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Judicial Appointments in India and South Africa: Balancing Judicial Independence, Transparency, Accountability and Public Confidence

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Recent Developments:

- The debate over **judicial appointments and transparency** has gained renewed attention following the Supreme Court's proceedings in **Arvind Malhotra v. High Court of Himachal Pradesh**, in which the Court declined to entertain a plea seeking a direction to the High Court Collegium to consider a particular judicial officer for elevation.
- Arvind Malhotra, a Principal Judge of the Family Court at Dharamshala, had questioned the non-consideration of his candidature while comparatively junior judicial officers were recommended; the Supreme Court indicated that courts cannot issue directions to a Collegium regarding whom it should consider or recommend.
- The case has revived concerns regarding the **opacity of the Collegium system**, particularly regarding the criteria, reasons and comparative assessment underlying recommendations for elevation.
- The **South African Judicial Service Commission model** provides a useful comparative perspective because it combines judicial participation with public nominations, public comments and open interviews while retaining institutional safeguards for judicial independence.
- The Supreme Court continues to publish Collegium resolutions concerning judicial appointments and transfers, reflecting an institutional movement towards greater **procedural transparency** even though deliberations themselves remain confidential.

South Africa's Judicial Appointment Model:

Constitutional Framework and Judicial Service Commission:

- South Africa follows a comparatively **open and participatory appointment framework** centred on the **Judicial Service Commission**, established under the Constitution to select suitable persons for judicial office and investigate complaints concerning judicial officers.
- The Commission includes representatives from the **judiciary, legal profession, academia, executive and legislature**, thereby creating a broader institutional representation than India's judge-dominated Collegium model.
- South Africa's Constitution requires consideration of the need for the judiciary to broadly reflect the country's **racial and gender composition**, thereby giving representational diversity an explicit constitutional dimension.

Selection Procedure:

- The process begins with a public notice regarding judicial vacancies, followed by **nominations, shortlisting and interviews** of eligible candidates.

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- Professional bodies and members of the public can submit **comments and representations** concerning candidates before the interviews.
- Candidate interviews are conducted **in public**, while the Commission subsequently deliberates privately and communicates its recommendations to the President.
- The South African model therefore separates **public scrutiny of candidates** from confidential institutional deliberation, demonstrating that transparency does not necessarily require every stage of decision-making to be public.

Judicial Accountability:

- The Judicial Service Commission also has a role in dealing with **complaints against judicial officers**, creating an institutional mechanism for judicial accountability.
- South Africa's constitutional framework permits removal of a judge through prescribed constitutional procedures in cases involving **serious misconduct, incapacity or incompetence**, thereby linking judicial independence with institutional accountability.
- The model demonstrates the principle that judicial independence should protect judges from improper interference without creating an absence of mechanisms for addressing misconduct.

Appointment of Judges in India:

Constitutional Position:

- **Article 124** provides the constitutional framework for the appointment of Supreme Court judges, under which judges are formally appointed by the **President of India**.
- **Article 217** deals with the appointment of judges of High Courts, with the President making appointments after the constitutionally prescribed consultations.
- The Constitution therefore formally vests appointment power in the executive, but judicial interpretation has substantially altered the practical balance between the executive and judiciary.

Evolution of the Collegium System:

- The **Collegium System** is not expressly mentioned in the Constitution; it evolved through a series of Supreme Court judgments known collectively as the **Three Judges Cases**.
- The judicial interpretation emerging from these cases established the **primacy of the judiciary** in recommendations for appointments and transfers of judges.
- At the Supreme Court level, the Collegium comprises the **Chief Justice of India and the four senior-most judges of the Supreme Court**.
- At the High Court level, the Collegium generally comprises the **Chief Justice of the High Court and the two senior-most judges** of that High Court, after which the recommendation proceeds through the prescribed institutional process.
- The present framework was restored after the Supreme Court struck down the **National Judicial Appointments Commission** framework in 2015, holding that judicial independence forms part of the Constitution's **basic structure**.

The Three Judges Cases:

First Judges Case:

- **S. P. Gupta v. Union of India (1981)** initially interpreted the constitutional expression relating to consultation in a manner that gave greater weight to the **executive** in judicial appointments.

Second Judges Case:

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- **Supreme Court Advocates-on-Record Association v. Union of India (1993)** reversed the earlier approach and established the **primacy of the Chief Justice of India and the judiciary** in judicial appointments.
- The judgment laid the foundation for the Collegium mechanism and treated judicial primacy as essential for protecting **judicial independence**.

Third Judges Case:

- **In re Special Reference No. 1 of 1998** clarified and expanded the Collegium mechanism, establishing the present five-member Collegium for appointments to the Supreme Court.
- The decision also strengthened the principle that judicial appointments should be based on **institutional consultation rather than the unilateral preference of an individual office-holder**.

Memorandum of Procedure:

Meaning and Purpose:

- The **Memorandum of Procedure** is the framework governing the process for appointment and transfer of judges of the Supreme Court and High Courts.
- It operates alongside the Constitution and the judicial principles established through the **Three Judges Cases**, providing procedural steps for initiating, evaluating and forwarding recommendations.
- The process involves interaction among the **High Court Collegium, State authorities, Union Government and Supreme Court Collegium**, depending upon the level and nature of the appointment.
- The Supreme Court has also emphasised the importance of transparency-enhancing measures while retaining necessary confidentiality in the appointment process.

Transparency under the Existing System:

- The Supreme Court now publishes a substantial number of **Collegium resolutions**, including recommendations concerning appointments, transfers and reconsideration of judicial candidates.
- This practice improves public access to institutional decisions, although the underlying deliberations, individual assessments and internal discussions generally remain confidential.

India–South Africa Comparison:

Institutional Structure:

- India relies primarily on a **judicially evolved Collegium**, whereas South Africa uses a constitutionally established **Judicial Service Commission** with wider institutional representation.
- India gives greater weight to **judicial independence and judicial primacy**, whereas South Africa attempts to combine judicial participation with broader societal and institutional representation.

Transparency and Public Participation:

- The Indian process traditionally places greater emphasis on **confidential deliberation**, partly to protect candidates from reputational harm and external pressure.
- South Africa permits **public comments and public interviews**, making candidate evaluation substantially more visible to citizens and professional bodies.
- The comparative lesson is not that complete publicity is necessarily superior, but that carefully designed **public scrutiny at appropriate stages** can strengthen institutional legitimacy.

Political Participation and Judicial Independence:

- Wider political participation can improve democratic legitimacy but may also create risks of **executive influence and politicisation of judicial appointments**.
- Excessive judicial control can protect independence but may create concerns regarding **accountability, representativeness and transparency**.
- An effective system must therefore maintain an institutional equilibrium between **independence and accountability**.

Key Issues in India:

Transparency versus Confidentiality:

- Confidentiality can protect candidates and judges from **external pressure, lobbying and reputational damage**, particularly when allegations concerning suitability are considered.
- Excessive secrecy, however, can generate perceptions of **arbitrariness, favouritism and lack of accountability**.
- The appropriate objective is therefore **structured transparency**, under which reasons, criteria and institutional outcomes are disclosed to the maximum extent compatible with legitimate confidentiality.

Collegium versus Representative Institutions:

- The Collegium provides strong protection against direct executive control, but critics argue that it lacks **democratic representation and formal external accountability**.
- A broader commission could include judges, lawyers, academics and constitutional representatives, potentially improving diversity and public confidence.
- However, political dominance within such a commission could undermine the **independence of the judiciary**, making institutional safeguards essential.

Independence versus Accountability:

- **Judicial independence** is essential for constitutional supremacy, fundamental rights and the rule of law because judges must be able to decide cases without fear or favour.
- Independence cannot mean complete institutional immunity from scrutiny because public confidence also depends upon **integrity, competence, diversity and accountability**.
- The challenge is therefore to create accountability mechanisms that examine conduct and institutional processes without enabling retaliation against judges for judicial decisions.

Way Ahead:

Towards a Balanced Appointment Framework:

- India should strengthen the **objective and transparent criteria** used for judicial appointments, including integrity, competence, constitutional commitment, professional experience and diversity.
- The Collegium should provide greater disclosure of the **institutional reasons for recommendations**, while protecting genuinely sensitive information concerning candidates.
- A permanent and professionally supported **judicial appointments secretariat** could assist with background verification, data collection and objective evaluation without replacing the constitutional role of the Collegium.
- A structured mechanism for receiving **credible complaints and relevant inputs** concerning candidates could improve due diligence while preventing politically motivated allegations from influencing appointments.
- Greater publication of Collegium resolutions should continue because **institutional transparency** can strengthen public confidence without requiring complete disclosure of confidential deliberations.
- Any reform involving executive or political participation should contain strong safeguards against **politicisation, majoritarian influence and retaliation against independent judges**.

Value Addition for UPSC:

Constitutional and Judicial Keywords:

- **Article 124:** Appointment of judges of the Supreme Court.
- **Article 217:** Appointment of judges of High Courts.
- **Article 50:** Separation of the judiciary from the executive in the public services of the State.
- **Basic Structure Doctrine:** Judicial independence is an essential component of the Constitution's basic structure.
- **Three Judges Cases:** Judicial decisions that established and clarified the Collegium system.
- **Judicial Service Commission:** South African constitutional body involved in judicial appointments and judicial accountability.

Conclusion:

- The South African experience shows that greater **openness in judicial appointments** need not automatically undermine judicial independence when constitutional safeguards, institutional representation and clear procedures are maintained.
- For India, the central challenge is not merely choosing between the **Collegium and a representative commission**, but designing an appointment process that protects judicial independence while making its procedures sufficiently transparent, objective and accountable to command sustained public confidence.