

Preserving Judicial Independence in India: A Constitutional Critique of the Appointment Process

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Abstract:

The exercise of judicial power of a court of law is hinges for constitutional democracy and rule of law. This study critically analyzes the framework of judicial appointment in India from an executive overshadowed perspective to a judge-centered collegium paradigm constructed through judicial activism. The study focuses on the constitutional provisions, prominent constitutional legislations including, the First, Second and Third Judges Cases and the NJAC judgment, alongside judicial doctrines like the Basic Structure Doctrine and exposes how freedom of judicial independence has been guaranteed and protected. The paper posits that important decision-making disabilities apply at any stage in restrictive scope but primary bestowing authority to the judicial arms is compulsory, the existing collegium system is incapable of rational systems to accountability devoid of representation or ease of access, and transparent processes. Relying primarily on doctrinal and cross-national examinations, this analysis reveals independent yet responsible notions of governance in India and demonstrates the sovereign pressures in assuming such powers. The study suggests measures aimed at strengthening accusations of judicial independence and impartiality while defending institutional reputation, credibility, and democratic soundness of the mechanism in its controls.

Keywords: Judicial Independence, Collegium System, NJAC, Basic Structure Doctrine, Constitutional Law, Judicial Appointments, Supreme Court of India, Judicial Accountability, Indian Constitution, Judges Cases, Constitutional Supremacy.

Introduction:

Judicial independence is a foundational pillar of constitutional democracies and plays a vital role in upholding the rule of law, safeguarding fundamental rights, and maintaining the balance of power among the organs of the state. In India, the Constitution envisages a judiciary that is independent, impartial, and capable of acting as a check against executive and legislative overreach. This vision is evident in the Constituent Assembly Debates and is reinforced by Article 50, which mandates the separation of the judiciary from the executive.

The process of appointing judges is central to maintaining judicial independence. Over time, India's judicial appointment system has evolved significantly. Initially dominated by executive influence, the process underwent a dramatic shift through judicial interpretation. In the *First Judges Case* (1981), the

Supreme Court upheld executive primacy. However, the *Second Judges Case* (1993) reversed this stance, establishing the Collegium system, which was further clarified in the *Third Judges Case* (1998). To reform the opaque Collegium, Parliament introduced the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act, 2014. These efforts were struck down by the Supreme Court in the NJAC judgment (2015), on the grounds that they violated the basic structure of the Constitution—particularly the independence of the judiciary.

This paper undertakes a constitutional critique of the appointment process, analyzing whether the current Collegium system effectively upholds judicial independence while ensuring accountability and transparency. The study delves into landmark case laws, the basic structure doctrine, and comparative frameworks to understand the strengths and shortcomings of the existing system.

The need of the hour is to preserve judicial independence while introducing reforms that enhance openness, diversity, and public trust in the judiciary. This research aims to contribute to that discourse by offering a balanced, well-grounded critique and suggesting pathways for reform.

Concept of Judicial Independence:

Definition and Dimensions

Judicial independence refers to the ability of judges and the judicial institution to perform their functions impartially and without any undue influence from external sources—whether governmental, private, or public. It ensures that judges are free to decide cases solely based on the law and facts, uninfluenced by political pressures, social biases, or personal interests.

Judicial independence is commonly categorized into three major dimensions:

1. **Individual Independence:** This refers to the autonomy of judges in their personal capacity. It ensures that a judge is free from coercion, threats, or influences that might affect their impartiality. This includes security of tenure, financial security, and institutional safeguards against arbitrary removal or transfer.
2. **Institutional Independence:** This involves the independence of the judiciary as a separate and co-equal branch of the state, distinct from the executive and legislature. It ensures that courts are not subject to interference in their administrative functions, budgeting, or jurisdictional boundaries.
3. **Decisional Independence:** This dimension protects the judge's ability to make decisions based solely on legal reasoning and facts, without fear of reprisal or the need to cater to popular or political expectations. It includes the ability to render decisions free of influence from within or outside the judiciary.

These three dimensions are interdependent and essential for a healthy and functioning rule of law. Without individual, institutional, and decisional independence, the judiciary cannot act as a meaningful check on the other branches of government.

Theoretical Foundations and International Principles

The foundation of judicial independence lies in the **theory of separation of powers**, articulated by **Montesquieu** in the 18th century. According to this theory, the liberty of the citizens is best preserved when the legislature, executive, and judiciary are distinct and no branch controls the others. The judiciary, being the least dangerous branch in terms of resources and enforcement power, must be protected to uphold individual rights and curb potential excesses of the other two branches.

Internationally, judicial independence is widely recognized as a universal human rights principle. Prominent international declarations and instruments include:

- **The United Nations Basic Principles on the Independence of the Judiciary (1985):** These principles assert that judicial independence is essential to the rule of law and the protection of human rights. Judges must decide cases impartially, without external influence, and must be appointed through transparent and merit-based systems.
- **The Bangalore Principles of Judicial Conduct (2002):** Adopted to guide the ethical conduct of judges globally, the Bangalore Principles stress independence, impartiality, integrity, propriety, equality, competence, and diligence as core judicial values.
- **The International Covenant on Civil and Political Rights (ICCPR):** Article 14 guarantees the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law.

These international norms have been instrumental in shaping domestic constitutional frameworks, including that of India.

Role in Separation of Powers and Constitutional Governance

Judicial independence is not merely an institutional aspiration but a constitutional imperative. It plays a central role in maintaining the balance of power between the legislature, executive, and judiciary. In India, the Constitution envisages a clear separation of powers, even though not strictly applied in the American sense. Judicial independence acts as a safeguard against authoritarianism and protects citizens from legislative or executive tyranny.

In the Indian context, Article 50 of the Constitution expressly directs the state to separate the judiciary from the executive. Furthermore, the judiciary has been vested with the power of **judicial review** under Articles 32 and 226, which empower it to strike down arbitrary or unconstitutional actions by the state. This power would be hollow without the actual independence to exercise it fearlessly.

Moreover, the **basic structure doctrine**, as established in *Kesavananda Bharati v. State of Kerala* (1973), recognizes judicial independence as one of the essential features of the Constitution. This ensures that even constitutional amendments cannot erode this principle.

In a democracy like India, the judiciary serves not only as the guardian of the Constitution but also as the protector of individual liberties and the final interpreter of the law. Without independence, the judiciary cannot perform these functions effectively.

Need for Judicial Independence:

Judicial independence is not just an ideal; it is a functional requirement for the survival of constitutional democracy. The need for an independent judiciary arises from its unique role as the protector of the Constitution, the guardian of fundamental rights, and the adjudicator of disputes involving individuals, institutions, and even the state. In the Indian context, where the judiciary has often stood as the last resort for justice against legislative and executive overreach, the need for judicial independence becomes all the more pressing.

1. Upholding the Rule of Law

The judiciary is the custodian of the rule of law. It ensures that all actions of the state—be it the executive, legislature, or its own institutions—are conducted within the boundaries set by law. A dependent judiciary cannot stand up to arbitrary exercise of power and cannot protect the rights and

freedoms guaranteed to citizens. Judicial independence ensures that no authority, howsoever powerful, is above the law.

2. Protection of Fundamental Rights

India's Constitution provides a comprehensive set of fundamental rights under Part III, which the judiciary is empowered to enforce through Articles 32 and 226. Citizens often turn to the courts when their rights are violated by the state or other actors. An independent judiciary, immune from pressure or influence, is essential for impartially adjudicating such claims and ensuring the enforcement of rights.

3. Balancing Powers: Check on Executive and Legislative Overreach

In a constitutional democracy, a system of checks and balances among the three organs of government is essential. The judiciary acts as a vital check on the possible overreach of the executive and legislature. It reviews laws passed by Parliament and actions taken by the executive to ensure their conformity with constitutional provisions. Without independence, the judiciary may become a mere rubber stamp of other branches, thereby defeating the purpose of constitutional governance.

4. Safeguarding the Basic Structure of the Constitution

The doctrine of basic structure, evolved in *Kesavananda Bharati v. State of Kerala* (1973), places the judiciary at the center of constitutional preservation. The power to strike down constitutional amendments that alter the basic structure ensures that certain fundamental values—like judicial independence, secularism, and the rule of law—remain intact. This role demands an institution free from fear, bias, and external pressure.

5. Impartial Dispute Resolution and Public Confidence

Justice must not only be done but also be seen to be done. The credibility of the judiciary depends largely on public confidence in its impartiality. If judges are perceived as biased or influenced, public trust in the judicial system erodes, leading to social unrest and loss of faith in democratic institutions. Judicial independence, therefore, is key to maintaining public trust in the justice system.

6. Judicial Review and Constitutional Interpretation

Indian courts have the power of judicial review to assess the constitutional validity of legislation and executive actions. This interpretative power can have profound political and societal implications. To exercise this power effectively and fairly, judges must be free from ideological or institutional pressures. Only an independent judiciary can offer credible, consistent, and courageous interpretations of the Constitution.

7. Ensuring Fair Trials and Rule of Natural Justice

At the core of the justice system is the promise of a fair trial. Judicial independence guarantees that judges are neutral arbiters who apply the law without fear or favour. It also ensures the application of the principles of natural justice—like the right to be heard and the rule against bias—which are essential for protecting the dignity and rights of individuals.

8. Guarding Against Majoritarianism and Populism

In democracies, especially diverse and populous ones like India, courts often become the protectors of minorities and marginalized sections against majoritarian policies. At times, the judiciary may be required to take unpopular stands that uphold constitutional values in the face of public pressure or political populism. Only an independent judiciary can withstand such pressure and maintain its constitutional role.

9. Strengthening Constitutional Morality and Democratic Values

Judicial independence also strengthens constitutional morality by ensuring that decisions are based on

the values enshrined in the Constitution rather than personal beliefs or political ideologies. It ensures consistency in legal reasoning, which contributes to the development of a democratic legal culture and respect for constitutional norms.

Analysis of the Basic Structure Doctrine: Role of Judiciary in Protecting the Constitution:

The Basic Structure Doctrine is one of the most significant judicial innovations in Indian constitutional history. It was laid down by the Supreme Court in the landmark case of *Kesavananda Bharati v. State of Kerala* (1973), which profoundly transformed the role of the judiciary in India. The doctrine establishes that while Parliament has wide powers to amend the Constitution under Article 368, it cannot alter or destroy its “basic structure.” This concept is not explicitly mentioned in the Constitution but was judicially created to ensure that the foundational principles of the Constitution remain inviolable.

The judiciary's role in articulating and enforcing the basic structure doctrine is a testament to its function as the guardian of the Constitution. This doctrine empowers the courts to review constitutional amendments and strike them down if they violate essential constitutional principles such as the supremacy of the Constitution, secularism, federalism, democracy, the rule of law, and judicial independence.

The significance of the doctrine lies in its capacity to maintain constitutional continuity while permitting necessary changes. It creates a balance between flexibility and rigidity, allowing for democratic progress without compromising the Constitution's core identity. Through the application of this doctrine, the judiciary has safeguarded essential features from being tampered with, even by a constitutional majority. For example, in the *Minerva Mills v. Union of India* (1980) and *Indira Nehru Gandhi v. Raj Narain* (1975) cases, amendments were struck down for violating the basic structure. Similarly, in the *NJAC judgment* (2015), the court invalidated the 99th Constitutional Amendment and the NJAC Act, ruling that judicial primacy in appointments was part of the Constitution's basic structure.

In this way, the judiciary has not only interpreted the Constitution but actively preserved its spirit. This active judicial role sometimes leads to criticisms of judicial overreach. However, proponents argue that in a vibrant democracy, the judiciary must serve as the sentinel of constitutionalism. The Basic Structure Doctrine ensures that transient political majorities cannot undermine permanent constitutional values.

Thus, the doctrine is a critical mechanism for constitutional protection, with the judiciary as its principal enforcer. It continues to define the limits of constitutional amendments and reaffirms the judiciary's pivotal role in maintaining the sanctity and supremacy of the Indian Constitution.

Basic Features of the Constitution According to Kesavananda Bharati Verdict:

The *Kesavananda Bharati* judgment (1973) is a cornerstone of Indian constitutional jurisprudence. Decided by a 13-judge bench—the largest in Indian legal history—the case revolved around the extent of Parliament's power to amend the Constitution under Article 368. The majority held that while Parliament could amend any part of the Constitution, it could not alter its “basic structure.”

The term “basic structure” was not definitively defined, but the judgment laid down several principles that constitute the core of the Constitution. These basic features have been elaborated upon in later judgments and are considered sacrosanct. The key features identified in *Kesavananda Bharati* and subsequent interpretations include:

1. **Supremacy of the Constitution** – The Constitution is the highest law of the land, and no law or amendment can contravene its fundamental structure.

2. **Republican and Democratic Form of Government** – India must remain a democracy where power is derived from the people and exercised within constitutional limits.
3. **Secularism** – The state must maintain an equal distance from all religions, ensuring freedom of religion and religious neutrality.
4. **Separation of Powers** – The three branches of government (legislature, executive, and judiciary) must function independently within their respective domains.
5. **Judicial Review** – The judiciary has the power to review laws and amendments to ensure they do not violate constitutional principles.
6. **Rule of Law** – The law must govern the nation, not arbitrary decisions, ensuring equality before law and due process.
7. **Federal Character of the Constitution** – There is a distribution of powers between the Centre and States, which cannot be undone by amendments.
8. **Unity and Integrity of the Nation** – The territorial and political integrity of India must be preserved.
9. **Sovereignty** – India's political independence and sovereignty are inviolable.
10. **Freedom and Dignity of the Individual** – Fundamental rights like liberty, equality, and dignity cannot be diluted through constitutional amendments.

These features have become the touchstone for assessing the validity of constitutional amendments. Even though they were not exhaustively listed in the original judgment, the doctrine has evolved through subsequent cases. Courts have invoked the basic structure doctrine to safeguard the independence of the judiciary, the primacy of fundamental rights, and the electoral process, thereby preserving India's constitutional ethos.

Appointment of Judges in India:

The appointment of judges in India is a subject of deep constitutional, legal, and political importance. The Constitution of India initially envisaged a collaborative process involving both the executive and judiciary. According to **Article 124** for the Supreme Court and **Article 217** for High Courts, judges are appointed by the President in consultation with the Chief Justice of India (CJI), and, in the case of High Courts, with the Governor and the Chief Justice of the respective High Court.

Initially, the word “consultation” was interpreted in a limited manner, giving primacy to the executive. However, the judiciary reinterpreted this in a series of landmark cases, fundamentally altering the balance of power in the appointment process.

This evolution occurred through the **Three Judges Cases**:

1. In the **First Judges Case (1981)**, the Supreme Court held that “consultation” did not mean “concurrence,” giving the executive the upper hand.
2. In the **Second Judges Case (1993)**, this interpretation was overruled, and the Court held that the Chief Justice of India would have primacy in appointments through a Collegium—a body of the senior-most judges.
3. The **Third Judges Case (1998)** clarified the Collegium's composition and functioning, making it a five-member body for the Supreme Court and a three-member body for High Courts.

This Collegium system, although developed to preserve judicial independence, has faced criticism for being opaque, lacking accountability, and not being diverse or representative. In response, Parliament enacted the **99th Constitutional Amendment** and established the **National Judicial Appointments Co-**

mmission (NJAC), which was to include judicial and non-judicial members.

However, in **2015**, the Supreme Court struck down the NJAC as unconstitutional, reinstating the Collegium system on the grounds that judicial primacy in appointments is a basic feature of the Constitution.

Today, India continues to use the Collegium system for appointing judges, with no formal legislation governing the process. While it has helped shield judicial appointments from political interference, the system suffers from institutional drawbacks. Calls for reform persist, advocating for more transparency, clear criteria, and democratic accountability without compromising judicial independence.

Analysis of the Three Judges Cases: The “Three Judges Cases” collectively mark a transformative period in the constitutional evolution of judicial appointments in India. These cases define the contours of how judges to the higher judiciary—Supreme Court and High Courts—are appointed, significantly shifting the balance from executive primacy to judicial primacy.

First Judges Case – *S.P. Gupta v. Union of India* (1981)

This case interpreted the word “consultation” in Articles 124 and 217 as not binding on the President, thereby granting the executive the final say in judicial appointments and transfers. The Court emphasized the necessity of checks and balances and upheld the executive’s supremacy. This judgment was heavily criticized for compromising judicial independence and allowing political interference.

Second Judges Case – *Supreme Court Advocates-on-Record Association v. Union of India* (1993)

This case overturned the earlier ruling, holding that “consultation” meant “concurrence” of the Chief Justice of India. The Court created the **Collegium System**, asserting that the CJI, in consultation with a plurality of senior judges, would recommend appointments. This was justified to protect judicial independence, as political dominance in appointments was seen as a threat to fair and impartial adjudication.

Third Judges Case (1998)

This was not a litigation but a Presidential Reference under Article 143. The Supreme Court elaborated on the Collegium system’s structure, stating that the CJI must consult a **Collegium of four senior-most judges** for Supreme Court appointments. For High Courts, a three-member Collegium was recommended. The President, though formally making the appointments, had little discretion if the Collegium reiterated its recommendation.

Impact and Critique

The shift to the Collegium system drastically reduced the executive’s role, thereby enhancing judicial independence. However, it also led to a **self-appointing judiciary**, with no formal criteria or transparency. The lack of diversity, public scrutiny, and accountability mechanisms has attracted criticism from civil society and constitutional scholars.

While the Three Judges Cases ensured protection from political manipulation, they also created a system that many argue lacks democratic legitimacy. The challenge today is to reform this system in a way that retains judicial independence while ensuring transparency and accountability.

NJAC Case: Constitutional Analysis: The National Judicial Appointments Commission (NJAC) case, formally known as *Supreme Court Advocates-on-Record Association v. Union of India* (2015), marks a

pivotal moment in Indian constitutional law. This case dealt with the constitutional validity of the 99th Constitutional Amendment Act, 2014, and the NJAC Act, 2014, both of which aimed to replace the existing Collegium system of appointing judges to the higher judiciary with a commission comprising both judicial and non-judicial members.

The NJAC was to consist of the Chief Justice of India, two senior-most Supreme Court judges, the Union Law Minister, and two eminent persons to be appointed by a committee comprising the Prime Minister, the CJI, and the Leader of the Opposition. The objective was to introduce transparency and accountability in judicial appointments, an area long criticized for its opacity under the Collegium system.

The constitutional challenge to the NJAC centered on the principle of **judicial independence**, which the petitioners argued was a part of the **basic structure** of the Constitution. They contended that including members of the executive and non-judicial persons in the appointments process diluted the independence of the judiciary, making it vulnerable to executive and political influence.

A five-judge Constitution Bench of the Supreme Court struck down both the NJAC Act and the 99th Amendment as unconstitutional by a 4:1 majority. The Court reasoned that judicial primacy in appointments is an essential feature of judicial independence, which is part of the basic structure. The majority opined that allowing the executive or outsiders to have a say in judicial appointments violated the separation of powers and endangered the impartiality of the judiciary.

Justice Khehar, writing the majority opinion, emphasized that the independence of the judiciary could not be compromised, even in the name of transparency. He also observed that judges alone are best suited to assess the merit and suitability of other judges, and that involving non-judicial actors in this delicate process would politicize appointments.

Justice Chelameswar, in his dissenting opinion, supported the NJAC, asserting that the Collegium system had failed to deliver transparency and accountability. He expressed concern about nepotism and secrecy in the judiciary and argued that public confidence required reforms that allowed for broader participation in judicial appointments.

While the NJAC judgment reaffirmed the judiciary's independence and its role in protecting the Constitution, it also reignited the debate on judicial accountability and transparency. Critics argue that although the Collegium system protects against executive overreach, it lacks democratic legitimacy and fails to ensure diverse and merit-based appointments.

The NJAC case is thus a landmark in defining the contours of the basic structure doctrine and reinforcing the principle that the judiciary must remain independent and insulated from political pressures. However, it also serves as a reminder that judicial independence must not come at the cost of transparency and public trust. The challenge moving forward is to evolve a balanced model that secures independence while enhancing credibility and openness in judicial appointments.

Conclusion:

Judicial independence forms the backbone of a functioning constitutional democracy, and its preservation is vital to upholding the rule of law, protecting fundamental rights, and maintaining the balance of power among the different organs of government. The appointment of judges lies at the heart of this independence, making the process by which judges are selected and elevated to higher courts a matter of paramount constitutional significance.

The journey of judicial appointments in India, from a constitutionally mandated consultative process to the Collegium system and the attempted shift to the NJAC, reflects a deep and ongoing tension between institutional autonomy and democratic accountability. Through landmark rulings such as the *Three Judges Cases* and the NJAC judgment, the Supreme Court has firmly entrenched judicial primacy in appointments as a core component of the basic structure of the Constitution. These decisions have played a crucial role in insulating the judiciary from political influence and ensuring its capacity to act as an impartial arbiter.

However, the exclusive control of appointments by the judiciary through the Collegium system has drawn substantial criticism for its lack of transparency, objectivity, and diversity. The system has been accused of fostering elitism, favoritism, and opacity in decision-making. The NJAC was an attempt to reform this process by introducing elements of accountability and broad-based representation, but its rejection by the Supreme Court reaffirmed that any such reforms must not compromise judicial independence.

This creates a paradox: while judicial independence must be protected from external interference, the judiciary cannot remain impervious to public accountability and transparency. The future of judicial appointments lies in finding a middle path that respects judicial autonomy while embracing modern standards of institutional responsibility and democratic legitimacy.

Reform is not only desirable but necessary. An ideal system would involve a transparent, participatory, and merit-based process that includes checks and balances without threatening the judiciary's constitutional role. This could include setting clear criteria for selection, codifying the Collegium system through legislation, and incorporating elements of public scrutiny while preserving the final authority with the judiciary.

In conclusion, the constitutional critique of the judicial appointments process in India reveals the need for a principled and well-thought-out reform that harmonizes judicial independence with institutional integrity. The ultimate goal should be to foster a judiciary that is not only independent but also credible, accountable, and reflective of the constitutional values it is meant to uphold. As India continues its democratic journey, ensuring an independent yet transparent judiciary will be fundamental to preserving the ideals enshrined in the Constitution.