

The Collegium System and the Doctrine of Basic Structure A Constitutional Inquiry

Prof. Dr. N. Rajeswari¹, Dr kandula Veera Brahmam², P Sowjanya³

¹Faculty of Law, Dr MGR Educational and Research Institute
(Deemed to be University), Chennai-95

²Associate Professor, DNR college of Law Bhimavaram west Godavari District ,
A.P PIN-534203

³Research Scholar, Dept of Law, Sri Padmavati Mahila Visvavidyalayam
(Women's University), Tirupati, Andhra Pradesh, India

Abstract

The collegium system in India is one of the most crucial judicial innovations in the history of Indian constitution. The system has evolved through judicial interpretation in the Judges Cases, and was restated in the National Judicial Appointments Commission Judgment, which now forms a crucial part of the judicial appointments and transfers of judges in the higher judiciary. The constitutionality of collegium system has still sparked off a lot of academic and political controversy as it is connected with the concept of basic structure. The present article raises the question whether in the light of the doctrine developed in *Kesavananda Bharati v. State of Kerala*, the principle of judicial primacy in appointments is an essential feature of the constitution. It examines the constitutional basis of judicial independence, separation of powers and institutional accountability under the provisions of Article 124 and 217 of the Constitution of India. The study also scrutinises the criticisms levelled against the collegium system for its opacity, lack of transparency, democratic deficit and the constitutional validity of the reforms like the National Judicial Appointments Commission. While independence of the judiciary is part of the basic structure, the collegium system may not be constitutionally sacrosanct and needs to be balanced and calibrated with other structures and reforms that will ensure constitutional balance and public trust in the judiciary, the article concludes.

Keywords: Collegium System, Basic Structure Doctrine, Judicial Independence, Constitutional Governance, Judicial Appointments

1 Introduction

The Indian Constitution had initially provided for a consultative mechanism in the appointment of judges to higher judiciary. Judges of Supreme Court and High Courts are appointed by the President in consultation with the Chief Justice of India and other Judges as may be considered necessary, as per the Constitution of India, Article 124 and Article 217. The Constituent Assembly when framing the Constitution was aiming to strike a balance between executive participation and judicial consultation. The framers did not want the executive to be too strong, nor the judiciary to be too powerful in the matter of appointments. Dr. B.R. Ambedkar explained that it would not be desirable to give the Chief Justice powers of its own since the power itself could be dangerous. Originally, therefore, there was a preferred model of a collaborative institutional process.

For many years following independence the executive dominated appointments, but there was a continuing judicial consultation. The executive had an exceptionally high degree of

discretionary power in appointing judges, particularly in the time when there was a clear dominance by one political party in Parliament and the government institutions. But the fear of executive interference was strong during the 70s especially in 1975 when India was in the Internal Emergency. The supersession of senior judges in the appointment of the Chief Justice of India after the decision in the Kesavananda Bharati case raised apprehensions regarding threats to judicial independence. The transfer of High Court judges during the Emergency also led to the further discussion of the need to keep the judiciary free from political influence.

The shift in the way the appointment was achieved started with judicial interpretation in the so-called Judges Cases. In the First Judges Case (S.P. Gupta vs Union of India), the Supreme Court said that the executive has a primacy in judicial appointments and that the opinion of the Chief Justice of India does not bind the President. This ruling, which was a major advance to executive power and a setback to judicial power in appointments, was upheld in the subsequent case of *Jeffers v. Brady*. In the later case of *Jeffers v. Brady*, this decision was upheld and became a significant factor in executive power and reducing the role of the Judiciary in appointments. The decision was, however, heavily criticised as it took at least one step towards compromising judicial independence, particularly in the political climate of the time.

With the Second Judges Case (Supreme Court Advocates-on-Record Association v. Union of India), a significant Constitutional change happened. In this historic ruling, the Supreme Court overturned the First Judges Case and stated that the rule of a judge is to be paramount in appointments. The Court read the word 'consultation' as 'concurrence' of the Chief Justice of India. The judgment established the collegium system to determine appointment to the Supreme Court and the High Courts, where senior judges, led by the Chief Justice of India, would determine the appointments themselves. Excluding judges from executive pressures was a requirement for judiciary independence, which is part of the Constitution's basic structure, the Court concluded.

2. Doctrine of Basic Structure and Constitutional Supremacy

Doctrine of 'Basic structure' is one of the most significant principle of Indian Constitution that the Indian judiciary has evolved. It arose as a reaction to the disagreements over Parliament's right to amend the Constitution and maintain the essence of constitutional governance. It is the doctrine that Parliament has broad powers and under Article 368 of the Constitution it may amend the Constitution, but it may not change or destroy the basic features of the constitutional system which are the foundation of the Constitution. This doctrine has shaped the judicial history of India in a significant way and is at the heart of the discussion on judicial independence and collegium system.

The bedrock of the basic structure doctrine is found in the earliest conflicts on the Constitution pertaining to the law of the land and the role of Parliament to amend it. The Supreme Court affirmed the wide amending power of Parliament in *Shankari Prasad* case and *Sajjan Singh* case. In *I.C. Golaknath v. State of Punjab*, however, the Court limited the power of the Parliament, it observed that the fundamental rights can't be amended. This clash between the Parliament and judiciary eventually reached the famous *Kesavananda Bharati* judgment.

The doctrine of basic structure was laid down by a thirteen judge bench of the Supreme Court in *Kesavananda Bharati v. State of Kerala*. The basic structure of the Constitution and essential features of the Constitution are immune from amendment by Parliament. Without trying to be exhaustive, the judges recognized principles like supremacy of the Constitution, republican and democratic form of government, secularism, federalism, separation of powers, and judicial review as being part of the basic structure.

This doctrine enhanced the constitution's supremacy and provides checks and balances on the power of majoritarian politics. It guaranteed that the Indian constitution was not subject to drastic changes with every change of majority in the parliament. The judiciary thus took the task of 'guardian of the constitution' to uphold the basic values of governance. Judicial review became a vital tool in maintaining the balance of the constitution and the absence of authoritarianism.

The doctrine came to the fore again during the Emergency, when democratic institutions were severely tested. In *Indira Nehru Gandhi v. Raj Narain*, the Supreme Court used the basic structure doctrine to rule that constitutional amendments that wished to shield election disputes from judicial review were struck down. Likewise, in the case of *Minerva Mills v Union of India*, the Court recognized the limited amending power as a part of the basic structure. These decisions guaranteed institutional checks and balances and constitutional supremacy.

The doctrine of basic structure gradually developed to an established part of the doctrine of judicial independence. An independent judiciary is essential to the protection of fundamental rights and rule of law, according to the Supreme Court on several occasions. The judiciary must be independent of the executive and legislative actions if it is to be able to do its constitutional duty. This, in turn, meant that the appointment of judges went hand in hand with the preservation of the Constitution.

The constitution was eventually rationalized in this way. The Court in the Second Judges Case has emphasized that executive dominance in judicial appointments could impinge on judicial independence, a part of the basic structure. Hence, there was a need for judicial primacy in the appointments to ensure the integrity of the Constitution. This was an interpretation that elevated the mechanics of which went into the appointment process into the area of constitutional essentials.

3. Judiciary Independence as a Basic Feature of the Constitution

Judicial independence is an integral part of constitutional democracy in India. It makes sure that judges act in their adjudicatory role free from fear, favour, bias and external pressure. An independent judiciary ensures respect for fundamental rights, constitutionalism, and a balance on the arbitrary use of power by the executive and legislative organs. The Supreme Court has, over the years, consistently upheld judicial independence as a part of the basic structure of the Constitution.

The Indian Constitution has several provisions which aim at ensuring judicial independence. Supreme Court & High Court Judges have security of tenure, fixed service conditions and protection against arbitrary removal. The only way to have him removed is on the ground of proven misbehaviour and/or incapacity by Parliament through impeachment. All judges'

salaries and allowances are paid from the Consolidated Fund and cannot be cut after appointment. Also, in the constitutional amendments, there are bans on legislatures discussing judicial conduct, except during the impeachment process. These protective measures are all designed to ensure institutional independence.

Judicial independence is further provided by the doctrine of separation of powers. The Indian Constitution follows neither a strict division of powers but outlines functional differences between the organs of government. The judiciary has the role of interpreting the Constitution and guarding against illegality. It is essential that it is uninfluenced by political pressures and partisan considerations to do its job effectively. For the purposes of the constitutional governance and the rule of law, an independent judiciary is thus essential.

In times of constitutional crisis, the importance of judicial independence was clearly highlighted. This led to serious concern about institutional autonomy during the Emergency (1975-1977) when executive interference in the functioning of the judiciary was raised. The replacement of judges and political appointments of judges with politically influenced individuals showed how the executive power could affect the judge's confidence and the trust of the people. Such experiences had a profound impact on judicial practice concerning nomination.

Judicial independence has been a formal part of the basic structure of the state in several seminal decisions of the Supreme Court. In *Kesavananda Bharati*, several judges had referred to judicial review and independence of judiciary as important characteristics of the constitution. The Court reiterated that independence of the judiciary is essential for proper constitutional adjudication in *S. Sampath Kumar v. Union of India* and *L. Chandra Kumar v. Union of India* later.

In the *Judges Cases*, the Lawyer General argued that judicial independence, as well as judicial appointments, were at stake. In the *Second Judges Case*, the Court concluded that the executive's right to appoint could undermine the independence of judges if they feel obligated and/or threatened by the executive. To prevent these dangers, the Court decided that the judiciary should have "conclusive power" in regard to appointments and transfers. The collegium system thus became a constitutional avenue to ensure institutional autonomy.

But independence of judiciary does not mean that they are not held accountable. Those who criticise the collegium system say that if the judiciary gains too much control without having any procedure in place, it might also instill a lack of faith in the public. There are allegations of favouritism and opacity because there are no formal criteria, reasons recorded, and no public scrutiny. Others argue that institutions must be held accountable and have democratic legitimacy without sacrificing independence.

4. The Judges Cases and the Constitution and Judicial Appointments

The development of the collegium system is chiefly a product of judicial interpretation in a series of judgements which is referred to as *Judges Cases*. This case had a significant impact on the constitution of India and changed the dynamics between the executive and judiciary. These decisions were used by the Supreme Court to slowly develop judicial autonomy in the interpretation of constitutional provisions relating to appointments.

In 1981, a seven-judge Bench of the Supreme Court in the case of S.P. Gupta vs. Union of India held that the First Judges Case would be decided on the basis of the total number of judges in the High Court. The main question that arose was what did the words “consultation” in Article 124 and 217 mean? The Court ruled that the appointment and transfer of officers was a matter of executive authority and that there was no need for the executive to agree with the Chief Justice of India. The judgment focused on the issue of democratic accountability and noted that elected governments have more legitimacy in making appointments. This reading greatly enhanced the power of the executive branch over the judiciary.

But, in the First Judges Case, the judiciary was criticized for failing to safeguard the independence of the judiciary sufficiently. Some critics said that the dominance of the executive might lead the judiciary to fall victim of political pressure and thus jeopardize the rule of law. These concerns were exacerbated by the political climate of the Emergency. Thus, there was a request for re-evaluation of the sentence.

In 1993, a constitutional shift was brought about with the Second Judges Case. The nine judge bench reversed the earlier judgment and struck down the First Judges Case. Thus, the Court established that the judiciary be the first to exercise their power regarding appointments to make sure judicial independence was maintained. It had defined “consultation” in such a way that it amounted to a concurrence of the Chief Justice of India whose opinion was to be decisive. The collegium system, comprising of the Chief Justice of India and two senior-most judges, was introduced in the judgment.

The doctrine of basic structure and separation of powers was put to great use by the Court. It surmised that judicial independence would be impossible if the executive had the lead in appointments. Fundamental rights of independence of judiciary have to be protected from political interference in the appointment system. Consequently, interpretation of the Constitution served to reform institutional governance to the advantage of the judiciary.

This case was brought before the courts as a Presidential Reference in Article 143 of the Constitution in 1998, and is known as the Third Judges Case. The President wanted to know how the collegium system works. The Supreme court has increased the size of the collegium comprising the Chief Justice of the Supreme court and the four senior most judges of the Supreme court for Supreme court appointments. The Court stressed the need of collective decision-making to lessen the tendency of arbitrariness and individual discretion. It clarified aspects of procedures for consultation, recommendations and reconsideration of names.

All these decisions together changed the constitutional structure without resorting to a formal constitutional change. The judiciary through interpretation essentially invented a whole new institutional structure. Supporters saw this as a necessary step to ensure the independence of the judiciary and critics saw it as a usurpation of the Court's constitutional role, as it were rewriting parts of the constitution.

The Judges Cases also changed the definition of constitutional consultation. The Constitution's authors had deliberately not given either the executive or the judiciary all the power. In the Supreme Court, however, consultation was understood broadly, thus giving judges primacy.

Critics say that this interpretation contradicts the original constitution and reduces the accountability in democracy.

5. NJAC Judgment and Debate on Constitutional Validity of Judicial Reforms

The National Judicial Appointments Commission was one of the most significant attempts towards Constitutional reforms in India which concerns judicial appointments. The Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 aimed to introduce a commission system with representation from the judiciary, the executive and eminent persons instead of the collegium system. The reform was in response to the lack of functioning of the collegium system and the public criticism for lack of transparency and accountability.

The NJAC was made up of the Chief Justice of India, two most senior Supreme Court judges, two eminent persons appointed by a committee headed by the Prime Minister, Chief Justice of India and Leader of Opposition and Union Law Minister. The commission's goals were to bring a degree of institutional diversity and participatory decision-making into the commission without sacrificing a high proportion of judges. The constitutional amendment was passed almost unanimously in Parliament and ratified by over 50% of states.

Proponents of the NJAC said that the collegium system had become opaque, unaccountable and favouritistic. The public was barely aware of the criteria used for selection or rejection in collegium deliberations, as these took place behind closed doors. The other problems were nepotism and a lack of diversity, which hurt public confidence even more. The NJAC was introduced as a fair and independent system to improve transparency.

But the NJAC came under attack by several petitions questioning its constitutionality before the Supreme Court. Supreme Court Advocates-on-Record Association v. Union of India, popularly referred to as the NJAC Judgment, concluded by a majority of 4:1, that the constitutional amendment and the NJAC Act were unconstitutional. The Court was of the view that judicial independence was part of the basic structure of the Constitution and NJAC was found to threaten it by weakening the primacy of judges.

Most of them believed that if the Law Minister and eminent persons are added, then political influence is possible in the selection of judges. Judges often are required to resolve disputes against the government, so executive involvement in appointments would taint the impartiality of the institutions. The Court further commented on the veto authority of any two commissioners, which might create obstacles to good appointments.

The Judges Cases are upheld. It believed in the independence of judiciary and that judges must play a decisive role in selecting judges. The Court thus made judicial primacy not just a procedural mechanism but a constitutional requirement, tied to the doctrine of basic structure.

Justice Jasti Chelameswar gave a strong dissent on the collegium system for its lack of transparency and accountability. He said that constitutionalism is not democratic if it is secret. According to the dissent, participation of non-judicial members would not necessarily undermine judicial independence. Broad institutional involvement on the other hand, can enhance legitimacy and public trust.

The NJAC judgment sparked a lot of constitutional debate. The Supreme Court faced criticism for serving the interests of institutions and for opposing democratic change. One scholar suggested that the Court was striking down an amendment to the Constitution that was accepted widely even though there was no political consensus at the time. Others argued that judicial independence is not just about judicial appointments.

6. Transparency, Accountability and future of Collegium System in India

The future of collegium system is dependent upon its ability to respond to the persistent issues of transparency, accountability, diversity and institutional legitimacy. The independence of the judiciary is a core objective of the system but has been subject of criticism by legal scholars, political institutions, civil society and even by judges and members of the judiciary. These attacks have reignited discussions on whether there is a need for a meaningful reform that can keep the independence and enhance the trust in the government.

One of the major problems with the collegium system is the lack of transparency in decision making. Traditionally, the deliberations of the Collegium took place in secret, and reasons for any selection or rejection of candidates were seldom made public. This confidentiality generated the sense of arbitrariness and favoritism. Judicial appointments have an impact on constitutional governance, and on the administration of justice itself; therefore, critics say that total secrecy creates a lack of public trust and democratic accountability.

Another key issue is accusations of nepotism and lack of diversity. Critics argue that the collegium system can sometimes work in favour of candidates from influential legal families, or specific social networks. Higher judiciary representation of women, SC, ST, OBC, minorities and regional communities is relatively low. The absence of institutional arrangements for ensuring diversity has led to the demands for wider and more inclusive appointment processes.

Another challenge is still the delay in appointments. Disagreements have come up often between the executive and collegium with recommendations, and this has led to extended vacancies in High Courts and the Supreme Court. There are a lot of pending cases and judicial pendency. Many critics say judicial inefficiency and access to justice is lacking due to the lack of clear timelines and institutional coordination.

Some of these concerns are acknowledged by the Supreme Court itself. After the NJAC judgement, the Court had sought suggestions to reform the collegium system. Some reform suggestions came up such as setting up a permanent secretariat to support the collegium, laying down criteria for selection that are objective, having databases of candidates, and publishing reasons for selection. Later, the Supreme Court started posting collegium resolutions on its website, marking a small move towards transparency.

Modernization of technology and institutions can also aid the process of reform. Efficiency and lack of arbitrariness can be achieved with digital databases, performance assessments and with transparent notification of vacancies. Institutional research bodies can help to identify meritorious candidates from a wide range of professions such as academia, district judiciary and specialised legal practice.

Another important aspect that defines the destiny of the collegium system is the public confidence. The judiciary is not only legitimate because of the text of the Constitution, it is also legitimate because of the trust in its fairness and integrity. Clear processes and responsible management help build institutional legitimacy and democratic legitimacy. So, an increase in openness and inclusiveness can ultimately undermine, and not support, judicial independence.

The tussle over judicial appointments in India doesn't seem to be over anytime soon. Concepts of constitutionality values like independence, accountability, transparency, diversity and separation of powers do not always go together. The collegium system is one effort in seeking to reconcile these values in the Indian constitutional context. The extent of change will depend on future constitutional dialogue between judiciary, legislative, executive, legal community, and civil society.

7. Conclusion

The collegium system fits somewhere in between the middle of the constitution in India that deals with judicial appointments and judicial independence. The system has grown up over time, rather than as a direct result of constitutional change, as a result of the judiciary's response to past concerns about executive interference and institutional autonomy. The Judges Cases and the subsequent constitutional jurisprudence gave judicial independence the meaning of the doctrine of basic structure and introduced the doctrine of judicial primacy in appointments as a constitutional safeguard.

Meanwhile the collegium system has also come in for relentless criticism on the issue of opacity, lack of accountability, allegations of favouritism and lack of diversity. When it comes to the issue of judicial independence and democratic accountability, the NJAC controversy offers a prime example. Though the Supreme Court struck down NJAC to guarantee institutional autonomy, it also pointed to the need for substantive changes to the collegium system itself.

The question of collegium system in the constitution is thus of a wider nature, which brings to question separation of powers, constitutional supremacy, and the role of judiciary in democratic governance. Judicial independence is undoubtedly a part of the constitution of India's basic structure, but whether the collegium system itself is the only constitutionally acceptable system continues to be an issue.

Future reforms should aim to achieve a balance between judicial independence and transparency, merit, diversity and public confidence. The end goal of constitutional governance is that institutions are independent and accountable. The future of Indian constitutionalism and the legitimacy of judicial institutions in a democracy will thus be further shaped by the evolution of the collegium system.

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