



## The intersection of meritocracy and exclusion: Exploring diversity obstacles in the higher judiciary in India, UK & USA

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### Abstract

The Indian higher judiciary is seen as a pillar of justice in the country's system, responsible for interpreting laws upholding constitutional values and ensuring fair access to justice for all. While the idea of meritocracy guides the selection and progress of judges focusing on skills and knowledge as criteria for appointment and growth there are underlying complexities that maintain exclusionary practices and impede diversity in the judiciary. Although meritocracy is meant to be fair, it often operates within subjective frameworks especially in the appointment processes of the Indian higher judiciary. Unlike some democracies where judicial appointments are publicly scrutinized and overseen by parliament. India's system largely remains shrouded from view controlled mainly by a few individuals within the executive and judiciary. This lack of transparency encourages discretion and favoritism allowing personal biases to influence decisions and undermining principles.

As a result, despite claims of adhering to meritocracy the Indian higher judiciary is mostly homogenous with individuals, from backgrounds being overrepresented on the bench. Women, minorities people from marginalized castes and individuals from lower socioeconomic backgrounds are still not well represented in the top levels of the legal system. This lack of representation does not affect how diverse the judiciary is but also raises concerns about how fair and effective it is in providing unbiased justice. The focus of this paper will be on understanding how appointment processes and institutional practices that prioritize merit can unintentionally lead to exclusion of the marginalized groups. Moreover, this research aims to bring attention to the steps and changes needed to create a more inclusive judicial system that mirrors the diverse makeup of Indian society.

**Keywords:** Judiciary, appointments, minority, meritocracy, marginalized

### Introduction

In any country, the judiciary plays a crucial role in upholding justice and the principles of the constitution. In India, the higher courts have duties such as interpreting laws, protecting constitutional requirements, and ensuring fair justice for all citizens. However, there have been concerns about how appointments in the judiciaries are made based on merit, as this may lead to exclusionary practices. This paper delves into how meritocracy and exclusion in the Indian higher judiciary focus on barriers to diversity and the impact of having a bench that lacks diversity (Kapiszewski and Taylor, 2008) <sup>[10]</sup>.

### Meritocracy as an Ideal

The concept of meritocracy is based on the idea that individuals should progress according to their abilities and accomplishments. It is an aspect of modern democratic systems ensuring that those in positions of power are the most competent. In relation to the judiciary, meritocracy aims to ensure that judges have the skills, knowledge and impartiality to make fair decisions.

The notion of meritocracy implies that candidates are selected based on criteria such as academic credentials, professional experience and proven competence. This is meant to create a judiciary that's efficient and respected. However, putting principles into practice can pose various challenges (Eric K. Yamamoto, 1997) <sup>[7]</sup>. The legal system in India at its higher levels operates using a collegium system for judicial appointments. This system consists of the Chief Justice of India and a group of judges who are responsible for selecting judges for the Supreme Court and High Courts. While the system aims to uphold meritocracy,

critics have raised concerns about its lack of transparency and accountability (Kapiszewski and Taylor, 2008) <sup>[10]</sup>.

### Importance of Diversity in the Judiciary

The significance of having diversity in the judiciary cannot be understated. Firstly, it enhances the credibility of the system by mirroring the diverse demographics of society. Secondly, diverse perspectives among judges can lead to nuanced and fair decision-making processes. Judges with backgrounds bring unique life experiences and viewpoints that can enrich the judicial process and ensure responsiveness to all segments of society (Jay Vinayak and Sengupta, 2020) <sup>[9]</sup>.

The absence of diversity in the judiciary can lead to a disconnect from the realities of marginalized communities, perpetuating biases and reinforcing existing power dynamics. Therefore, promoting diversity within the judiciary is crucial not only for representation but also for achieving justice and equity (Van Zyl Smit, 2015) <sup>[20]</sup>.

### The Consequences of Homogeneity in Judiciary

An absence of diversity in the judiciary can have significant and wide-ranging effects, influencing the effectiveness, trustworthiness, and authority of the legal system. When the makeup of the judiciary fails to mirror the varied demographics of the population it serves, it runs the risk of perpetuating structural imbalances and eroding public confidence.

Baxi (1982) <sup>[3]</sup> contends that a judiciary composed of individuals with similar characteristics may encounter difficulties in comprehending and resolving the complex problems that impact diverse sections of society. Judges

who come from comparable socio-economic, educational in nature, and cultural situations may possess restricted viewpoints of the realities and difficulties encountered by marginalised communities. The absence of a variety of perspectives might result in legal judgements that uphold current power dynamics and neglect the concerns of marginalised communities.

The lack of diversity in the judiciary also weakens its legitimacy. According to Hasan (2006), the lack of representation of marginalised groups undermines the public's trust in the courts and their capacity to provide equitable and unbiased justice. A court that lacks representation from all segments of society it covers is seen as distant and prejudiced, which can undermine its credibility and the integrity of the legal system. The absence of trust might discourage individuals from pursuing legal action and also cultivate a feeling of marginalisation within minority communities.

Furthermore, a judiciary that lacks diversity may unintentionally sustain discriminatory practices and biases. Studies suggest that heterogeneous judicial panels are more inclined to take into account a more comprehensive array of viewpoints and backgrounds, resulting in more impartial and fair judgements (Hasan, 2006). Conversely, a dearth of variety can lead to a limited understanding and application of laws and policies, which may fail to adequately address the intricacies of societal problems.

The socio-economic ramifications of a judiciary that lacks diversity extend beyond the outcomes of individual cases. If court decisions frequently neglect to address systemic inequities, they can exacerbate the perpetuation of social and economic imbalances. This phenomenon can lead to a series of consequences, influencing the formulation of public policies, the ability of individuals to move up the social ladder, and the general perception of fairness and equity in a society.

In order to lessen these repercussions, it is imperative to advocate for diversity within the court. This entails the implementation of transparent and inclusive appointment procedures, the provision of mentorship and assistance for underrepresented groups, and the active resolution of institutional prejudices. By promoting a broader range of representation within the judiciary, the legal system can more accurately mirror the society it serves, bolster its legitimacy, and guarantee the fair and impartial administration of justice.

Ultimately, the absence of multiplicity amongst the judiciary has substantial adverse ramifications for both the legal system and humanity as a whole. To tackle this problem, it is necessary to make a collective and focused endeavour to foster inclusiveness and representation. This will guarantee that the judicial system can efficiently maintain justice and preserve the principles of law for every individual in society.

### Case Law Analysis

In order to comprehend the actual consequences of merit-based and exclusionary practices in the Indian judiciary, it is imperative to analyse significant instances that have influenced the present system. Three notable cases—the Second Judges Case (1993), the Third Judges Case (1998), and the National Judicial Appointments Commission (NJAC) Case (2015)—demonstrate the development of judicial appointments in India and the persistent difficulties

of openness and inclusivity. The Second Judges Case, formally referred to as Supreme Court Advocates-on-Record Association vs. Union of India (1993), marked a significant turning point in the history of the Indian judiciary. This case implemented the Collegium system, which brought about substantial changes to the procedure for judge appointments. Before this decision, the executive branch exerted significant control over judge appointments, which raised concerns regarding the autonomy of the judiciary. The ruling sought to bolster judicial independence by bestowing the judiciary with a pivotal role in the selection process.

The Collegium system comprises the Chief Justice of India as well as a distinguished panel of senior judges who propose appointments along with transfers of justices. Although the primary purpose was to safeguard the judiciary against executive intervention, the case also resulted in unforeseen repercussions. The Collegium system functions with a significant level of confidentiality, characterised by a lack of openness and external oversight. The lack of transparency in the nomination process has faced criticism due to its susceptibility to subjective variables, which may result in the perpetuation of prejudices (Agarwal, 2022) <sup>[1]</sup>.

The Third Judges Case, often known as the 1998 Judges Case, is a significant legal case.

Re: Specific Reference No. 1 of 1998, also known as the Third Judges Case, we sought to address any ambiguities in the Second Judges Case's Collegium system. This case originated from a presidential reference made under Article 143 of the Indian Constitution, with the purpose of obtaining clarification on specific components of the Collegium system.

The advisory decision of the Supreme Court upheld the Collegium system while introducing additional procedural norms to enhance consultation as well as consensus among the members of the Collegium. Nevertheless, even after these explanations, the system persisted in functioning with a notable level of obscurity. The absence of honesty in the decision-making process continued to be a significant worry since it restricted public examination and responsibility (Thiruvengadam and Joshi, 2012) <sup>[19]</sup>.

The Third Judges Case, although it strengthened the autonomy of the judiciary, did not specifically tackle the matter of inclusivity in the judicial system. The lack of initiatives to foster inclusivity and equitable representation from marginalised populations resulted in the judiciary remaining predominantly composed of individuals representing similar socio-economic as well as educational backgrounds.

The National Judicial Appointments Commission (NJAC) Case refers to a legal case that took place in 2015.

The National Judicial Appointments Commission (NJAC) issue, officially referred to as Supreme Court Advocates-on-Record Association vs. Union of India (2015), was a significant legal issue regarding the process of selecting judges. The NJAC, or National Judicial Appointments Commission, was a proposed constitutional entity designed to enhance transparency and inclusiveness in the process of appointing officials by involving individuals from the government, judiciary, and civil society.

The NJAC aimed to supplant the Collegium system by implementing a more equitable approach that aimed to tackle concerns of opacity and absence of responsibility.

Nevertheless, the Supreme Court declared the NJAC Act and the 99th Constitutional Amendment, which had constituted the NJAC, illegal. The court determined that the NJAC undermined the autonomy of the judiciary by permitting executive intervention (Jain and Maheshwari, 2020) <sup>[8]</sup>.

The NJAC was intended to enact reforms that would enhance diversity and transparency, but its denial by the Supreme Court upheld the Collegium structure. This ruling was perceived as a hindrance for those calling for a more transparent and all-encompassing judicial appointment procedure. Detractors contend that the Collegium system, despite its focus on judicial autonomy, nonetheless lacks the essential transparency and means to guarantee a varied representation.

### Significance and Insights

These significant legal instances demonstrate the intricate relationship between the autonomy of the judiciary, the openness of its proceedings, and the inclusion of many perspectives within the Indian judicial system. Although the Collegium system was created to safeguard judicial independence, its deficiency in openness and transparency has been a notable negative. The absence of initiatives to foster diversity has resulted in a judiciary that inadequately reflects the various demographics of Indian society.

The instances highlight the necessity for reforms that achieve a harmonious equilibrium between judicial autonomy and openness, as well as inclusiveness. India can potentially enhance its judicial appointment process by drawing insights from the experiences of other democracies, such as the United Kingdom and the United States. A more transparent and equitable strategy can be explored to ensure fairness in the selection of judges. One possible approach is to establish autonomous regulatory agencies, such as the Judicial Appointments Commission in the UK, and to guarantee transparency and evaluation by both the public and the legislative branch, as observed in the US.

### Result

Although the judicial selection process in India is based on the notion of meritocracy, the upper court is still primarily composed of individuals from similar backgrounds. The lack of diversity, especially in the Supreme Court and those high courts, is seen in the considerable inadequate representation of women, minorities, and those from underrepresented groups or lower socio-economic backgrounds.

### Absence of adequate representation

The Indian higher judiciary frequently faces criticism for its limited diversity. Women, comprising approximately 50% of the Indian population, have significant underrepresentation in the upper echelons of the judiciary (Ash *et al.*, 2022). In 2023, the representation of women in the Supreme Court and High Courts as judges will be significantly lower than that of men. This disparity gives rise to concerns regarding the judiciary's ability to comprehensively comprehend and effectively tackle matters impacting many segments of society.

Likewise, minorities, as well as people from marginalized communities, encounter substantial obstacles when attempting to enter the judiciary. India's judiciary fails to sufficiently represent the country's diverse ethnic, religious,

and social makeup. The underrepresentation of Scheduled Castes and Scheduled Tribes, as well as other minority groups, in higher judicial positions, weakens the judiciary's capacity to provide fair and impartial justice.

### Influence on Equity and Effectiveness

The absence of variety within the courts has consequences for the impartiality and effectiveness of judicial decisions. A judge who does not reflect the demographic makeup of society may need more intricate comprehension to tackle intricate socio-cultural matters. This can lead to judgments that fail to thoroughly take into account the varied experiences and viewpoints of all residents. Consequently, doubts arise regarding the judiciary's integrity and efficacy in dispensing justice.

### Obstacles to Advancing Diversity in the Process of Selecting Judges

#### Issues about transparency

The absence of openness in the appointment process is a significant obstacle to promoting diversity in the Indian higher judiciary. The collegium system, characterized by a panel of esteemed justices, employs a significant level of confidentiality in the process of appointing fresh members to the judiciary (Mittal and Jain, 2023) <sup>[8]</sup>—the absence of transparency results in the criteria and procedures for judge selection being withheld from the public. Hence, appointment decisions might be influenced by subjective variables and personal biases, resulting in the preservation of current power structures instead of fostering diversity.

#### Systemic biases

Institutional prejudices significantly contribute to the discriminatory behaviours witnessed in the Indian court. The criteria utilized to assess merit frequently mirror the histories and advantages of individuals who currently hold positions of authority. For instance, candidates that come from recognized colleges or have prestigious legal histories are often given preference. This institutional prejudice not only restricts possibilities for applicants from less fortunate origins but also perpetuates a cycle because the judiciary continues to be comprised of those from similar socio-economic as well as educational backgrounds. These prejudices weaken the meritocratic standards that the judiciary seeks to preserve.

#### Challenges related to social and economic factors

Socio-economic obstacles exacerbate the lack of representation of communities of colour in the judiciary. Individuals from lower socio-economic origins sometimes need more access to high-quality education and professional prospects. The presence of structural inequities, such as the unequal distribution of educational resources and limited access to professional networks, impedes the progress of these individuals in the legal profession. Access to crucial resources is necessary for numerous competent individuals to contemplate judicial positions, hence limiting diversity throughout the judiciary.

*The philosophy of meritocracy refers to a system in which individuals are rewarded and advanced based on their abilities, skills, and successes rather than factors such as social status or personal connections.*

The judicial appointment process is founded on the notion of meritocracy, which involves selecting candidates based on their abilities and accomplishments rather than their socio-economic background. Nevertheless, the practical application of democracy in the Indian judiciary encounters numerous obstacles. Subjective evaluations, a need for more transparency, and institutional prejudices can distort the meritocratic system, resulting in the exclusion of competent individuals from varied backgrounds. This distorted implementation of meritocracy impairs the judiciary's capacity to accurately represent the diversity of society and effectively meet the requirements of all citizens.

### Comparison: United Kingdom versus the United States The United Kingdom

The Judicial Appointments Commission (JAC) in the United Kingdom is characterized by a heightened level of transparency and inclusivity in the process of appointing judges. The JAC functions autonomously as a governing entity tasked with choosing contenders for judicial positions based on their qualifications, with a particular emphasis on promoting diversity. The JAC's procedures involve explicit standards for choosing candidates and a commitment to ensure that the court represents a wide range of social backgrounds. As an illustration, the JAC organizes outreach initiatives and actively promotes submissions from a diverse pool of candidates, which includes those from marginalized communities. This strategy has resulted in a judiciary that more accurately reflects the demographic composition of the UK population (O'Neill, 2023) <sup>[14]</sup>.

The JAC's processes are transparent, which enables more public scrutiny and accountability in judicial nominations. This transparency fosters public confidence in the impartiality and comprehensiveness of the judiciary. The UK model's focus on diversity and merit serves as a helpful comparison to the Indian system, showcasing the advantages of a transparent and inclusive method for selecting judges.

### USA

Judicial appointments in the United States, particularly those before the Supreme Court, are subject to thorough examination and evaluation by the public and politicians. The appointment process comprises several stages, including the president's nomination and the Senate's confirmation. Despite many disagreements, this procedure guarantees that judicial selections undergo substantial scrutiny from the public and political spheres. The Senate's responsibility in confirming nominees serves as a mechanism to restrain executive power and underscores the significance of having varied and inclusive representation. The US model, despite the possibility of being influenced by political factors, highlights the importance of openness and responsibility in the selection of judges. The US process of judge selections undergoes thorough public and political examination to ensure that they are not just determined by merit but also encompass broader societal considerations about equal opportunity and diversity (Zamani and Brown, 2003) <sup>[21]</sup>. Nevertheless, effectively addressing the difficulties associated with negotiating political factors and potential prejudices necessitates meticulous supervision to prevent compromising the integrity of the merit-based selection process.

### Summary

The analysis demonstrates that although the principle of meritocracy is fundamental to judicial appointments, its execution in the Indian judiciary is impeded by issues related to transparency, institutional biases, and socio-economic barriers. The judiciary's limited diversity hampers its capacity to adequately serve and reflect India's heterogeneous population. The paper examines the methods used in the UK and the US. It emphasizes the advantages of candour, public scrutiny, and inclusive characteristics in fostering a judiciary that is more varied and representational. By implementing changes and incorporating successful strategies from other legal systems, the Indian judiciary can improve its justice and efficiency.

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