggest practical and effective solutions to strengthen the independence of the judiciary and help in mitigating various threats arising from not only the other two organs of the government, the legislature, and the executive, but also from the people, the media and the politics of the country.

II. KEYWORDS

Judicial Independence, Judicial Appointments, Collegium System, NJAC.

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III. INTRODUCTION

A. Over the Seventy-Five Years

Seventy-five years back, at the inaugural session of the Supreme Court of India, the First Chief Justice of India, Hari Lal Jekisundas Kania, said, "An independent supreme court, as shown by the working of such courts in other democratic countries, will have far-reaching influence on the constitutional history and progress of the Union of India."[2]

Seventy-five years from then, with immense gratitude towards the Supreme Court of India, we are presented with an opposite opportunity to understand, with the benefit of hindsight and experience of contemporaries, the application of the concept of judicial independence in India, the many controversies around it and on that understanding build our vision for the future, the judiciary we would like to see in the 100th year of our Independence.

Public faith in a constitutional institution is the root that helps it stand upright, to face the winds of the time and shelter the democratic aspirations of the people. The impartiality, facilitated by the independence, is indispensable to this public faith. The Indian judiciary has endured various threats to its independence,[3] not only from the executive and the legislature but also from within. This reason to celebrate should not become a cause for complacency, for 'The price of liberty is eternal vigilance.'[4]

B. The Choice for Comparison

This principle of independence of the judiciary is universally recognised, but the experiences with it have varied from country to country. Otto Von Bismarck is famously credited with saying that, "The wise man learns from the mistakes of others", making a compelling case for our comparative study.

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[2] Speech by Chief Justice H.J. Kania at the Inaugural Sitting of the Supreme Court of India (Jan. 28, 1950), reproduced in Supreme Court of India, *Golden Jubilee Souvenir* (2000).

[3] See infra.

[4] John Philpot Curran, Speeches of John Philpot Curran, Vol. 2, at 235–36 (Dublin: James Duffy 1855). Simplified version of "It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt."

Thailand, a fellow Asian country, never colonised, is a constitutional monarchy.[5] The country's political system is similar to India's, except that India is a republic. In this context, it is a good country to compare with, as the lessons drawn from it would be easier to apply to the Indian system.

France, the birthplace of the slogan 'Liberty, Equality, Fraternity', presents a unique model of a semi-presidential system with deeply rooted democratic ideals. This diversity in government models and in the application of the principle of judicial independence will further enrich our study.

Germany, a nation with a tumultuous history, a sufferer of the scourge of wars,[6] has lived the reason to protect the liberties of the people. The enduring nature of the 1949 constitution and its continuance after the 1990 reunification of Germany is a testament to the strength of the German legal system and, therefore, makes it suitable for a comparative study.

C. Objectives of the Study

The objectives of the study are:

1. To understand how different constitutions seek to concretise the concept of Judicial Independence in their respective legal systems.
2. To identify, through case studies, the challenges these systems face regarding Judicial Independence.
3. To study and analyse the Indian way of ensuring judicial Independence in juxtaposition with the selected jurisdictions.
4. To propose solutions for mitigating threats to and further safeguarding the principle of Judicial Independence.

D. Research Questions

1. What are the different facets of Judicial Independence?

[5] E. Jane Keyes & Charles F. Keyes, History of Thailand, Encyclopedia Britannica (Oct. 25, 2024), https://www.britannica.com/topic/history-of-Thailand (last accessed Aug. 23, 2025).
[6] Patrick J. Geary et al., History of Germany, Encyclopedia Britannica (July 22, 2025), https://www.britannica.com/topic/history-of-Germany (last accessed Aug. 23, 2025).

2. How do different types of Constitutional systems ensure judicial independence in their countries?
3. What are the major threats to Judicial Independence in the selected jurisdictions?
4. What lessons can India learn from other jurisdictions in keeping its judiciary Independent?

E. Research Methodology

The study employs doctrinal and analytical research methodology with a comparative constitutional approach. The comparative framework adopted in the paper is primarily functional and normative, analysing how different constitutional systems seek to secure judicial independence and respond to challenges affecting it. India, Thailand, France, and Germany have been selected owing to the diversity of their constitutional structures namely parliamentary democracy, constitutional monarchy, semi-presidential system, and federal parliamentary system thereby enabling a broader comparative understanding of institutional safeguards for judicial independence. The following sources have been utilised to gather information and study the various phenomena with respect to the research topic:

1. The Constitutions
2. Case Laws
3. Law Commission and other reports
4. Newspaper reports

IV. JUDICIAL INDEPENDENCE

1. **Judiciary and Public Faith:** The judiciary is not only the guardian of people's fundamental rights, but also of their faith in the constitutional order. Tasked with the resolution of disputes, the conquest of what is just for the people has been its constant endeavour. This makes a person recall the Aristotelian quote, "When men seek for what is just, they seek for what is impartial; for the law is that which is impartial".[7] The idea of justice is deeply rooted in impartiality,

[7] Aristotle, Politics 1287b.

which underpins public trust in the institution. The constitution provides the legal sanction for the institution of the judiciary, but it is the public faith and willingness of people to accept the judiciary's verdict that give it relevance. Judicial independence, thus, is indispensable to that faith.[8]

2. **What does Judicial Independence Entail:** Independence of the judiciary can no longer be understood in a narrow sense as the absence of influence by the legislature or the executive over this third organ of government. As discussed above, independence is necessary for impartiality. *"Judicial independence entails the ability of judges to adjudicate and decide cases without the fear of retribution."*[9]It is characterised by the absence of conditions that prevent a judge from deciding matters objectively. To be truly independent, a judge must be able to adjudicate "without fear or favour, affection or ill will."[10] The concept of independence of the judiciary, therefore, is not limited to appointments to the courts. It expands its horizons to include within its sweep independence from many other pressures and prejudices. "It consists of many dimensions, including fearlessness from other power centres, social, economic and political, freedom from prejudices acquired and nurtured by the class to which the judges belong and the like."[11] A facet of independence is the courts' financial independence. The Supreme Court of India has ruled that institutional independence, which is financial freedom or autonomy, is also an integral part of the concept of Judicial Independence.[12]

A. The Guarantees of the Constitutions

1. The Constitution of India, 1950

The Indian Constitution weaves into its provisions a shield insulating the Judiciary from executive and legislative influences. Starting from the Directive principles, the constitution directs the state to take steps to separate the judiciary from the executive

[8] S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India).
[9] Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 S.C.C. 481 (India) (statement of D.Y. Chandrachud, J.).
[10] Id.
[11]Id.
[12] State of Rajasthan v. Ramesh Chandra Mundra, (2020) 20 S.C.C. 163 (India)

in the public services.[13] The judges to the high courts and the Supreme Court are to be appointed by the President of India in consultation with the Chief Justice of India and other judges.[14] The Supreme Court has read the word 'Consultation' to mean concurrence.[15] The appointment mechanism later took the form of 'Collegium System', where appointments are made on the recommendations of a collegium consisting of five senior-most judges of the Supreme Court of India, including the chief justice of India.[16]

The tenure of the judges of the Supreme Court and the High Courts is constitutionally guaranteed, and they hold office until the age of 65 and 62, respectively. This is accompanied by a special process for the removal of judges, requiring an address by both houses of parliament and a special majority. The grounds on which such an address can be passed are proved misbehaviour or incapacity.[17]

The salaries of judges are constitutionally insulated from parliamentary vote and charged on the consolidated fund of India, which cannot be varied to their disadvantage after their appointment[18] except in the case of financial emergency.[19] In order to prevent any conflict of interest negatively impacting their discharge of duties as a judge of the Supreme Court, there is a constitutional bar on the judges from pleading or acting before any court or tribunal in India after their retirement.[20]

The constitution also confers upon the Supreme Court and the High Court the power to punish for contempt, further empowering them to protect their dignity and the public faith vested in them from undue accusations.

The Supreme Court is further granted administrative autonomy and is empowered to make rules regarding procedure.[21] In addition, the constitution prohibits the

[13] INDIA CONST. art. 50.
[14] INDIA CONST. art. 124,217.
[15] Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441 ("Second Judges Case").
[16] In re Special Reference No. 1 of 1998, (1998) 7 S.C.C. 739 ("Third Judges Case").
[17] INDIA CONST. art. 124, cl. 4.
[18] INDIA CONST. arts. 125, 221.
[19] INDIA CONST. arts. 360.
[20] INDIA CONST. art. 124, cl. 7.
[21] INDIA CONST. art. 145.

parliament from discussing the conduct of judges except during the proceedings for removal.[22]

2. The Constitution of the Kingdom of Thailand, 2017

The Kingdom of Thailand is constituted into a constitutional monarchy by its constitution, i.e. a democratic polity with the King as the head of the state.[23] It is the King who appoints and removes the judges.[24]

The constitution provides for four categories of courts, viz. courts of justice[25], military courts[26], administrative courts[27] and the constitutional courts[28]. The process of appointment of judges to the constitutional court is a comprehensive mix of selection, election and later approval of the nine judges who are to be appointed by the king.[29]

The elections from the plenary meetings of the Supreme Court [30] and the Supreme Administrative Court [31] are conducted to appoint five judges, three and two, respectively. One person is to be selected from law professors[32] and one from the professors of political science or public administration at the Universities in Thailand. [33] The remaining two are to be selected amongst the people who have held a position not lower than director general or head of any government agency or a deputy attorney general.[34]

A selection committee is tasked with making the selections wherever prescribed[35] and consists of the president of the supreme court, the president of the house of representatives, the leader of opposition in the house of representatives, the president of the supreme administrative courts and the persons appointed by the independent

[22] INDIA CONST. art. 121.
[23] Constitution of the Kingdom of Thailand B.E. 2560 (2017), § 2.
[24] Id. § 190.
[25] Id. § 194.
[26] Id. § 199.
[27] Id. § 197.
[28] Id. § 200.
[29] Id.
[30] Constitution of the Kingdom of Thailand B.E. 2560 (2017), § 200(1).
[31] Id. § 200 (2)
[32] Id. § 200(3)
[33] Id. § 200(4)
[34] Id. § 200 (5)
[35] Id. § 203

organs.[36]The appointment procedure is quite comprehensive and appears prima facie independent. But merely the appointment cannot guarantee independence, as we shall later see.[37]

The independence of judges is explicitly guaranteed by the constitution, particularly for trial and adjudication, where they are to carry out their functions without any partiality.[38] The courts are independent in terms of personnel administration as well[39], a provision similar to that in the Indian constitution[40] except that the former is a mandate and not a directive principle, and in budgets[41], which the Indian supreme court has ruled to be very necessary for the Independence of the judiciary[42]. It is interesting to note that the constitution itself provides for an oath of judges that causes them to declare their loyalty towards the king[43] as opposed to the Indian constitution, which wants them to bear true faith and allegiance to the constitution of India.[44] This, when applied in practice, could result in a serious compromise with the principle of judicial independence.

3. The Constitution of France, 1958

In the French constitutional scheme, the President is the guarantor of the independence of the judiciary and the judges, irremovable from office.[45] With a view of institutionalisation of that guarantee, the appointments to the higher judiciary are made by the Superior Council of the Judiciary (Conseil supérieur de la Magistrature), with the President of the Republic at its head. The Minister of Justice is *ex officio* vice president. The council further includes five judges, one public prosecutor, one counseiller d'etat and three prominent citizens who are neither part of parliament nor of the judiciary. Among them, one each is appointed by the President of the Republic,

[36] Id. § 215.
[37] See infra section 3.2.1.
[38] Constitution of the Kingdom of Thailand B.E. 2560 (2017), § 188.
[39] Id. § 193.
[40] INDIA CONST. art. 145.
[41] INDIA CONST. art. 125, 221, State of Rajasthan v. Ramesh Chandra Mundra, (2020) 20 S.C.C. 163 (India)
[42] S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India).
[43] Constitution of the Kingdom of Thailand B.E. 2560 (2017), § 191.
[44] INDIA CONST. sched. 3.
[45] CONSTITUTION OF FRANCE, art. 64.

the President of the National Assembly and the President of the Senate. The same council is also vested with the disciplinary powers.[46]

The French Constitution has devised a very powerful institution called the Constitutional Council.[47] The crafting of this council is unique, as it is structured as an independent supervisory authority with judicial powers. It is conferred with a duty to oversee the Presidential elections[48], the elections to the national assembly and the senate.[49] And to decide upon the constitutional validity of the bills as and when such a question is presented before it.[50] Reflecting the spirit of independence, the council is composed of nine members appointed, three each, by the President of the Republic, the President of the National Assembly and the President of the Senate.[51]

The Constitutional Council had further entrenched the constitutional principle of judicial independence by ascribing it the status of fundamental principle or the foundational principle of the French Republic (*principe fondamental reconnu par les lois de la République* (PFRLR)).[52]

4. The Grundgesetz or Basic Law of Germany

The *Grundgesetz* or the Basic Law also declares judges to be Independent and subject to no one but the law.[53] The judges are elected to the Federal Constitutional Court, which is made autonomous and independent of all other constitutional organs,[54] by a two-thirds majority from both the houses, i.e., half by the Bundestag and half by the Bundesrat.[55] They enjoy a fixed term[56] and can only be removed by judicial decisions for reasons and in the manner provided by law.[57] It is interesting to note that the

[46] CONSTITUTION OF FRANCE, art. 65.

[47] Id. art. 56.
[48] Id. art. 58.
[49] Id. art. 59.
[50] Id. art. 61.
[51] See supra note 48.
[52] Conseil Constitutionnel [CC] [Constitutional Council] decision No. 80-119 DC, July 22, 1980, Rec. 47 (Fr.), para. 6, Official Journal of July 24, 1980, in 1868, Collection 46, ECLI:FR:CC:1980:80.119. DC.
[53] Grundgesetz [GG] [Basic Law], art. 93(1)– (3) (Germany) (as amended in 2024).
[54] Id.
[55] Id.
[56] Id.
[57] Id.

removal process is not a parliamentary one but a judicial one. Federal judges can only be removed, retired, or transferred on the decision of the Federal Constitutional Court, taken by a majority of two-thirds of the total number of judges, on an application of the Bundestag. The only grounds provided for removal are violation of the principles of the basic law, i.e. the constitution or the constitutional order of the *Land* (A state or constituent unit of federation).[58]

B. Analysis

The four constitutions discussed above provide for four different styles of government. It is interesting to note that, except for the Indian Constitution, the other three constitutions explicitly guarantee the Independence of the judiciary. A few insights can be drawn from the provisions discussed above.

The constitution of the Kingdom of Thailand provides a very different procedure for the appointment of judges to the constitutional court, and, interestingly enough, the post is not limited to lawyers and judges. While the Indian Constitution does provide for a scope to appoint distinguished jurists,[59] it is not a mandate and therefore has never been utilised.[60] It is high time that these sleeping provisions are awakened.

The procedure for appointing judges in France is also unique in this regard. The system has been well commended, and it is observed that, as things stand, there is no fear of executive interference. The CSM has complete freedom in selecting the appointees to the top judicial jobs in the country.[61] It should be noted that the system works with respect to the French government because it has a semi-presidential form of government, and it is neither necessary nor desirable that the prominent persons appointed represent the executive's interests. The same is not the case in India. Here,

[58] Id. art. 98(2).
[59] INDIA CONST. art. 124, cl. 3(c).
[60] Balram K. Gupta, Time to Appoint a Distinguished Jurist Judge, *Indian Express* (July 2, 2022), https://indianexpress.com/article/cities/chandigarh/supreme-court-time-to-appoint-a-distinguished-jurist-judge-8006199/ (last visited Aug. 25, 2025).
[61] Council of Europe, Parliamentary Assembly, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, The honouring of membership obligations to the Council of Europe by France, Doc. 15833, § 4.2, at 18–19 (Sept. 25, 2023).

the President of India, the Vice-President, and the Speaker more often than not belong to the ruling party.

In Germany, there have been accusations that the mainstream political parties are trying to cement their own influence over the court.[62] The judges are appointed by election, with both houses of parliament electing judges by a two-thirds majority. While it seems that a party controlling the Bundestag or Bundesrat can effectively appoint judges of its choice, the history shows no party has been able to achieve a two-thirds majority ever.[63] In context, the system appears largely independent and insulated from political control. The court in Germany has decided a variety of cases from the dissolution of parliament to the banning of political parties, and public polls show that the Court enjoys substantially higher trust than the other major political structures of the country.[64]

While no system can properly fit the Indian context, drawing inspiration from them, we can devise a system tailor-made to our own conditions.

V. CASES AND ISSUES

A. Issues in General

The core challenge to judicial independence has historically been executive influence. For the capabilities and the desire of the executive to influence, being the biggest litigant, far exceeds anyone else's, and the threat to liberty is most devastating if it succeeds. Recent case studies suggest that, despite strong measures in place, allegations of politicisation in the judiciary have persisted. It is not necessary for the judiciary to actually be politicised for it to herald a disaster for democracy; it is when significant portions of the electorate perceive the judiciary not as an independent

[62] Germany's constitutional court under protection after vote, *AP News* (Aug. 2024), https://apnews.com/article/germany-constitutional-court-protection-vote-parliament-3b9a3c3966f6ac5e52d87f57c4f2b05f (last visited Aug. 24, 2025).
[63] Donald P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 32 (3d ed. 2012).
[64] Miller, Russell A., The German Legal System and Courts, in The Oxford Handbook of German Politics 210 (Klaus Larres, Holger Moroff & Ruth Wittlinger eds., 2022; online ed., Oxford Academic, 18 Aug. 2022).

arbiter but as a political actor actively working against their chosen representatives that trust in fundamental democratic institutions erodes.[65]

The challenge with allegations of political trials is that the judicial authorities always deny political motives, while defendants invariably claim them. And, of course, this holds true: we should never assume we are entirely safe from political influence in the judiciary. A basic commitment to the rule of law requires constant effort to uphold judicial independence and critically reflect on any allegations of bias.[66] With these in mind, let us look at two of the recent cases.

B. Case Studies

1. Banning of the Move Forward Party

The most glaring example is the order by the constitutional court for dissolution of the main opposition party, Move Forward Party,[67] on the grounds that it had advocated and campaigned for the amendment of Section 112 of the Thai Criminal Code (the lèse-majesté law). The Court held that such legislative advocacy constituted an attempt to undermine the democratic regime with the King as Head of State, in violation of the Constitution. It is worth noting that the predecessor to the Move Forward Party, the Future Forward Party, which was the main opposition to the military coup leader turned Prime Minister Prayuth Chan-o-cha, was also dissolved by the court on the grounds of illegal loans.[68] The Move Forward Party was the largest party in the 2023 general elections held in Thailand, and almost 14 million people

[65]E.U.'s far right vs judiciary conflict, The Hindu, https://www.thehindu.com/news/national/eus-far-right-vs-judiciary-conflict/article69479905.ece.
[66] Schmitt-Leonardy, C. (2025) *Dictatorship of the Court vs. will of the people?*, *Verfassungsblog*. Available at: https://verfassungsblog.de/marine-len-pen-verdict / (Accessed: 25 August 2025).
[67] Thailand: UN experts seriously concerned about dissolution of Forward Party,PrimeC theain political party, U.N. Office of the High Commissioner for Human Rights (Aug. 2024), https://www.ohchr.org/en/press-releases/2024/08/thailand-un-experts-seriously-concerned-about-dissolution-main-political.C
[68] Thai court dissolves opposition Future Forward Party over loan, Reuters, https://www.reuters.com/article/world/thai-court-dissolves-opposition-future-forward-party-over-loan-idUSKBN20F17A/.

voted for it.[69] This incident shows that when the loyalties[70] are divided between the executive and the law, it's the law that often takes a back seat.

2. The Trial of Marine Le Pen

In March 2025, the French court convicted the far-right leader Marine Le Pen in an embezzlement case, barring her from holding any public office for five years.[71] The leader was seen to be a frontrunner in the 2027 presidential election.[72] This has caused many to raise eyebrows, including many foreign leaders who have categorised it as political targeting and stifling of free speech.[73] The most striking point being "the retroactive application" of a criminal law enacted after the alleged act. [74] Retroactive criminalisation is diametrically opposed to the principle of the Rule of Law and thereby runs the risk of delegitimising judicial institutions in the eyes of the public.

After the verdict was delivered, there had been targeting of the judges who had to be granted police protection.[75] This suggests two rather opposite things. First, the acceptability of the judiciary as a neutral arbiter, and therefore public faith in it, has declined; second, the Independence of the judiciary is also threatened by a section of the public that believes it is possible to influence judicial conduct through threats of force.

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[69] House of Commons Library (UK), Thailand: Political developments 2023-24 and the banning of the Move Forward Party, No. 10141 (Nov. 18, 2024).
[70] See Supra Note 41.
[71] Tribunal Correctionnel de Paris [Paris Crim. Ct.], Judgment of Mar. 31, 2025, Affaire des assistants parlementaires du Front National au Parlement européen [Nat'l Front Parliamentary Assistants Affair] (criminal conviction of Marine Le Pen for embezzlement of European Parliament funds).
[72] Marine Le Pen: Embezzlement trial verdict, *CNN* (Mar. 31, 2025), https://edition.cnn.com/2025/03/31/europe/marine-le-pen-embezzlement-trial-verdict-france-intl (last visited Aug. 24, 2025).
[73] E.U.'s far right vs judiciary conflict, *The Hindu* (Aug. 24, 2025), https://www.thehindu.com/news/national/eus-far-right-vs-judiciary-conflict/article69479905.ece (last visited Aug. 24, 2025).
[74] Affaire Marine Le Pen: Le Piège Judiciaire en Cinq Actes, *European Centre for Law and Justice*, https://eclj.org/geopolitics/french-institutions/affaire-marine-le-pen-le-piege-judiciaire-en-cinq-actes?lng=en&utm_source=brevo&utm_campaign=Marine%20Le%20Pen%20Goes%20to%20the%20ECHR&utm_medium=email (last visited Aug. 24, 2025).
[75] French judges in Marine Le Pen case face death threats, police launch probe, *France24* (Apr. 2, 2025), https://www.france24.com/en/france/20250402-french-judges-in-marine-le-pen-case-face-death-threats-police-launch-probe (last visited Aug. 24, 2025).

C. Issues in India

While delivering a lecture at the Oxford Union, the then Chief Justice of India, D.Y. Chandrachud, said he had not faced any political pressure or appeal in 24 years of his service. It is a testament to the robustness of our system that the judicial arm stays isolated from the political arm of the government.[76] In present, we do not find many cases to refute this statement. However, history has not been the same. The tussle of influence is as old as the first executive of the Indian Republic. When it came to finding a successor to CJI Kania for the top judicial office, the then prime minister wanted to appoint someone other than the next in line of seniority, Patanjali Sastri. The executive would have had its way, but all the other judges threatened to resign if the executive did so.[77] From then to the calls of a committed judiciary,[78] from the development of the collegium system[79] and then to eventual striking down of NJAC [80], the debate has not yet ended.[81]

1. The debate regarding appointments

While the Supreme Court in S.P. Gupta vs. Union of India affirmed the primacy of the executive in judicial appointments later, the Second Judges Case and Third Judges Case interpreted into the Constitution an extra-constitutional method of appointment of judges by reading into it a collegium system of judicial recommendation, often criticised for its opacity.[82] The Parliament of India brought through an amendment[83] of the constitution a National Judicial Appointments Commission (NJAC), which is composed of the Chief Justice of India, two senior-most judges of the Supreme Court, the Union Law Minister, and two eminent persons to be appointed by a selection

[76] Never faced any political pressure from govt in 24 years as judge: CJI Chandrachud, *PTI News*, https://www.ptinews.com/story/national/never-faced-any-political-pressure-from-govt-in-24-years-as-judge-cji-chandrachud/1615155 (last visited Aug. 24, 2025).
[77] Kania and Nehru, *Supreme Court Observer*, https://www.scobserver.in/journal/kania-and-nehru/ (last visited Aug. 24, 2025).
[78] T.R. Andhyarujina, A Committed Judiciary: Indira Gandhi and Judicial Appointments, in *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* 43 (Arghya Sengupta & Ritwika Sharma eds., Delhi, 2018; Oxford Academic online ed., Aug. 22, 2019), https://doi.org/10.1093/oso/9780199485079.003.0002 (last visited Aug. 22, 2025).
[79] In re: Judicial Appointments, (1998) 7 S.C.C. 739 (India).
[80] Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 5 S.C.C. 1 (India).
[81] Law Commission of India, 214th Report, Judicial Reforms, (2008).
[82] Id.
[83] The Constitution (Ninety-Ninth Amendment) Act, 2014 (India).

committee.[84] The constitutional amendment and the accompanying Act were struck down by the Supreme Court on the ground that they provided a veto to any two of the six members of the Commission, thereby enabling non-judicial members namely the Law Minister and/or the eminent persons to collectively block judicial recommendations. The Court held that this diluted the primacy of the judiciary in judicial appointments and consequently violated the basic structure of the Constitution.[85]

The appointment process of the judiciary is the starting point of its independence. It must be reminded again that the Independence we talk about is not limited to one from the executive but from "prejudices acquired and nurtured by the class to which the judges belong."[86] A selection mechanism where the judges have a primary say in appointments cannot be said to be free from the latter. Elevation of advocates to the post of judges should only be based on legal acumen and personal merit. It is many times seen that advocates with well-wishers in higher judiciary or high political setup have been made judges, and it is not necessary for them to be the most competent.[87] Even in the case of elevation, it has been held true that the best talent among the judges of the high court has not always found its way to the Supreme Court.[88]

These reasons collectively warrant a serious relook at the system for appointing judges.

2. The debate regarding post-retirement appointments

Among the issues faced by the Supreme Court of India in the context of independence of the judiciary, the issue of post-retirement appointments reigns supreme. To understand the extent of the issue, a brief look at history is warranted.

On 7th June 1949, while the provisions regarding judiciary were being debated in the Constituent Assembly, Prof. K.T. Shah sought to propose an addition to the article

[84] INDIA CONST. art. 124A.
[85] Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 5 S.C.C. 1 (India).
[86] See Supra note 8.
[87] Law Commission of India, 230th Report, Reforms tn the Judiciary - Some Suggestions, para. 1.4 (2009).
[88] Law Commission of India, 14th Report, Reform of Judicial Administration, ch. 5, para. 6 (1958).

which provided for the prohibition on appointment of judges to executive posts such as ambassadors, ministers, etc.[89] The amendment was negatived as Dr. Ambedkar argued that it was "purely for a theoretical reason."[90] That fear of Prof. Shah soon turned out to be very real when Justice Fazl Ali was appointed as Governor of Odisha, while he was serving on the bench.[91] The practice has continued since then.

In 2020, the former CJI Ranjan Gogoi was nominated to the Rajya Sabha and in 2023, Justice Abdul Nazeer was appointed as governor of Andhra Pradesh. Both of them were part of the bench which delivered the landmark Ayodhya Verdict allowing the construction of Ram Janmabhoomi Mandir.[92] The issue was a key promise of the contemporary ruling party, as evident from the statement of the I&B minister, "The BJP always maintained Ram temple would be built on Ram Janmabhoomi. Whatever legal measure is required, the BJP will try for that."[93] This raised allegations, though hushed, of quid pro quo and use of the term 'Whatever' certainly does not alleviate them.

As the Law Commission in its 1958 Report noted, "The government is a party in large number of cases in the highest court and the average citizen may well get the impression, that the judge who might look forward to being employed by the government after his retirement does not bring to bear on his work that detachment of outlook which is expected of a judge in cases in which government is a party."[94] Therefore, post-retirement appointments of judges by the executive cast serious aspersions on their independence while they serve on the bench. It is very pertinent to note here that the constitution has explicitly prohibited post-retirement appointment of Comptroller and Auditor General[95] and similar restrictions have also

[89] Constituent Assembly Debates, Vol. 8, 8.100.78 (India).
[90] Id. at 8.100.88.
[91] Anuja Jaiswal, As CJI takes the lid off judges taking plum posts after retirement, experts say the rot runs deep, *Livemint* (Jan. 14, 2024), https://www.livemint.com/news/india/as-cji-takes-the-lid-off-judges-taking-plum-posts-after-retirement-experts-say-the-rot-runs-deep-11749214059258.html (last visited Aug. 24, 2025).
[92] M. Siddiq v. Mahant Suresh Das, (2019) 5 S.C.C. 1 (India).
[93] Poll pressure on govt to show action on Ram temple: PM Modi, *Indian Express*, https://indianexpress.com/article/india/poll-pressure-on-govt-to-show-action-on-ram-temple-pm-modi-bjp-2019-lok-sabha-election-5560403/ (last visited Aug. 24, 2025).
[94] Law Commission of India, 14th Report, Reform of Judicial Administration, ch. 5, para. 29 (1958).
[95] INDIA CONST. art. 148, cl. 4.

been imposed on the chairman of Union Public Service Commissions.[96] It is a travesty that neither the Constitution nor any other statute prohibits such appointments for judges.[97]

VI. CRITICAL LESSONS FOR INDIA

A. With respect to Judicial Appointments

While the Thai Constitution provides a mix of selection and election, Germany has opted for a completely elected model, while France uses a selection model.

The Indian political and judicial system is quite different from the above-mentioned jurisdictions, as we have a parliamentary system of government with a president at the head and a single, integrated judiciary. This has the following implications:

1. In Thailand, where there are different courts and elections must be held, India does not have such a differentiated system, so elections cannot be held. The Idea of an election is, even then, not desirable as it could easily cause merit to be overlooked by popularity, which is not desirable.
2. Similarly, the German experiment can also not be simply replicated in India, because it is not easy for any single party or alliance to secure a two-thirds majority in either house. Thus, this mode of appointment would seriously harm the independence of the judiciary.
3. As prevalent in France, having a commission such as CSM could be given a thought, but the composition and manner of appointment of members to such a commission needs to be looked at since France follows a semi-presidential system.[98]
4. Noting the views expressed by Justice J.S. Verma, the judge who delivered the majority judgement in the Second Judges case, in Frontline magazine, that the appointments should be a participatory process. While the domain

[96] INDIA CONST. art. 319.
[97] International Commission of Jurists, Judicial Independence in India: Tipping the Scale, Part E: Post-Retirement Employment (Jan. 2025), https://www.icj.org/wp-content/uploads/2025/01/Judicial-Independence-in-India.pdf
[98] supra.

expertise of the chief justice and other justices is limited to the legal acumen of the candidate, the executive is much more aware of the antecedents.[99]

Based upon the past experiences, the lessons drawn from different countries and objections of the Supreme Court to the National Judicial Appointments Commission, the following method of appointments is suggested:

1. The Collegium system, as it currently stands, is to continue with a restricted function of preparing reports on the legal acumen and capabilities of candidates.
2. The executive shall be tasked with vetting the candidate and checking their antecedents.
3. In addition to the above two, an Independent Presidential Council on Judiciary, which shall be formed, with the following as the members:
    - The President of India as the Chair of the Council.
    - The Prime Minister of India, ex officio
    - The Chief Justice of India, ex officio
    - The Attorney General of India, ex officio
    - The Lokpal of India, ex officio
    - Three other legal personalities:
        - One retired judge of the Supreme Court
        - One renowned scholar of law, eligible to be made a SC judge under Article 124.
        - One professor of law.
4. The three legal personalities shall be selected by the ex officio members by consensus or by a two-thirds majority vote if consensus cannot be reached.

[99] Law Commission of India, 214th Report, Judicial Reforms, Part III (2008).

5. The Council shall meet at least four times a year or as frequently called by the President of India.
6. No person under point 4 shall be the same in three consecutive council meetings.

Functioning of the Council:

1. The acumen report from the collegium, paired with the antecedent report from the executive, shall be presented before the council in an anonymised format.
2. The selection should be by consensus as far as possible, but if consensus cannot be reached, the candidate must receive 5 votes in favour to be appointed.
3. The President of India shall not have a right to vote at first instance but may exercise a casting vote if the candidate is tied at four votes in favour, with both the Prime Minister and the Chief Justice of India exercising their votes in favour.
4. The president of India shall not be advised by the CoM in the discharge of her functions as chair of the IPCJ.
5. The candidate cleared by the council shall be appointed by the President of India by a warrant under his hand and seal.

B. With respect to post-retirement appointments

The main issues that arise with respect to post-retirement opportunities by the government are:

1. Unscrupulous members of the judiciary may use this as a bargaining chip with the government to negotiate favourable decisions.
2. The government might use this possibility as leverage to influence the judges' decision.
3. Any such appointment indicates a sense of potential conflict of interest to the common people and erodes their faith in the courts.

The simplest solution to this issue is to raise the judges' retirement age, then ban post-retirement office holding. A more complicated solution is also being suggested here.

The compendium of ethical conduct by the French CSM provides that no judge should receive a gift from a party with which he is or has engaged.[100] This should apply to the government as well, since it is the biggest litigant in India, and offering posts that are not statutorily mandated for retired judges to them is often perceived as a gift. An inspiration could be drawn from the French HATVP, which is tasked with keeping transparency and probity in public life and often regulates post-retirement endeavours of public servants if they present a conflict of interest or illegality.[101] A similar institution can also be established in India, which is independent and carries out the same checks on the post-retirement appointments of the judges.

VII. CONCLUSION

"The law is wisdom (nous) without desire", [102] and it is imminent that it is applied as such since desires bring attachment, attachment brings partiality, which in turn threatens the independence of the judiciary. Public faith in institutions is key to the survival of any nation-state. When people start believing that the institutions that govern them are not for their welfare but for the welfare of their occupants, the option that seems feasible to them is bringing them down. A great history of revolutions testifies to this proposition.

The constitutions of India, France, Germany, and Thailand envisage robust structures to ensure judicial independence in their respective jurisdictions, but their experiences have been difficult and varied. The Indian experience shows that addressing the issue of the appointment and post-retirement appointments of judges is an urgent need.

A shloka comes in Ganesh Puran, आच्छादने दोषवृध्दिः ख्यापने तु लयो भवेत्।[103] (A fault gets aggravated if it is concealed but fades away if revealed). In that spirit, it must become

[100] Conseil supérieur de la magistrature, Compendium of the Judiciary's Ethical Obligations, Chap. II, ¶ 11 (2025), https://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf
[101] Haute Autorité pour la transparence de la vie publique, Rapport d'activité 2020 (2021), https://www.hatvp.fr/rapports_activite/rapport_2020/.
[102] Aristotle, Politics 1287a.
[103] Ganesh Puran U.P. 33.4

the primary aim in the 75th year of the Indian Republic to uncover and address these areas and make India a prosperous and righteous nation.

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