

(JOINT JURIST)

[NATIONAL-LEVEL | PEER-REVIEWED | OPEN-ACCESS LEGAL JOURNAL] |
VOLUME 1 | ISSUE 1 | MAY 2026

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***“A Comparative Study of Methods of Judicial Appointment
Evaluating Models in India, the United Kingdom, the United States
and France”***

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Abstract

Judicial appointments are an important aspect of constitutionalism, impacting the independence, legitimacy, and effectiveness of the judiciary. The objective of this article is to compare the process of appointment of judges in India, the United Kingdom, the United States and France, focusing on how these jurisdictions strike the balance between judicial independence and democratic accountability. The article classifies four systems of judicial appointment governed by these approaches: the collegium system controlled by the judiciary in India, the commission system in the United Kingdom, the political/electoral system in the United States and the hybrid institutional system in France, governed by the Conseil Supérieur de la Magistrature.

The Indian collegium system offers great independence, but lacks transparency and accountability. The commission-based United Kingdom system offers more transparency and merit, but depends on legislative action and the development of conventions within institutions. In the United States, there is much variation in the electoral and political appointment processes and would offer higher levels of democratic participation in the appointment of judges, but offers challenges in politicization and weakening judicial impartiality.

In contrast, the French model is formalized around the merit selection process, with constitutional control over the system and limited executive involvement through the institutionalization of the appointment system within an independent constitutional body, as well as the minimization of political and judicial influence from the legislature and executive. While no system is perfect, the French system is a more coherent and stable one, and may provide useful lessons to those countries that are looking for reform in the appointment and election of judges.

Introduction

The appointment process for judges is at the heart of constitutional politics. The system affects not only the composition of the courts, but the nature, legitimacy and independence of the judiciary it establishes. In a constitutional democracy governed by rule of law, courts are expected to settle disputes, uphold basic rights and freedoms, and safeguard against excesses on the part of the executive and/or legislative branches. How well the judiciary can perform this role is largely dependent upon the method of appointment, criteria for appointment, the appointment authorities and institutional frameworks involved.[1]

The issue of judicial appointments is thus not merely an administrative issue but raises constitutional and political concerns regarding the division of powers, institutional independence and accountability, and the confidence of the people in the administration of justice. Based on constitutional norms and historical development, different countries have utilized slightly different mechanisms to select judges, some meant to insulate the appointment process from politics to protect the judiciary's independence, and others meant to ensure the judiciary's accountability and legitimacy by involving the elected political institutions.[2] A third includes independent commissions, or is a hybrid with other types of institutional arrangements.

Indian courts have witnessed one of the most extraordinary legal revolutions. The judiciary now appoints itself through a series of landmark judgments. The manner of judicial appointments, with the judges appointing fellow judges, is arguably one of the most unique appointment systems in the world.[3] This is referred to as the collegium system. The system is well defended on the grounds of independence of the judiciary being part of the basic structure of the Constitution. The system has been blamed for lack of transparency and accountability, and for nepotism.[4] The system has been the subject of controversies and reforms, and the annulment of NJAC in 2015 reflects the continuing conflict within the Indian system.[5]

In the UK the Constitutional Reform Act 2005 created the Judicial Appointments Commission (JAC) which was designed to consolidate the shift from an executive appointment system to one founded on transparency, merit and the independence of the decision-making bodies.[6] In the UK model, the state has been able to achieve a success story in balancing independence and accountability through formalization, open competition and a limited discretion for the executive. Nonetheless, concerns have arisen related to diversity, the transparency of consultations, and the potential for democratic oversight of appointments.[7]

In contrast, in the United States, the constitutional design specifically incorporates a form of political participation during judicial appointment, as under Article II of the Constitution, the federal judges are nominated by the President and confirmed by the Senate.[8] Even though this system allows for a good deal of democratic oversight, judicial appointments have become a battleground, in many cases part of the partisan ideological war.[9] The different state judicial appointment systems (elected, merit selection, and legislatively appointed) highlight the federal character of American constitutionalism.

The French system is hybrid and features both a professional merit and an institutional control system in the form of the governmental body known as the Conseil Supérieur de la Magistrature

(CSM).^[10] It is neither a political system nor a judicial system. The CSM has constitutional standing and plays a prominent role in appointing judges, whereas the executive is only in charge of prosecutorial appointments. The system has strong institutional safeguards and a uniform structure of the magistracy, balancing autonomy and accountability.

With this context in mind, this paper considers the judicial appointment models of India, the United Kingdom, the United States of America (with a particular focus on select states) and France with the aim of evaluating descriptively and normatively their ability to strike a balance between judicial independence and democratic accountability to produce a skilled, fair and legitimate judiciary.

Based on the above arguments, this paper concludes that all four systems do have their respective merits and institutional bases but the French system which is based on a system of merit selection, institutional structure and limited executive involvement is likely to provide a more appropriate balance of judicial accountability and independence than the relatively opaque Indian collegium, the politicized and semi-autonomous US model or the general consensus still being developed in the UK.

2. Theoretical Framework: Judicial Independence and Democratic Accountability

One cannot understand how judicial appointments mechanisms work without an understanding of the constitutional values supporting the arrangements. In every system, there is the fundamental value tension of judicial independence and democratic accountability, which are fundamental to the very idea of a constitutional democracy, but also very often at odds with one another.^[11]

Judicial independence is generally regarded as one of the foundations of the rule of law. It secures impartial judicial decision-making without executive or legislative interference.^[12] The specific rationale for insulating judicial appointments from political influence is often based upon the need to protect minority rights, secure the rule of law, and avoid abuse of power by the state.^[13] As Alexander Hamilton wrote in *The Federalist* No. 78, the judiciary must be the "least dangerous branch" for the reason of their exercise of judgment, not will.^[14] This assumes judges have been appointed by a method which insulates them from interference from the start.

In practice, such total insulation from democratic processes raises serious legitimacy and accountability issues, as judges wield enormous public power and their decisions have farreaching social, political, and economic consequences.^[15] In democratic societies, some level of accountability, whether direct or indirect, is argued to be necessary for the judiciary to remain sensitive to the prevailing norms, rather than acting as a voice for an unaccountable and unelected elite, particularly in terms of judicial appointments.^[16] Too much involvement by the judiciary may lead to elitism and lack of transparency, while too much political involvement may lead to a lack of impartiality.

Different constitutional systems respond to this tension in different ways. The executivedominated system is illustrated at the federal level by the United States, where judicial appointments are routinely made in a political manner with participation of the politicians in the elected branches of government.^[17] This model stresses democratic

accountability, but has frequently led to episodes of politicization, with partisan ideological polarization and conflict over judicial appointments.^[18]

The second is the judicial primacy model, as in India with its collegium system of appointments, which seeks to promote judicial independence and insulation from political influence.^[19] Critics argue that the judicial primacy model lacks transparency, institutional accountability, and objective criteria, and is consequently prone to arbitrariness and nepotism.^[20]

Third is the commission, or hybrid, model which attempts to balance independence and accountability in institutional design. The UK's Judicial Appointments Commission and France's Conseil Supérieur de la Magistrature represent examples of this model.^[21] Some of these systems establish independent bodies consisting of judicial, legal and lay members to make decisions regarding judicial appointments. This is seen as a way of limiting the role of the political branch while avoiding a fully judicialized appointment procedure.^[22] Nonjudicial members also contribute public accountability and diversity.

Another aspect of the theory distinguishes the formal independence from the functional independence, the former being guaranteed by constitutional provisions (e.g. grant of life tenure or security of tenure to the judges) while functional independence would be determined by the manner of appointment, promotion, and disciplinary action against the judges.^[23] Conversely, a system that appoints judges for political reasons, even with life tenure, will result in a politically sympathetic judiciary. A judicial merit system and institutional insulation in the appointment process will lead to both actual and perceived independence of the judiciary.

Another important aspect of transparency is to legitimize judicial appointments. It is increasingly accepted that independence is not possible without public confidence, and public confidence cannot be attained without transparency and accountability in judicial appointments.^[24] Closed-door systems of decision making (e.g., collegium-type deliberation) may erode trust in the independence of the system and are not necessarily reliable safeguards. Open systems of decision making (that provide some form of transparency in selection and appointment) may invite politically motivated attacks on candidates and deter qualified candidates from applying.^[25]

Diversity and representativeness add to this complexity. Contemporary research in legal scholarship has shown that increased diversity in the judiciary corresponds to a more legitimate and higher quality decision-making body.^[26] Judicial appointment bodies which rely on narrow professional networks and informal consultation processes tend to lack diversity, in comparison to bodies that rely on a more open and formalized appointment process.

Ultimately, though, each of these models is imperfect, and the trade-offs between them are dictated by political culture, constitutional interpretation and historical precedent. The challenge is how to design such an appointment mechanism as to avoid both extreme politicization on one hand and extreme opacity on the other, while promoting meritocracy, independence and public trust.

The theoretical principles described provide the framework for comparing the approaches adopted by India, the United Kingdom, the United States (in selected states) and France to

identifying the system that is likely to strike the best balance between the competing interests served by independence and accountability.

3. Judicial Appointments in India: Constitutional Evolution and Critical Appraisal

The appointment of judges to the higher judiciary (i.e. the Supreme Court and the High Courts) in India is regulated both by the constitutional scheme of appointment, and by executive action. Judges of the Supreme Court and the High Court are appointed under Articles 124(2) and 217(1) respectively, by the President of India, after "consultation" with the Chief Justice and such other constitutional functionaries.^[27] When this provision was incorporated in the text, the hope was to lay down a collaborative process for the executive and the judiciary with a view to promote democratic accountability and institutional integrity. However, the Constitution was silent on the mode of consultation and the meaning of "consultation" which led to decades of protracted controversial litigation with respect to the appointments.^[28]

The first major judgment dealing with this provision was the *S.P. Gupta v Union of India* (1981) judgment in which the Supreme Court interpreted the word "consultation" literally, and held that "consultation" did not mean "concurrence". In effect the court supported the executive, which was left to appoint judges against the wishes of the judiciary.^[29] The decision, which was said to be justified for democratic accountability, was widely criticized, particularly in light of the experience of India during the Emergency. An executive interference with the judiciary's functioning had raised pressing questions on judiciary independence in India.^[30] The decision was also seen as contrary to the constitutional commitment to the rule of law and the separation of powers.

The major turning point for the Supreme Court system came in 1993, when the nine judges on the bench of Supreme Court *Advocates-on-Record Association v Union of India* re-interpreted the constitutional scheme and instituted a new collegium system.^[31] It was decided that the opinion of the Chief Justice of India, formed after consultation with other senior judges, would be binding on the executive regarding the process of judicial appointments. This was a landmark judgment in Indian constitutional history as it transferred to the judiciary the power of appointment. This transfer the Court justified by declaring that an independent judiciary was a basic feature of the Constitution and therefore could not be changed by the ordinary political process.^[32]

The collegium system became binding after the Supreme Court's decision in the *Re Special Reference No 1 of 1998* case, which stated that the collegium would be composed of the Chief Justice of India as well as the four other most senior justices of the Court.^[33] This multimember body was intended to ensure that judicial appointments were not arbitrary and were the result of institutional deliberations. Notwithstanding these clarifications, the collegium process remained opaque as most decisions were taken in camera and very little information was available about the basis and criteria of appointments.

The controversial issue of independence versus accountability for the judiciary rose again with the 2014 National Judicial Appointments Commission (NJAC) Act intended to replace the collegium with a commission consisting of members of the judiciary, executive and civil society.^[34] Aimed as a reform to bring in greater transparency and overcome the alleged problems of nepotism, the NJAC Act and the 99th Constitutional Amendment were struck down by the Supreme Court in *Supreme Court Advocates-on-Record Association v Union of India* (2015) on the grounds that these Amendments weakened the independence of the

judiciary.[35] The court held that the inclusion of members of the executive, and the possibility of a veto by a non-judicial member, compromised the independence of the judiciary.

Post the judgment, while it reaffirmed the independence of judiciary in the appointment of judges, the court also commented about the non-transparency and accountability of the collegium system.[36] However, no major structural change was imparted and the appointment of judges from the collegium system continues to be the principal method in India. However, the role of the executive is mostly procedural; it may only record its objections or request for reconsideration, being otherwise bound by repeated recommendations.

Its most important feature, however, is that it is one of the strongest institutional safeguard of the independence of the judiciary in comparative constitutional law as far as it seeks to protect judges from political patronage when being appointed and to protect the judiciary from executive interference with regard to the judiciary.[37] Critics point out that the procedure also lacks transparency and some regard it as arbitrary and lacking objective standards.[38] Allegations of nepotism and favoritism also bring the efficacy of the system into question, as appointments to the higher echelons of the judiciary take place within the secretive confines of the collegium.[39]

The other main criticism of the system is its institutional accountability. Unlike systems based on commissions, the collegium does not have a higher authority to oversee it and its decisions cannot be meaningfully challenged.[40] Whereas the legitimacy of the judiciary in a democracy has been discussed at length because judges take on such a large mandate for interpreting and implementing the constitution, the problem of judicial vacancies and slow judicial appointments have aggravated the backlog of cases considerably.

In the same manner, one may view the Indian model as a reaction on the part of the constitution against the historical prejudices towards the executive. The dominant judicial model has certainly proved successful in protecting judicial independence, but at the cost of transparency and accountability. So the solution is not to abolish the collegium system altogether, but to reform it to ensure greater transparency, clear and objective parameters, institutional checks, and at the same time, preserve the independence of the judiciary.

4. Judicial Appointments in the United Kingdom: Institutional Reform, Transparency, and the Limits of Depoliticisation

The constitutional arrangements for the appointment of judges in the United Kingdom have undergone a major reform process over the last 20 years as a part of a wider push to make constitutional government more transparent, independent of institutions and modern. Before the passage of the Constitutional Reform Act 2005 (CRA 2005), the power to appoint judges was placed in the hands of the Lord Chancellor who is a unique constitutional actor who simultaneously occupies the executive, legislature and judiciary within the UK.[41] The concentration of such a large power in one hand was seen to be increasingly incompatible with the modern application of the doctrine of separation of powers, as the executive was felt to have too much influence over the appointment of judges.[42] The system was often seen to lack transparency, with judicial appointments historically being made through a "tap on the shoulder" system whereby judicial officeholders are appointed through personal connections in the legal profession.[43] There was limited diversity in the judiciary, and there were concerns over the method of selection and with its legitimacy.

This system was replaced by a new system under the Constitutional Reform Act 2005 that was intended to be more independent and transparent, including the creation of a Judicial Appointments Commission (JAC), an independent statutory body charged with the task of selecting candidates who should be recommended to the Crown for appointment to judicial office.^[44] The creation of the JAC was an attempt to depoliticise the process of appointment, by removing it from the control of the executive, and placing it in an independent institutional structure. The Act did not completely depoliticise the process, as a limited role remained for the Lord Chancellor in appointing judges, which provided a degree of democratic oversight without excessive politicization.

A fundamental aspect of the scheme of the JAC is the composition of its membership. The JAC was designed to strike a fair balance between those with professional legal knowledge and expertise, and those who could represent the general public. To this end, the Commission is composed of members of the judiciary and legal profession, and lay members. The lay members also serve the purpose of ensuring the judiciary does not become self-perpetuating, that fresh possible perspectives are brought into the selection process, and that judicial appointments should not appear to be the province of the professional legal establishment.^[45] At the same time, the presence of experienced legal professionals ensures candidates will be held to the high standards of legal and judicial practice.

The process of selection itself has been made far more structured and transparent than the position that prevailed prior to 2005. Vacancies are advertised and candidates invited to apply. The selection process is subject to open competition and assessments are made against defined competencies, such as legal knowledge, intellectual capacity, integrity, and the ability to deliver fair and reasoned judgments. The use of competency frameworks, structured interviews and scenario-based assessment is a move towards a more evidence-based approach to candidate selection and a move away from the reliance on informal or ad hoc approaches. The JAC consults senior members of the judiciary and other stakeholders to gain a better picture of candidates' professional strengths and overall suitability for judicial office.

After it selects a candidate, the JAC recommends it to the Lord Chancellor. The Lord Chancellor has weak appointment powers, and may either choose to accept or reject the JAC's recommendation. It may ask the JAC to reconsider its decision, but may not appoint an independent candidate.^[46] This limited veto power allows the executive to retain some input into the process while also preserving the independence of the Commission. The requirement of giving reasons for its rejection or reconsideration adds an additional layer of openness to the process because the Commission's decision can be scrutinized.^[47] Hence the appointment, even if final in form, is ultimately made by the Monarch as a matter of constitutional tradition, with substantive decisions being left in independent hands.

The process for the appointment of judges to the United Kingdom Supreme Court is similar to that for the lower courts but more specific, given that it is the Supreme Court of the United Kingdom. For each vacancy a selection commission is convened which follows a special process defined in the Constitutional Reform Act 2005.^[48] The appointment process, which stresses not only excellence in the law, but also a subtle understanding of constitutional law and the role of the judiciary in the democratic process, has been designed to ensure that individuals appointed to the highest court in the land are chosen on the basis of merit and suitability, rather than politics.

UK principles that stress procedural fairness and transparency in public law have been reinforced by case law regarding the JAC process. The case of *R (Katie Thomas) v Lord Chancellor* [2015] EWCA Civ 912 went to the Court of Appeal, which provided further clarification on the treatment of consultee responses within the JAC process.^[49] The Court found the appointment process to be valid and in line with constitutional requirements, but stressed the need for transparency and due process to maintain public confidence in the process. The case also established that while the JAC is independent its decisions are subject to judicial review.^[50]

Nonetheless, the UK model is one of the more successful attempts to reconcile the two conflicting values of judicial independence and accountability by institutionalizing a fairly strong selection process. The combination of an independent commission and open competition, with explicit criteria, has improved the transparency and legitimacy of the process.^[51] The UK system is seen to avoid the lack of transparency in the largely opaque collegium system in India, on the one hand, while avoiding the politicization of the judiciary and an excessive degree of involvement by the executive that critics have attributed to the collegium system in the United States.

There are criticisms of the UK system, including a lack of direct democratic oversight of the system as Parliament does not play a formal role in the appointment of judges.^[52] Though this was done in an effort to prevent the JAC from being politicized, it has meant that the debate as to whether limited parliamentary oversight would lend legitimacy to the JAC without compromising its independence has continued. Likewise, though seeking to promote diversity on the bench, the JAC has had only limited success in achieving a judiciary that is more representative of society, particularly at senior levels. Structural barriers within the legal profession have also been perpetuated by customary career paths and unequal access to opportunities.

Another major area of criticism focuses on the supposed insulation of the system from informal and unofficial factors. Despite the formality of the process, informal factors such as informal contacts and professional references might still introduce subjectivity into assessments of personality-related factors such as temperament and suitability.^[53] This suggests that institutional frameworks, however well designed, cannot eliminate discretion or informal influence, but can only seek to regulate and minimize them as far as possible.

In contrast, the system in the UK is designed to strike a careful balance between independence, transparency and accountability. It seeks to lower the risk of political influence upon and interference in the selection process, as well as the danger of judicial self-selection, by delegating power to an independent commission. Thus, the reliance upon procedural safeguards and rational scrutiny may be understood as a means of defending considerations of merit in judicial appointments. While the framework is not without its modern problems, such as concerns over diversity and democratic accountability, the UK's model for constitutional reform offers perception into modernizing the judicial appointment process without compromising judicial independence.

5. Judicial Appointments in France: A Sophisticated Institutional Framework for Balancing Judicial Independence and Accountability

The French judicial nomination process is one of the most formalized and institutionalized in comparative constitutional law, as it is a reflection of the civil law's customary penchant for professionalization, institutional coherence and administrative rationality. Unlike in common law countries, where appointments are often made through political processes or seniority, in France the judiciary is a professionally organized career body within a hierarchical, centralized structure.^[54] The institutionalization of the recruitment of judges, which replaces individual or political choices, is intended to ensure merit-based appointments, continuity and to guarantee the independence of the judiciary. The Conseil Supérieur de la Magistrature (CSM), a constitutional body centered on the judiciary, is its main bastion of judicial independence and has an important role in the appointments, discipline, and careers of judges and prosecutors.^[55]

A separate and independent judiciary is guaranteed under the French Constitution of 1958, which specifically states in Article 64 that the President of the Republic is the "guarantor of the independence of the judiciary".^[56] This power is counterbalanced by institutional safeguards against the abuse of power in the executive. Even though the right to appoint judges and magistrates is formally granted to the head of state and not the executive, in practice the head of state's responsibility is a largely ceremonial role, as the power is exercised by the CSM.^[57] This distinction between the formal and real powers of the head of state is the basis of the French appointment system.

Unity of the magistracy is a characteristic of the French system. French judges and prosecutors are members of the same corps of magistrates, and they share a single identity.^[58] They are recruited from the same competitive exam and trained together at the same École Nationale de la Magistrature, which has a high degree of homogeneity, to become magistrates.^[59] In contrast to the model used in India and the United Kingdom, judges are routinely drawn from among advocates or lawyers in service. This leads to greater diversity of experience in jurisprudence but less homogeneity of institutions. The French model puts a premium on early professionalism and on professional careers, thereby securing judicial independence within the judiciary.

The most distinctive aspect of the system is that the CSM has an active role in appointing judges (magistrats du siège): for such positions the CSM has power of nomination and the executive must heed its recommendations.^[60] It is a procedure calibrated in a way so that, taking the characteristics of the candidate's work record, legal knowledge, integrity and suitability into account, an institutional model is followed that guarantees consistency and objectivity and minimizes the use of discretion by all the bodies involved in this procedure. The binding effect of the recommendations of the CSM and its collective character avoid political interference and the concentration or monopoly of powers.

By contrast, in the case of prosecutors (magistrats du parquet), the executive has greater influence over the CSM. The Minister of Justice proposes candidates, while the CSM merely advises on the appointment, which is ultimately made by the Minister.^[61] It reflects the dual function of public prosecutors in the French system, who are responsible for enforcing the law and applying state policy within the field of criminal law.^[62] The institutional split, however, despite being justified by its functional rationale, has long been criticized by both academics and international bodies for the additional risk of executive interference in their decision.^[63]

Despite this, the French system has guarantees to preserve independence. In particular, although the Minister of Justice can give general directions and policies, they cannot intervene in individual cases, thus reducing the extent to which a political agenda may dictate the prosecution of individual cases.^[64] More recently, reforms as well as judicial decisions have sought to establish greater prosecutorial independence, in continuing efforts to bring the prosecution in line with judicial independence.^[65]

The CSM also reflects the balance between independence and control. The CSM is composed of non-judges and prosecutors, as well as other distinguished professionals outside the judiciary selected directly from those who are already established in other professions.^[66] This mixed approach is one of the defining features of the French model: it avoids creating a self-perpetuating judicial hierarchy while ensuring that professionalism and expertise are the primary considerations in appointing judges, and that lay members of the judiciary provide a source of democratic legitimacy and public accountability, while avoiding overt political interference.

Another characteristic trait of the French system consists in these disciplinary functions being concentrated in the same body as the management of career of the judges. With the CSM being vested with both appointment and evaluation, as well as promotion and discipline of judges, these functions are naturally brought together. This allows a type of accountability in the continuing professional appraisal of judges while also reinforcing independence because it is an institution that is insulated from political interference.

In addition to the quality of judges, the rigid system of appointment including merit based selection, intrinsic to the French system, tends to produce a more consistent level of professionalism than is found in many other countries. This is in contrast to the Indian collegium system, under which appointments are made largely on the basis of informal considerations. A further reason for the relatively limited role of the executive in the appointment of judges is that it is believed to reduce the politicization of the judiciary, a problem perceived (to a varying degree) in the United States. Finally, the appointment of lay members is supposed to improve the democratic accountability of the judiciary relative to a system composed solely of judges and magistrates.

At the same time, the French model also has its drawbacks, especially the executive's role in appointing the prosecutors raises questions of whether it provides an opportunity for indirect political influence and involvement in the cases involving the executive.^[67] Furthermore, since the judiciary is seen as a career path, and judges are often recruited from the magistracy, the most common means of appointing judges may lead to a less diverse range of professional backgrounds compared to the more diverse background of lawyers who may have been recruited to the bar.

Ultimately, however, these limitations have not weakened the advantages of the French system, nor do they call into question the very difficult task of designing a system for judicial appointments that is both independent yet accountable and representative. Compared to other jurisdictions, the French system has achieved a more adequate and stable compromise. The Indian collegium system is opaque, the US model is more politicized, and the United Kingdom model is open to the problem of statutory rather than constitutional checks on the selection process. In doing so, it offers itself as a stable institution that may adapt to changing constitutional requirements.

Ultimately, the French system of judicial appointment is a model of elegant sophistication, illustrating a compromise between the ideal of meritocratic recruitment, institutional balance, and limited executive influence. The resultant system is imperfect and has received its share of criticism, but nonetheless stands as an example of how constitutional design can achieve a balance between judicial independence and democratic accountability. It stands as a comparative model which, although not transferable, may provide useful experience for other jurisdictions which may be seeking to formulate methods for their own judicial appointments.

6. Methods of Judicial Appointment in the United States: Conceptual Classification

The system of judicial appointment in the United States is unique for its multiplicity, a reflection of the federal structure of the government and the constitutional philosophies behind it. Although there is not a single primary method for selecting judges in the United States, there are several methods which each balance judicial independence and democratic accountability in different ways. There are five main classification types of methods used by the states: partisan elections, non-partisan elections, gubernatorial appointments, legislative appointments, and merit selection.

The method of partisan elections involves the direct election of judges by the public with candidates explicitly affiliated with political parties. Judicial candidates stand for election in a manner similar to other political candidates, by running under a party label on the ballot. One benefit of this is that it provides strong democratic accountability, as it puts courts under the direct control of the electorate. This has a downside, however, because the role of the judiciary as an independent and impartial branch of the government may be weakened by apparent political interference in judicial decisions.^[68]

A non-partisan election avoids political parties in the candidate selection process for public office, though elected officials are still ultimately chosen by the citizenry. Although nonpartisan elections are designed to ask voters to focus on the candidates' qualifications rather than political affiliations, political support is still considered to some extent. Voters' knowledge is still limited.^[69] Thus, non-partisan elections are described as often obscuring the influence of politics rather than eliminating it.

Another common method of appointment is the gubernatorial appointment system, in which judges are appointed by the Governor of the state with or without the advice of advisory commissions and with or without confirmation by the legislature. It stresses expediency and professional selection, since judges can be appointed for their merits and experience. But it has also raised the specter of executive supremacy, and the possibility of the judiciary and executive becoming ideologically aligned.^[70]

Legislative appointments are systems by which judges are appointed by the state legislature through a majority vote. This system is one of the more democratic methods of selecting judges, as it places the appointment process in the hands of elected officials. However, it has also been criticized for fostering political bargaining and compromising the principle of merit appointment by the legislature's partisan composition.

Finally, the Missouri Plan (merit selection) is a compromise between the other two approaches. A non-partisan commission prepares a group of names and sends them to the governor who then makes the appointment. Although not an official system, the process in Missouri is still based on state law, and judges are subject to retention elections, which are elections to

determine whether a judge is to remain in office. This can be seen as an attempt to reduce the harms of politicization while preserving a modicum of public accountability, though it has been heavily criticized.^[71]

These five models illustrate the variety of selection regimes across the United States, and how many of them prioritize different constitutional values, such as democratic legitimacy, and efficiency and expertise. The various merit-based systems are designed to balance the two constitutional values of democratic legitimacy and efficiency. The rest of this article applies this theoretical basis to a detailed assessment of the chosen states and how these different techniques play out in practice, along with their limitations.

6.1 Judicial Appointments in the United States: A State-Wise Comparison

The judicial appointment process in the United States reflects the pluralistic and highly decentralized character of the United States' constitutional system: federalism and political experimentation with democracy. Under the federal system established by Article II, Section 2 of the Constitution, the president nominates judges and the Senate provides advice and consent to the appointments.^[72] State judicial appointment processes vary considerably in how they balance judicial independence and accountability. The analysis below looks at ten different states which adopted a different method of selecting their electors: Texas, Michigan, Wisconsin, California, New York, Virginia, South Carolina, Missouri, Florida and New Jersey.

Judges in Texas are elected in designated partisan elections, meaning that a judicial candidate runs with a party affiliation which is indicated on that candidate's ballot. These elections are characteristic of Texas' strong tradition of citizen participation in government. The party involvement in judicial elections may call into question the neutrality and independence of judges who are required to go out and raise funds and mobilize the political system, creating both real and perceived conflicts of interest. Institutional factors related to gained electoral support can also influence judges' actions. This is especially true in prominent criminal matters, wherein public sentiment may affect the legal proceedings.^[73]

Judicial elections in Michigan are non-partisan elections, meaning candidates do not appear on the ballot with party labels. This was intended to reduce political influence over the judiciary and enable voters to select judges based on merit instead. Nonetheless, political considerations often play a large role in practice: candidates are often informally supported by political parties or other special interests. Without party labels, voters may not be aware of a candidate's positions and may have to vote based on limited or indirect information about candidates. As a result, the Michigan model does reduce but not eliminate the problem of politicization.

Though Wisconsin has officially bipartisan elections, Wisconsin judicial elections have become increasingly politicized and characterized as highly-contested partisan races. In recent years, large sums of money from political actors and interest groups have been funneled into Wisconsin judicial elections. However, this episode shows that even ostensibly non-partisan electoral systems are not immune from politics, particularly during a period of extreme ideological polarization, and illustrates the failure of the electoral model to ensure the impartiality of the judiciary.

Most judges in California, especially those in the higher courts, are appointed by the Governor with the aid of judicial nominating commissions, a form of professional selection. This appointment process puts these officials under some supervision of the courts, but ultimately grants the power to appoint judges to the chief executive. This may promote ideological homogenization, but judges are less subject to the influence of elections, which makes the system somewhat more effective, in that the result is less likely to be an ideologically biased judiciary.

In New York, the judges of the Court of Appeals are appointed by the Governor and confirmed by the Senate from a list of candidates submitted to the Governor by a judicial nominating commission, while judges of other levels of court are elected by an electorate that is often partisan. Therefore, this two-tiered system attempts to balance the principle of merit-based selection at the highest level with the principle of democratic participation at the lower levels. However, there may be inconsistencies in the quality and independence of judicial appointments due to variations in merit-based and democratic components within the same state.

Virginia uses legislative selection, which is a method of judicial selection where a state's judges are elected by its state legislature, with a majority vote of the legislature and a greater emphasis on democratic accountability. However, it is also noted that this can result in the procedure for selecting judges being compromised by political bargaining and ultimately,^[74] the lack of a non-partisan process for this evaluation could raise the question of whether merit is the only criterion used.

South Carolina's process is also a legislative appointment system, but it incorporates a judicial merit selection commission to screen applicants and reduce the number of nominees that the legislature must choose from. While the intention is to combine the merits of both systems, the process is still ultimately dictated by the legislature and therefore vulnerable to political and legislative influences.

Missouri is another merit selection state, also part of the Missouri Plan. A non-partisan commission selects qualified candidates, and sends a short list to the Governor to appoint a judge. After a period of years, the judge is retained or not retained in an election by the voters. It has been described as a compromise between independence and accountability, by giving less weight to party politics and providing some form of public accountability for decisionmaking.^[75]

Florida also uses a modified version of the merit selection system, which employs judicial nominating commissions, gubernatorial appointment, and retention elections, in an effort to ensure that appointments are made on a professional basis while providing a measure of accountability. However, critics argue that, even under this system, a governor may still be able to affect nominations via partisan politics if the selection body is composed of members appointed by the governor.

Lastly, New Jersey uses an executive appointment with legislative confirmation method, under which judges are appointed by the Governor and then confirmed by the state Senate. Judges are first appointed for a temporary term, and can be reappointed for further terms. Upon being reappointed, judges are granted tenure. New Jersey's method combines the positive aspects of

executive appointment and legislative confirmation, but also has the disadvantage of being subject to political influence, especially at reappointment.^[76]

The following analysis of these ten states offers an overview of the diversity and complexity of judicial appointment processes in the United States. The processes exhibit different balances between independence, accountability, and criticism. Other potential problems with electoral systems include politicization, political bargains in legislative appointments, political bias in executive appointments, and indirect politicization when an ostensibly meritocratic process becomes de facto politicized.

From a comparative perspective, American experience is also relevant to understanding the challenge of achieving effective judicial independence in a system with strong norms of democratic participation and political accountability. These systems provide a valuable basis for comparison of alternatives for judicial appointment and for an understanding of the problems of constructing a system that respects competing constitutional values.

7. Comparative Analysis of Methods of Judicial Appointment

These models are all fundamentally different. The most important difference between India, the United Kingdom, the United States, and France is not only the result (in terms of independence or accountability) but the technique (as well), whether they are judicially controlled systems, commission systems, electoral systems or hybrid institutional systems. They reflect very different constitutional choices as to control over the composition and organization of the courts, and the exercise of that control.^[77]

The collegium system, as followed in India, is a variant of the system of judicial appointment, by which judges are appointed and transferred by their peers on the recommendation of their seniors and with minimal involvement of the executive. This model takes judicial independence very seriously, because judges are not appointed by political actors, but has been criticized for the arbitrariness, lack of transparency, absence of formal criteria and lack of institutional accountability of its appointment procedures.^[78] Thus, while the collegium method has succeeded in insulating appointments from political influence, it does so at the cost of transparency and public accountability.

The United Kingdom has a commission-based appointment system, administered by the Judicial Appointments Commission.^[79] This provides the institutionalized mechanism for selection by an independent body, which is charged with finding the best candidate through a process of open advertisement and competition. The executive is not the only body that matters, its power is limited and is organized according to a commission, which is supposed to provide independence and accountability. This means decision-making powers are constrained through an institutional framework, rather than through the courts or the executive.^[80]

At the state level, the United States uses partisan elections, non-partisan elections, gubernatorial appointment, legislative appointment, and selection by merit. The states also have different understandings of the meaning of the constitutional purpose of selection. Other methods of judicial selection, such as gubernatorial and legislative appointments, place political decision-making in judicial selection, thus running the risk of allowing politicization of the judiciary, lack of independence, or political horse-trading for ideological reasons.^[81] Gubernatorial and legislative appointment methods introduce political oversight but may lead

to ideological influence or political bargaining.^[82] The merit selection method, such as the Missouri Plan, attempts to combine professional evaluation with limited public accountability, but even this hybrid approach is not entirely free from political considerations.^[83] The American experience has shown that the problems created by this political process can be seen as serving a protective function, and hybrid systems that fall somewhere between the two extremes—a merit selection process (such as the Missouri Plan) combining some professionalism plus a limited amount of public accountability by means of a public vote. Even merit selection is not free of politics.

The French model of court appointment is thus a hybrid institutional structure, centered on the professional and controlling functions of the Conseil Supérieur de la Magistrature,^[84] avoiding the purely professional judicial control as per the Indian model, the political contestation of the American model, and the purely extra-constitutional nature of the UK model. The CSM's binding function in court appointments allows for professional evaluation and some accountability, while respecting independence due to its mixed nature.^[85]

The main difference concerns where the power to invalidate laws was placed, with the Indian method concentrating it in the judiciary, the American methods dividing it among the political and electoral branches, the UK system giving it to an independent commission and the French methods allocating it to an institutional authority whose composition is defined in the constitution.^[86] Each method is an attempt to overcome the problems of politicization, opacity, and institutional bias.

Another difference is in terms of the level of institutionalization, where the UK and French systems are based on set procedures and institutionally-designed decision-making processes, whilst the Indian collegium is less formalized, and many of the American systems are based on political or electoral processes rather than assessments of candidates.^[87] This shows the extent of impact that institutionalization has on judicial appointments, through creating greater transparency and consistency.

The comparison of the different methods shows that systems based on a single authority, judicial or political, are opaque, and they can be susceptible to politicization. In contrast, hybrid and institutional models, with distributed decision-making and formalized procedures, may do a better job of balancing competing constitutional values.

8. Conclusion

The comparative study on the methods of appointment of judges in India, the United Kingdom, the United States and in France based on objective parameters makes it clear that the success of a regime depends on the method of judicial appointment. Each state has adopted some or the other method of judicial control, commission selection, political or electoral mode or institutional infusion of hybrid systems.

The Indian collegium system of judicial appointment is a strong commitment to judicial independence, as it takes the politics out of the appointment process, although it has been criticized for lack of transparency and institutional accountability. This shows the weaknesses behind a system of judicial appointment which gives the judiciary the sole discretion over making the appointment. The commission-based system in the United Kingdom, while more

structured and transparent is ultimately statutory-based and less democratic, suggesting that it is still in a stage of development.

The United States exemplifies this tradeoff between democratization and politicization through its varied state-level practices of appointing judges through political or electoral processes. Democratization increases participation, while politicization threatens the impartiality and perceived legitimacy of the judiciary, a tradeoff that is played out in judicial appointments worldwide.

In contrast, the French system of appointment of judges by merit to a collegium of judges, the Conseil Supérieur de la Magistrature, with constitutional controls and limited-role of the executive, is a more balanced and coherent system that does not push the extremes of isolation from politics or of government intervention. It does not have the shortcomings of the collegium appointment, since it has rules and accountability, not the shortcomings of electoral and political appointment, since it is not partisan, and not the shortcomings of statutory appointment, since it is constitutional.

Ultimately, no system is perfect, but the French model offers a more advanced and less vulnerable model for judicial appointments. Distribution-structured models that diffuse the locus of power, without a single body controlling all the levers, offer a means of achieving independence while ensuring a degree of accountability and protection from abuse. Thus the French model can be seen as a marginally superior method of appointment in comparative terms, and also provides lessons from which other jurisdictions may seek to reform.

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