

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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# **COMPARATIVE ANALYSIS OF PROCESS FOLLOWED FOR THE JUDICIAL APPOINTMENTS IN HIGHER JUDICIARY BETWEEN INDIA AND AMERICA**

AUTHORED BY - DR. KIRTI BAJAJ

## **Abstract**

The COI and America prescribes details regarding composition, powers and functions of the organs of the government (Legislature, Executive and Judiciary). In India, appointment of higher judiciary at Supreme Court (SC) and High Courts (HCs) are govern by Art. 124(2) and Art. 217(1) of the Constitution. In America, **Art. II, S. 2<sup>1</sup>** of the US Constitution states that, the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the SC and all other Officers of the US. In this paper researcher has tried to make comparison between the process followed for the judicial appointment in higher judiciary in India and America on different grounds such as constitutional provision for appointment, qualification, removal. With this researcher has tried to discuss the process of appointment of higher judiciary on the notions of accountability, transparency and judicial independence.

**Key Words:** Judicial appointment, Constitution of India, American Constitution, accountability, transparency, judicial independence, etc.

India and America, both are the common law country. The Constitution is the most important statute in both the country. Like America, the Indian Constitution has also accepted the notion of the rule of law, making it the supreme law of the land. According to **Hans Kelson<sup>2</sup>**, Constitution is the state's "basic framework." Both the countries have federal Constitution with common features like rule of law and independent judiciary. Theory of separation of power is not strictly followed in India, unlike in United States (US). Both the nations have accepted separation of power theory in different way but with principles of checks and balance. While preparing the Constitution of India (COI), the Constituent assembly had studied different countries Constitution and took the best and suitable provisions for our Constitution.

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<sup>1</sup> AMERICA CONST. art. II s.2

<sup>2</sup> Austrian Jurist; [https://en.wikipedia.org/wiki/Hans\\_Kelsen](https://en.wikipedia.org/wiki/Hans_Kelsen)

The COI and America prescribes details regarding composition, powers and functions of the organs of the government (Legislature, Executive and Judiciary). Judiciary is an indispensable organ of the government. The institution of judiciary resolves disputes and act as guardian of fundamental rights. Judiciary keeps a watch on other organs of government, i.e. Legislature and Executive. Any law that contradicts Constitutional provisions judiciary declared it as null and invalid. To ensure that the judiciary performs its functions effectively, the judiciary must be powerful and independent. India borrowed many principles from American Constitution for judiciary such as appointment, qualification, removal and the principle of independence judiciary.

### Comparison as to Constitutional Provisions

In India, appointment of higher judiciary at Supreme Court (SC) and High Courts (HCs) are govern by Art. 124(2) and Art. 217(1) of the Constitution. According to **Art. 124(2)**<sup>3</sup> the judges to the SC shall be appointed by the President of India after consulting the Chief Justice of India (CJI) and senior judges of the SC as he may deem necessary. While appointing the Chief Justice, the President has to consult with such of the Judges of the SC and the HC's as he may deem necessary. In case of appointment of other Judges, the President is required to consult the CJI though he may also consult such other Judges of the SC and the HC's as he may deem necessary. The procedure for appointment of Judges of HC is slightly different from the one concerning the appointment of judges of the SC. Appointment of Judges of the HC is governed by **Art. 217(1)**<sup>4</sup> of the Indian Constitution. The HC judges are appointed by the President after consulting the CJI, the Governor of the State concerned and in case of appointment of a judge other than the Chief Justice, the Chief Justice of the HC to which the appointment is to be made.

In America, **Art. II, S. 2**<sup>5</sup> of the US Constitution states that, the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the SC and all other Officers of the US. The process of appointing Justices has most basic feature the sharing of power between the President and Senate and to receive appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate.

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<sup>3</sup> INDIA CONST. art. 124(2)

<sup>4</sup> INDIA CONST. art. 217(1)

<sup>5</sup> AMERICA CONST. art. II s.2

The most important thing to be noted in this regard are that in India, according to the Constitution, nominating authority is not defined, the 2 pillars of the Indian democracy i.e. executive and judiciary, plays an important role in appointment of higher judiciary. Through the collegium system role of executive is limited only to confirm the appointment recommended by the collegium. Hence judges are appointed by the judges itself. Where as in America, according to their Constitution nominating authority is the President i.e. executive head of the State and executive; and executive and legislature plays an important role in the process of appointment of higher judiciary in courts.

### Comparison as to the Qualification

**Art. 124(3) (a) and (b)** prescribe certain criteria for the appointment of judge at SC.<sup>6</sup> Accordingly a person to be appointed as a Judge of the SC, a person must be a citizen of India and must have been, for at least five years, a Judge of a HC or of two or more such Courts in succession, or an Advocate of a HC or of two or more such Courts in succession for at least 10 years or he must be, in the opinion of the President, a distinguished jurist. **Art. 217(2)** provides that a person shall not be qualified for appointment as a judge of the HC unless he is a citizen of India and has for at least ten years held a judicial office in the territory of India or has for at least ten years been an advocate of a HC or of two or more such Courts.<sup>7</sup> It is usually the person who have already held posts as judicial officers of HCs are appointed as Judge of SC even though there is provision to make person judge who has been an advocate in HC for 10 years.

Where as in America there is no specific criteria is mention in the Constitution. Criteria for selecting a SC nominee vary from President to President, two general ideology, political ideology and profession qualification, appear to underline the choices of almost every President. The integrity, impartiality and outstanding qualification of an individual have also become an important criterion for a President while selecting a nominee for the Court. Although neither the Constitution nor federal law requires that a SC Justice be a lawyer, every person nominated to the Court thus far has been. In this regard Indian Constitution has defined category of person to be appointed as judge and in America President is free to appoint any person as a judge of the SC who is not objected to by the Senate. In America, it's generally the

<sup>6</sup> INDIA CONST., art.124(3)(a) and (b)

<sup>7</sup> INDIA COSNT., art. 217(2)

persons who are practicing in courts with many years of experience who are appointed as judicial officers.

### Comparison as to the Tenure of Judges

According to **Art. 124 (2)** of the COI, SC judges shall hold office until the age of 65 years and HC Judge shall hold office until the age of 62.<sup>8</sup> Where as in America according to **Art. III S. 1** judges shall hold the office during the good behaviour.<sup>9</sup> There is no statutory retirement age and they can hold office for lifetime. Long tenure helps to maintain judicial independence as the judges have no fear of removal unless and until they are not charged and convicted with bribery, treason or other high crimes and misbehaviour. The lifetime tenure also gives independence from the executive and legislature.

### Comparison as to Removal of judges

According to **Art. 124(4)** judges shall be removed by the president after voting in both the house of parliament which is called as impeachment process.<sup>10</sup> The process of impeachment can be initiated on the proved misbehaviour or incapacity only. The conduct of the judges cannot be discussed in State Legislature or Parliament except in the case of impeachment. The SC and HC have powers to punish any person of their contempt. The process of impeachment is very hard and requires majority of total membership and 2/3<sup>rd</sup> of those present in each house of the parliament. Such a hard process of removal makes the judiciary independent from both executive and legislature as it is difficult to achieve majority. Till present, the only impeachment of a Judge to have gone far was that of **J. V. Ramaswami** during early 90's. and the process was invoked against very few judges only.<sup>11</sup> This itself shows how the judicial independence is maintained in India and how the judiciary is less accountable.

In America **Art. II S.4** provides the procedure of impeachment for the removal of judges from their office on the grounds of conviction for treason, bribery or other high crime and misdemeanours.<sup>12</sup> US congress has power to carry impeachment process against a judge.

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<sup>8</sup> INDIA CONST., art. 124(2)

<sup>9</sup> AMERICA CONST., art. III s.1

<sup>10</sup> INDIA CONST., art.124(4)

<sup>11</sup> Unknown. List of Judges who faced Impeachment Proceedings, HINDU NET DESK, 2017; <https://www.thehindu.com/news/national/list-of-judges-who-faced-impeachment-proceedings/article18578156.ece>

<sup>12</sup> AMERICA CONST., art. II S.4

Till today 66 judges are impeached from their post.<sup>13</sup> With judicial independence its accountability is also important to maintain faith of public in judicial administration. After making detailed discussion on tenure and removal of judges in detail in previous chapters it is clear that America has maintain, as compare to India, accountability of judiciary without disturbing the principle of judicial independence.

### **Comparison as to Procedure Followed for the Appointment**

Any appointment process to the government department has three steps- nomination, selection and appointment. Those who are eligible for the post are come under the list and from that list the nominees are selected. From the selected nominees after scrutinizing the person is get appointed to the post for which he was nominated among the others. The same procedure is followed in the judicial appointment also. In India, there is no designated authority or commission for proposing the judicial nominees.

Before collegium the judicial appointment was done through the Memorandum of Procedure (MOP)<sup>14</sup> according to which the senior most judge at SC will be appointed as CJI.<sup>15</sup> In case of other SC judge, the CJI will initiate proposal and forward his recommendation to the Union Minister of Law, Justice and Company Affaire, to fill up the vacancy. After getting the recommendation from the judiciary the President will forward it to the Prime Minister for advice. After getting approval from the Prime Minister the president by signing the confirmation appoints the recomendee as judge. In case of HC judges and Chief Justice of HC, according to MOP, the Government after consulting with the CJI decide, as a matter of policy, to appoint the Chief Justice of all HCs from outside. The Chief Justice and Judges of the HCs are to be appointed by the President according to Art. 217 (1) of the Constitution. Chief Justice will consult with two senior most judges on bench regarding the person whom he is going to recommend to the Chief Minister of the State. A copy of the Chief Justice's proposal, with related documents should simultaneously be sent to the Governor to without delay. A copy of the recommendation may also be sent to the CJI and the Union Minister of Law, Justice and Company Affairs to expedite consideration. The Governor forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs within

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<sup>13</sup> U.S. Senate: About Impeachment; <https://www.senate.gov/about/powers-procedures/impeachment.htm>

<sup>14</sup> Memorandum of Procedure; <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/>

<sup>15</sup> *Id.*

six weeks from the date of receipt of the proposal from the Chief Justice of the HC. But in practise there is no fix time for the whole process and the documents are also kept secret or known to only the collegium.

Since 25 and more years India is following the procedure for the appointment of judges to higher judiciary by the collegium. In S. P. Gupta's case SC held that the power of appointment resides solely and exclusively in the president.<sup>16</sup> This decision was criticized in Subhash Sharma's case in which court held that primacy must be given to the SC and HC. The 2<sup>nd</sup> judges case was a landmark case on this point of appointment of higher judiciary. The court decided in this case that no appointment can be made unless it confirms by collegium. There shall be a collegium comprising of CJI and two senior judges of the SC.<sup>17</sup> In Re Presidential Reference case the court increase the collegium with CJI and four senior judges of the SC.<sup>18</sup>

The process of appointment followed by this collegium was unconstitutional, opaque and less efficient. The process of higher judicial appointments between the powers of the President and CJI i.e. Executive and Judiciary starts from the consultation process where the primacy to the views is shifted to judiciary. Judges are appointing judges. The other pillars of the democracy have very less role in appointment of judges. Through this judiciary is protecting itself from being accountable. India is facing tussle between the judiciary and executive on the point of appointment of higher judiciary.

In America the prospective candidate is nominated by the President. After nomination his name is forwarded to the Senate Judiciary Committee for pre-hearing investigation. Federal Bureau of Investigation (FBI) makes the private background investigation which includes examination of a candidate's personal financial affairs, candidate's public record and professional abilities. FBI is headed by high Justice Department officials, White House aides, or both, working together. For help in evaluating the backgrounds of Court candidates, Presidents sometimes also have enlisted the assistance of private lawyers, legal scholars, or, on rare occasions, the American Bar Association. The committee only evaluates that the nominee is well qualified, qualified or less qualified. After the report the nominee has to face public

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<sup>16</sup> S. P. Gupta v. Union of India, AIR 1982 SC 149; <https://indiankanoon.org/doc/1294854/>

<sup>17</sup> Supreme Court Advocate-on-Record Association v. Union of India, AIR 1994 SC 268; <https://indiankanoon.org/doc/753224/>

<sup>18</sup> Re Presidential reference case, AIR 1999 SC 1; <https://indiankanoon.org/doc/543658/>

debate and public hearing. Public hearing is nothing but an interview to clear up all the ambiguity in the investigation file. The whole hearing conducted by the Senate Judiciary Committee is broadcasted on social media and television and hence maintained transparency in the appointment of judges by the America. After completion of hearings, the Judiciary Committee meets in open session to determine what recommendation to report to the full Senate. This report plays an important role in appointment of judges. It shows whether the nominee gets unanimous support or almost unanimous support, some opposition, almost party line opposition.

There is clause for recusal and abstention where the person recused himself from evaluating or voting for the nominee if has some potential interest in this behalf. No Committee member, including the Chair, shall participate in the evaluation or vote on the rating of a nominee in any instance in which such participation would give rise to the appearance of impropriety or be incompatible with the purposes served and functions performed by the Committee. This is another method of maintaining the accountability of judiciary. As the report is made by judiciary committee it has sent for Senate consideration. There are no instances were found where the Senate has acted against the report made by the Senate Judiciary committee. After getting consent from the senate the president appoints the nominee as judge to the federal court for which he was nominated. After studying the whole process, we found that executive and legislature has the power of appointment of judges in America and the practise followed in America is more successful in maintain transparency in the process of judicial appointment, judicial independence and accountability as compare to India.

### **Comparison as to Consent**

Art. 124(2) and Art. 217(1) of Indian Constitution deals with the appointment of higher judiciary in SC and HCs respectively. According to **Art. 124(2)** every judge of SC shall be appointed by the President after consulting such judges of SC and HCs as the President deems necessary for the purpose. It is further provided in the article that in case of appointment of judges of SC other than CJI, CJI shall always be consulted. According to **Art. 217(1)** every HC judge shall be appointed by the President after consulting the CJI, the Governor of that State and in case of appointment of judges other than Chief Justice, the Chief Justice of HC.

It is clear from the wordings of Art. 124 that for the purpose of appointing the CJI, the President must first see whether he deems it needful to consult any judge or judges of the SC

and of the HCs, and if he arrives at the conclusion that the same is not required, then the matter ends thereupon. Art. 124 provides wide discretionary power to the President for consultation at the time of appointment of the CJI. Though the proviso attached acts as a restraint on the President's power of appointment, i.e. while appointing the judge other than the CJI, the CJI shall always be consulted. This makes it crystal clear that the word "consultation" provided in the substantive part of Art. 124(2) grants voluntary optional power, for the words used are "may deem necessary".

But after the series of Judges Case, as discussed in previous chapters, the SC's decision in Third Judges Case not only showed primacy to CJI and increased the number of collegium from 2 to 4. Now the President is bound to appoint the judges to the court as suggested by the collegium only.

In the Constitution of America, **Art. III** deals with the judiciary. In America, there is no mention of appointment of judges under Art. III, rather the appointment criteria have been mentioned under **S. 2 of Art. II**, according to which the power to appoint Judges of SC vests in the President with the advice and consent of the Senate. This advice and consent of the Senate is compulsorily to be taken by the President. It can be viewed that in America at the time of appointments to judicial offices, both the other organs of the government i.e. executive and legislature play an important role and no person from the judicial organ is involved in their appointment process. This makes vast difference from India, where it is always claimed that only the judicial officers themselves should have the capacity to appoint their next judges and this process always remain in controversy.

### **Comparison as to Judicial Independence**

As we know that the concept of judicial independence was borrowed from America. Judicial Independence is one of the basic structures of the COI. **Art. 50** of the Constitution as Directive Principles of State Policy.<sup>19</sup> Art.124 and 217 by fixing the tenure of the judges at SC and HC respectively protects judicial independence. Further these articles have provisions for removal of judges only on the grounds proven misbehaviour and incapacity. Since judges' salaries and allowances are set and not subject to a vote by the legislature, it is also a factor that contributes to the judges' independence. The SC held that the judges should be fearless and

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<sup>19</sup> INDIA CONST., art.50

should uphold the principle of rule of law. This is the basis of the concept of independence of the judiciary.<sup>20</sup> In another landmark case the court observed that the independence of the judiciary is necessary for democracy to function effectively.<sup>21</sup> The court further concluded by stating the powers and rights can never be hampered as long as the judiciary remains independent from the executive and the legislature. The controversy arises in 1968 after which SC feels threat to judicial independence. To uphold the independent of judiciary in India, SC has evolved the collegium system for appointment of judiciary through the three judges cases.

The federal judiciary was designed by the framers of the US Constitution as independent of the executive and legislature to maintain checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. Art. III S. 1 of the US Constitution provides long tenure to judges stating that judges shall hold the office during the good behaviour.<sup>22</sup> There is no statutory retirement age and they can hold office for lifetime which maintain judicial independence. Another important provision of the US Constitution is the provision of removal under Art. II S.4. according to it judges shall be removed from office only by impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanours.<sup>23</sup> The remuneration of judges may not be reduced while they are in the office. American SC held in **Northern Pipeline Construction Co. v. Marathon Pipe line Co.**<sup>24</sup> “Art. III as a prescription for ordering relations between the judicial branch and two political branches in a way that will uphold the framer’s vision of an independent federal judiciary.” Marshall C.J. said on judicial independence as “...the independence of all those who try causes between man and man, and between a man and his government, can be maintained only by the tenure of their office.<sup>25</sup> But at the same time SC of America confirms that executive and legislature (President and Senate) has the power, given by the Constitution, to appoint higher judiciary.

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<sup>20</sup> *supra* note 1

<sup>21</sup> *supra* note 2

<sup>22</sup> AMERICA CONST., art.III s. 1

<sup>23</sup> AMERICA CONST., art. II S.4

<sup>24</sup> Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 458 U.S. 50, 58-60 (1982) (USA); <https://supreme.justia.com/cases/federal/us/458/50/>

<sup>25</sup> United States ex rel. Toth v. Quarles, 250 U.S. 11, 15-16 (1955)(USA); <https://supreme.justia.com/cases/federal/us/350/11/>

## Comparison as to Judicial Accountability

Accountability, is a critical and necessary condition for democracy to breathe. Judicial accountability and judicial independence go hand in hand. The need for accountability in Judiciary arises to ensure a system of checks and balances and to prevent any unwarranted use of power. Accountability confronts in taking responsibilities for their actions and decisions. The Constitution states that SC and HC judges cannot be removed except by impeachment [Art. 124(4)].<sup>26</sup> According to it a judge of SC and HCs can be removed from his office only on for proved misbehaviour or proved incapacity, by what is popularly called the process of impeachment, where 2/3<sup>rd</sup> of the members of each House of Parliament can vote for the removal of the judge.<sup>27</sup> **Art. 235**<sup>28</sup> signifies the provision of an effective mechanism to enforce accountability, which indicates the higher judiciary's controlling power over the sub-ordinate judiciary. Different acts were enacted to bring judicial accountability such as The Judges Inquiry Act, 1968;<sup>29</sup> The Judges Inquiry Bill, 2006;<sup>30</sup> The Judges (Declaration of Assets and Liabilities) Act, 2009;<sup>31</sup> Judicial Standards and accountability Bill, 2012;<sup>32</sup> Right to Information Act, 2005;<sup>33</sup> Lokpal and Lokayukta Act, 2013<sup>34</sup> and National Judicial Appointment Commission Act, 2014.<sup>35</sup> But every attempt of legislature fails to bring judiciary accountable. By utilising its power of judicial review SC has struck-down the NJAC, 2014 stating it as unconstitutional.<sup>36</sup> By various judgment SC has set limits of RTI and accordingly is trying to remain accountable to none.

<sup>26</sup> INDIA CONST. art. 124 cl.4

<sup>27</sup> *Id.*

<sup>28</sup> INDIA CONST. art 235. Control over subordinate courts The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law

<sup>29</sup> The Judges Inquiry Act, 1968; <https://www.indiacode.nic.in/bitstream/123456789/1539/2/A1968-51.pdf>

<sup>30</sup> The Judges Inquiry Bill, 2006; <https://prsindia.org/billtrack/the-judges-inquiry-bill-2006>

<sup>31</sup> The Judges (Declaration of Assets and Liabilities) Act, 2009; <https://main.sci.gov.in/assets-judges>

<sup>32</sup> Judicial Standards and accountability Bill, 2012; <https://prsindia.org/billtrack/the-judicial-standards-and-accountability-bill-2010>

<sup>33</sup> Right to Information Act, 2005; [https://indiacode.nic.in/handle/123456789/2065?sam\\_handle=123456789/1362#:~:text=An%20Act%20to%20provide%20for,a%20Central%20Information%20Commission%20and](https://indiacode.nic.in/handle/123456789/2065?sam_handle=123456789/1362#:~:text=An%20Act%20to%20provide%20for,a%20Central%20Information%20Commission%20and)

<sup>34</sup> Lokpal and Lokayukta Act, 2013; [https://dopt.gov.in/sites/default/files/407\\_06\\_2013-AVD-IV-09012014\\_0.pdf](https://dopt.gov.in/sites/default/files/407_06_2013-AVD-IV-09012014_0.pdf)

<sup>35</sup> National Judicial Appointment Commission Act, 2014 ; [https://www.indiacode.nic.in/handle/123456789/2142?sam\\_handle=123456789/1362](https://www.indiacode.nic.in/handle/123456789/2142?sam_handle=123456789/1362)

<sup>36</sup> Supreme Court Advocates-on-Record v. Union of India, WPC 13/2015; <https://indiankanoon.org/doc/66970168/>

In 2009, CJI K G Balkrishnan had said to all judges to declare their assets voluntarily to the public as per resolution of full court, 1997. Only 7 out of 31 judges had disclosed their assets.<sup>37</sup> Why judges are not disclosing their assets? What is the thing they worried about? Are they have extra income other than disclosed one? All such question comes in mind which compel to say that judiciary is not remain aloof of the corruption. And how much the judiciary is accountable. Despite of so many legislations, the corruption is increasing in the judiciary and accountability has suffered. J. Veeraswami, J. P. D. Dinkaran, J. Arundhati Roy, J. Saumitra Sen, J. S. K. Gangele, J. Dipak Mishra, J. Nagarjuna Reddy, J. Karnan are some of example which came to the knowledge of public. Those who were not known to public, the numbers are unsettled. Falling of standards has happened for a person holding a high office in the judiciary, and it is because of years of neglect in checks and not putting a mechanism in place in obtaining rightful accountability from the system.

The Constitution of America, through **Art. III S. 1**, establishes special safeguards for the federal judiciary in order to ensure the independence of the judicial branch for fair trial.<sup>38</sup> The framers of the Constitution of US believed in judicial independence and expected the judges to be accountable to the people and Judges would be bound by oath or affirmation to support the Constitution. Constitutionally, impeachment is the only method of actually removing a federal judge from office.<sup>39</sup> The framers deliberately used “shall” instead of “may” when they intended to “leave no discretion to the Congress” and their use of “shall” not only mandated certain behaviour, but simultaneously prohibited all relevant alternatives.

Still there has many difficulties like constitutionally, impeachment lies only for “treason, bribery, other high crimes and in absence of good behaviour.” The Administrative Office Act, 1939 creates the Judicial Councils of the Circuit.<sup>40</sup> Each Judicial Council is composed of active circuit court judges from that circuit. The Judicial Councils perform the routine administrative and oversight of the federal judiciary.

Another legislation was passed by congress was the Judicial Councils Reform and

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<sup>37</sup> Samanway Rautray, *only 7 out of 31SC judges Have Declared Assets*, THE ECONOMIC TIMES, 2019; <https://m.economictimes.com/news/politics-and-nation/only-7-of-31-sc-judges-have-declared-assets/articleshow/69998464.cms>

<sup>38</sup> AMERICA CONST., art. III s. 1

<sup>39</sup> AMERICA CONST. art. II s.4

<sup>40</sup> The Administrative Office Act, 1939 (America); <https://www.law.cornell.edu/uscode/text/28/604>

Judicial Conduct and Disability Act, 1980 to amend existing legislation dealing with the judicial control of court management procedures and intended to facilitate administrative duties of the judiciary and to improve judicial accountability.<sup>41</sup> The Act relies upon internal judicial branch investigation of other judges. But the whole investigation kept confidential and not open to public.

Sec. 101 to 111 of The Ethics in Government Act of 1996<sup>42</sup> guides the Judges at the higher judicial authority to declare their financial assets both moveable and immovable.<sup>43</sup> Under s. 105 of the Ethics act permit any person to have an access to the copy of the declaration after furnishing a written statement to the concerned Judge.<sup>44</sup>

There is Code of Conduct for Judges in America according to which judges should maintain and enforce high standards of conduct to maintain the integrity and independence of the judiciary. Though judges are independent but they must comply with the law and should comply with this Code. The study reveals that though there is corruption in the organs of the government in America still he succeeds to maintain independence and accountability in judiciary.

### **Comparison as to Transparency in the Process of Judicial Appointment**

Transparency in the administration of the government is a crucial element to achieve the democracy in its fullest sense. Today the people became aware of their rights and want to be informed with every step taken by the government. Being the organ of the government, judiciary is also bound to maintain transparency in the administration of justice. SC of India in various judgment has put emphasised on transparency in the governance (already discussed in previous chapter). Transparency ensures openness in governance and makes the authority accountable and responsive and ensures reduce in favouritism and corruption. Through the landmark judgment right to information is added in the Art. 21<sup>45</sup> of the Constitution as fundamental right. India has Right to Information Act, 2005 to bring transparency in the system.<sup>46</sup>

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<sup>41</sup>Judicial Councils Reform and Judicial Conduct and Disability Act, 1980 (America); <https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability#:~:text=Under%20the%20Judicial%20Conduct%20and,Act%20of%201980%20%2C%2028%20U.S.C>.

<sup>42</sup>The Ethics in Government Act of 1996(America); <https://www.congress.gov/104/plaws/pub1179/PLAW-104pub1179.pdf>

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> INDIA CONST. art. 21

<sup>46</sup> *Supra* note 32

Judiciary, being one of the fundamental organs of the government has started playing the role of law making through its decisions. Judiciary who interprets the Constitutional provisions by adopting construction that fortifies the basic structure of the Constitution. A judiciary always proves the Constitution as a final interpreter and it is well known as guardian of the Constitution. Judiciary keeps an eye over the working of the other two organs of the government as well as started intervening in its functioning but when the question comes about the 'judicial appointment' it does not let any other organ interfere in its process. Judicial independence is paramount at the time of delivering judgments but not at the time of making judicial appointments in SC and HCs. The concept of judicial independence further emphasises the features like impartiality, accountability, efficiency. With the changing scenario in society, situation arose where judiciary has to intervene in law making process. Judiciary feels that NJAC was nothing but an interference of legislature in its jurisdiction and violative of judicial independence - the basic structure of the Constitution. Every attempt of legislature was failed to bring transparency in the appointment process of judges to SC and HCs.

Collegium system of appointment of higher judiciary which is followed in India is challenged on the same ground of non-transparency it follows. The process by which a judge is appointed to a superior court is one kept secret in India. This secrecy of the process of appointment leads to an inadequate input of information as to the abilities and suitability of a possible candidate to be appointed as a Judge. A rumor or third-hand information may be sufficient to damage judge's prospects. A personal friendship, kind of obligation may seem like a colour of recommendation. Consensus within the collegium is sometimes resolved resulting in unworthy appointments with disastrous consequences for the litigants and the credibility of the judicial system. The judges of the SC and HCs are appointed by themselves. The President of India is simply asked to put his seal and signature on the recommended candidates of the SC. The removal or dismissal of judges of the SC and HCs is very complicated. The judges of HCs and SC are answerable to none. Even the SC has also agreed that the process followed for the appointment of judges to SC and HCs are not satisfactory and needs to develop process which is Constitutional, transparent and strengthen judicial accountability without disturbing its independence.

In America, the executive and legislative branches are elected by the people, members of the Judicial Branch are appointed by the President and confirmed by the Senate. The appointments to the Federal Courts are purely political appointment in nature. The

Constitution of the US provides that federal judges from the district courts to the SC be nominated by the President and confirmed in their positions by the Senate.

The process of appointment of a federal judge starts from the occurrence of a judicial vacancy.<sup>47</sup> The President nominates candidates for justices and judges to the Senate after he receives recommendations from the Department of Justice.<sup>48</sup> Criteria for selecting a SC nominee vary from President to President, two general ideology appear to underline the choices of almost every President. Political considerations typically play an important role in SC appointments.<sup>49</sup> Though not mentioned in the Constitution, **Senate Judiciary Committee** plays an important role midway in the process. After announcement of the name of the nominee, the Judiciary Committee initiates an investigation from the nominee's background.<sup>50</sup> The private background investigation, which includes examination of a candidate's personal financial affairs, is conducted by the FBI.<sup>51</sup> The White House may reveal the names of SC candidates being considered with intention to test public or congressional reaction. For help in evaluating the backgrounds of Court candidates, Presidents sometimes also have enlisted the assistance of private lawyers, legal scholars, or, on rare occasions, the ABA.

Before the start of confirmation hearings public debate is to begin on a nominee's qualifications.<sup>52</sup> Much of this debate is paid by commentators in the news media and on internet sites and by advocacy groups that actively support or oppose a nominee. As confirmation hearings approach, Judiciary Committee members and staff closely study the public record and investigated information of the nominee and with such research they prepare questions to be assumed at the hearings.<sup>53</sup> The confirmation hearings of the nominee/ candidate conducted by the Committee are open to the public, and may be broadcast by radio or television.<sup>54</sup> Usually within a week of the end of hearings, the Judiciary Committee meets in

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<sup>47</sup> AMERICA CONST. art.3 s.1

<sup>48</sup> McMillion B. J., *Congressional Research Services, Supreme Court Appointment Process: President's Selection of a Nominee*, updated March8, 2022, p.1; <https://sgp.fas.org/crs/misc/R44235.pdf>

<sup>49</sup> Sheldon Goldman, "Judicial Selection and the Qualities That Make a 'Good' Judge" *The Annals of the American Academy of Political and Social Science*, 462, 1982, 112–24.,*JSTOR*, <http://www.jstor.org/stable/1044995> ; Accessed 20 Jan. 2023.

<sup>50</sup> B. J. McMillion, *Congressional Research Services, Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, updated Feb22, 2021, <https://crsreports.congress.gov/product/pdf/R/R44236>

<sup>51</sup> D. S. Rutkus, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*; <https://sgp.fas.org/crs/misc/RL31989.pdf>

<sup>52</sup>B. J. McMillion, *Congressional Research Services, Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, updated Feb22, 2021, <https://crsreports.congress.gov/product/pdf/R/R44236>

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

open session to determine what recommendation to report to the full Senate.

No Committee member, including the Chair, shall participate in the evaluation or vote on the rating of a nominee in any instance in which such participation would give rise to the appearance of impropriety or be incompatible with the purposes served and functions performed by the Committee.<sup>55</sup> The reports were prepared and presented before Senate in a single volume, including the views of every committee member, minority, additional views, after committee has voted on the nominee. All judicial nominations reported from the Senate Judiciary Committee are considered by the Senate in executive sessions. If a nominee is non-controversial the nomination will be passed by unanimous consent and no floor debate is necessary. When the Senate gives its advice and consent, the President signs the judicial commission which officially appoints the individual.

This much lengthy and detailed process is followed in America and every minute detail about the nominee is kept known to every interested person including lay man, its report gets published in media. This process brings a crystalline transparency in the American judiciary and makes the judiciary more accountable. It is not wrong to say that American judiciary is independent, more accountable and transparent as compare to the Indian judiciary which is more independent but less accountable and non-transparent.

### **Conclusion**

A comparative study of Constitution of leading countries of the world shows that they are either of the English model or of the American model or of hybrid model. England has parliamentary form of government whereas America has Presidential form of Government. India has adopted parliamentary form of government with President as chief executive head of the country. Constitution has created judiciary as organ of government whose work is to protect and interpret the Constitutional provisions. In America it is known as Federal Court or Constitutional Court where as in India it is known as Supreme Court.

In both the country the appointment of judges is an executive power, which is given to the president by the Constitution of both the countries. The difference between both is that, in India the appointment is made with “consultation with judiciary” whereas in US the

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<sup>55</sup> *Id.*

appointment is done after the “Senate Approval”. In Senate Approval method, according to the Constitution of US, the executive i.e. President nominates the candidate for the appointment to higher judiciary and with advice and consent of the senate confirms the appointment. The Senate before consent makes the detail investigation about the nominee and then only confirm its consent. On contrary India follows a system in which the appointment of judges is done through the consultation with senior judges of SC which is also as per the Indian Constitution. But our Constitution is silent over the process of consultation or how the consultation will take place. The consultation may be formal or informal. The SC being the interpreter of the Constitution, through its judgment in series of Three judges case, has evolve the ‘Collegium System’ where judges are appointing the judges. In collegium system the role of an executive i.e. President is limited only for making the appointment of the person who is recommended by the collegium. The SC has interpreted the word consultation as concurrence. The reasons for the appointment of judges through collegium is known only to the members of the collegium only and remain undisclosed to others. With this the judiciary became less accountable. The comparative analysis aims to analysis the present system of appointment of judges and to provide suggestion for more transparent, effective and accountable method of appointment of judges in India without disturbing its independence.

Researcher has attempted to discuss the process of higher judicial Appointment in India and America with special reference to judicial independence, accountability and transparency. Looking to the provisions of both the countries Constitutional provisions it can be said that both the Constitution has given power of judicial appointment to the President. However, this power of appointment of President cannot be taken by him alone but he is bound to take the advice and consent of the Senate in America and in India he has to consult with the CJI. This is to say that judicial appointment can be done by executive after advice and consent of Senate (legislature) in America. In India, judicial appointment is done by executive after consulting judiciary itself. Hence both the countries have accepted the theory of separation of power with the principle of checks and balance among the executive, legislature and judiciary.

After independence, in India, seniority norm was followed in the higher judicial appointment and accordingly senior most judge was appointed as CJI by the President after consulting the existing CJI. But after the decision pronounced by SC in Second Judges Case the primacy of opinion, is shifted from the President to the CJI and other two senior judges of SC. This process is called as collegium. This process is not a Constitutional process as not

written in the Constitution. In Third Judges Case the collegium was extended to CJI and four senior judges of SC. The process is non-transparent as no one know the reason of appointment of a judge as CJI, only the collegium members know it and it is not open to the interested public. With this Indian judiciary became less accountable, non-transparent but highly independent.

Federal judiciary in America is more accountable and less independent as compare to Indian Judiciary. The process of appointment of judiciary is transparent as the report of the Senate Judiciary Committee is published in social media and the public debate is also telecasted in America for the interested people. Executive and legislature are working in co-ordination for the appointment of higher judiciary which is missing in India. The lawyers, judicial officers, media, academician has important role in the selection of Chief Justice of America. By going through the study researcher is able to conclude that the process followed for the judicial appointment at SC of America is Constitutional. Theory of separation of power and checks and balance theory are working properly in America.

Today India is facing problem with the process of appointment of higher judiciary as the collegium system through which the appointment of higher judges is done is opaque and Indian judiciary is less or least accountable to none. The collegium system which we are following since more than 25 years is not a constitutional method of appointment. After studying process of judicial appointment followed in America it can be said that we maintain the independence of judiciary at the cost of its accountability. While America has maintained the judicial accountability with its independence.