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# CROWN WITHOUT BALLOT: THE CONSTITUTIONAL DILEMMA OF INDIA'S COLLEGIUM SYSTEM

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## ABSTRACT

One of the most controversial institutional arrangements in the modern constitutional law has been the Indian collegium system. An extraordinary shift of power of appointment out of the executive into the judiciary, it was not established by explicit constitutional text but through the judicial interpretation. Although its advocates explain it as a required process of maintaining judicial independence, its opponents consider it a non-transparent and unaccountable democracy, which allows self-selection by institutions. This paper asserts that the collegium system has a constitutional paradox; it was created so as to safeguard the judiciary against political capture but in so doing has created a crisis of legitimacy of its own. The paper discusses the constitutional history of the appointment of judges by Articles 124 and 217, the historical evolution of the doctrine of the Judges Cases, and the critical analysis of the collegium design on the principles of separation of powers, accountability and democratic legitimacy. It also examines how the National Judicial Appointments Commission was invalidated as a constitutional moment of closure where the Court asserted independence but opposed any substantial structural change. The paper argues that judicial independence, though being a part of the basic structure, cannot be discussed as a licence of institutional exclusiveness. The system in which the guardians of the Constitution practically manage to compose their own system without clear standards or effective accountability cannot be indefinitely maintained in a constitutional democracy. Judicial appointments in India must not rely on judicial monopoly, or executive domination, but a judiciously balanced system which balances independence and constitutional responsibility.

**Keywords:** Collegium System; Judicial Appointments in India; Judicial Independence; Democratic Legitimacy; Basic Structure Doctrine; Separation of Powers; National Judicial Appointments Commission (NJAC); Constitutional Governance.

## CHAPTER I - An Unelected Crown? Judicial Power and the Democratic Deficit

### 1.1 Judicial Appointments as a Location of Basic Structure Entrenchment and Constitutional Sovereignty.

Jurisdiction to make judicial appointments to constitutional courts is more than administrative. It is constitutive of constitutional order as such<sup>1</sup>. The modern constitutional democracy is always characterized by those interpreting the Constitution, as they are bound to influence the direction of rights, federalism, institutional limits, and democratic practice. Courts are thus placed in a strange normative position: they decide, in large part, who will be speaking with ultimate constitutional authority. This is enhanced in the Indian context by the fact that the higher judiciary is central in providing a check on legislation, executive action, and the enforcement of fundamental rights. The appointments process is therefore not a peripheral phenomenon of constitutionalism; it is one of the decisive locations<sup>2</sup>.

This constitutional importance became even eminent following the case of *Kesavananda Bharati v. State of Kerala*, when the Supreme Court enshrined the basic structure doctrine and made some fundamental pillars of the constitution inaccessible to the common amendment<sup>3</sup>. The independence of the judiciary was to be considered as part of one of such foundations. As soon as judicial independence is made a structural guarantee of the constitution, the very manner in which judges are chosen will be tied up with the constitutional safeguard of independence itself<sup>4</sup>. It is no longer who makes the judges, but who is to control the institutional future of the Constitution<sup>5</sup>.

However, the basic structure argument creates tension in itself. The rule of law certainly cannot be imagined without judicial independence. It is not possible that the political power can declare the courts to be discharging their constitutional role. However, the metamorphosis of independence into a structural limitation also offers an interpretive chance to the judiciary to assert more and more control of the terms of its own being. What starts as a barrier to intrusion can slowly turn into an assertion of institutional monopoly. Herein lies the controversial

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<sup>1</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 33–39 (2004).

<sup>2</sup> *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

<sup>3</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>4</sup> *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 SCC 1.

<sup>5</sup> *In re Special Reference No. 1 of 1998*, (1998) 7 SCC 739.

advantage of the collegium system. It puts itself forward as the protector of judicial independence, but by so doing it also permits the judiciary to be the great maker of its own composition<sup>6</sup>.

Whether judicial independence is a constitutional issue, then, is not the question; that is closed. The more important question is whether self-appointment can be discussed as the independence. The difference is paramount. One of the values in the constitution is independence. One of the institutional mechanisms is self-selection. The former can be used to justify insulation against domination; this does not necessarily mean that the concentration of the power of appointment in the institution to be insulated is justified. Should judicial independence be interpreted in a way that would empower the judiciary to monopolize appointments, a constitutional guarantee will be in effect turned into a kind of institutional sovereignty which is inadequately checked by accountability.

This paradox is exactly what is captured in the title of this paper - Crown Without Ballot. The collegium is not based on electoral mandate, parliamentary design or even explicit constitutional text. It bases it on the judicial interpretation<sup>7</sup>. That understanding might have been based on actual fears of executive meddling, but when it became institutionalized into a system of appointments, it posed a constitutional concern that remains unanswered: may an unelected institution rightly assume the power to decisively determine its own reproduction in the guise of constitutional protection?

## **1.2 The Counter-Majoritarian Difficulty Revisited: Democratic Legitimacy vs. Judicial Independence in the Power of Appointment.**

The issue of unelected judges striking down the legislation of elected officials has been long grappled with by modern constitutional democracies, the issue of what Alexander Bickel had referred to as the counter-majoritarian difficulty<sup>8</sup>. This challenge has conventionally been diluted in India through the perception that judicial review is softened to constitutional supremacy as opposed to judicial supremacy. Courts do not subvert democracy so to speak; they are enforcing the more profound democratic commitments of the Constitution. That, however, is a weaker justification when the question is no longer one of adjudication but of

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<sup>6</sup> Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 SCC 441.

<sup>7</sup> Id.

<sup>8</sup> Alexander M. Bickel, *The Least Dangerous Branch* 16–23 (2d ed. 1986).

appointments<sup>9</sup>.

One thing is judicial review; another is judicial control of appointments. The latter can be explained by the necessity to be constitutional. The latter incriminates the institutional legitimacy structure per se. Even a court that is reviewing legislation could be democratically located within a more comprehensive constitutional structure so long as its membership is formed by a process in which a plurality of constitutional actors participate<sup>10</sup>. However, when the judiciary is in control of the appointments process, it is no longer the protector of the constitutional parameters and starts to look like an institution that decides in part the conditions of its own existence<sup>11</sup>.

This point is more acute to be read in connection with the case of *Indira Nehru Gandhi v. Raj Narain*, when the Court reiterated the notion that constitutional democracy is reliant on structural checks and balance as well as the maintenance of fundamental features<sup>12</sup>. Even though the case had nothing to do with judicial appointments, its reasoning is quite pertinent. Nothing in the world, including a very significant institution, could argue constitutional immunity to the rules of balance and accountability. The concept of the power in a constitutional democracy being limited, distributed, and justified is part of the basic structure, as well as judicial independence.

The collegium makes this balance difficult since it makes the judiciary a filter of future adjudicators rather than an adjudicator. That change creates a legitimacy deficit. The position of courts, in Indian life, is already a strong one. They decide on contentious issues regarding elections, liberty, governance, commerce and social policy. When the same institution has control over access to its own ranks as well without meaningful involvement of politically accountable actors, it constitutes a kind of counter-majoritarian power, which is not merely interpretive but reproductive. It is no longer a mere worry that judges are overruling elected branches. That judges are active in appointing judges who will in turn carry on that power.

This does not pose a case of majoritarianism over the courts. That would be very destructive too. It is instead a case to support the idea of independence and insulation. The judiciary which

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<sup>9</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1406–09 (2006).

<sup>10</sup> Constitutional Reform Act 2005, c. 4, §§ 61–94 (U.K.).

<sup>11</sup> Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 Am. J. Comp. L. 103, 113–15 (2009).

<sup>12</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

is constitutionally independent does not have to be democratically unaccountable. In fact, the two concepts of democratic legitimacy and judicial independence do not have to be in a zero-sum game. Well-structured appointments systems can maintain decisional autonomy and at the same time make the institutional formation process constitutionally responsive. The collapse of the collegium is the confusion of that distinction.

### **1.3 Self-Insulation in Institutional Design and the Corrosion of Public Accountability in the Judiciary.**

A constitutional order becomes legitimized not due to the fact that power is wielded by the appropriate institution, but to the fact that the right procedures are used to wield that power, in a way that seems fair and principled and accountable<sup>13</sup>. In this aspect the collegium system is met with a great difficulty. It is frequently justified as a safeguard mechanism - a framework to protect against executive pressure. However, such defence is inclined to disregard the fact that independence is not sufficient to guarantee constitutional legitimacy. It needs also transparency, reasoned decision-making, and to make the institutional design visible to the populace and to exhibit fairness.

The issue with the collegium is that it exists in some form of what can be termed institutional self-insulation. Judges are internally concentrated in the authority to identify, evaluate and recommend them. The criteria used in selection are vague. The rationale of inclusion or exclusion is seldom expressed in a strong social manner. The procedure is still constitutional on paper but practically obscure. This obscurity is not a trifling administrative vice. It impacts on the legitimacy of the system as such since the judiciary is not a normal institution. It is the last decoder of constitutional rights and boundaries. Once the entrance to such an institution is controlled by obscurity, instead of reasoned public standards, the issue becomes of constitutional nature.

The Supreme Court in *Union of India v. Madras Bar Association* highlighted the significance of safeguarding the adjudicatory independence against the executive in the case of tribunals. That is a value, yet it is not to be interpreted to mean that independence depletes institutional legitimacy. One of the forms of control is independent and the other is lacking sufficient accountability in an institution. The collegium is a good example of such a danger. It protects

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<sup>13</sup> Jerry L. Mashaw, *Due Process in the Administrative State* 24–30 (1985).

against political domination at the same time, it introduces the risk of uncontrolled discretion<sup>14</sup>.

This is important in the light of Article 14. Arbitrariness of the state action is a constitutional suspect not only when the results are irrational, but also when the procedures are not structured to provide safeguards. When judicial appointments are made without any clear articulation of criteria, any intelligible reasoning that is publicly intelligible, or any objective evaluation techniques, then the process will be seen as a process driven by preference, as opposed to principle. Although the choices made with regard to appointments may be substantively well, there is always the vulnerability of legitimacy of the process where the process of making decisions becomes obscure.

In this regard, public accountability does not imply plebiscatory involvement or media-induced election. It implies that constitutional power should be exercisable in a way that it can be justified in a way beyond the institution that exercises it. It is at this juncture that the collegium tends to fall short. It asserts constitutional necessity and refuses institutional explanation. It is hard to maintain such a mixture in a constitutional democracy which is devoted to independence and also to reasoned government<sup>15</sup>.

#### **1.4 Revised Research Scope: Reframed to Constitutional Power Allocation vs. Appointment Procedure.**

The collegium is not a policy issue or an institutional choice as considered in this paper. It considers it as a constitutional problem of power distribution. The question then becomes, can the concentration of appointment power in the judiciary be consistent with the overall constitutional pattern of limited government, separation of powers and democratic legitimacy<sup>16</sup>?

The first is textual and structural: is it possible to maintain the collegium in the form of Articles 124 and 217? The second is doctrinal: can judicial interpretation, even in all its ingenuity, transfer, legitimately, institutional primacy by turning consultation into concurrence? The third is normative: does the defence of judicial independence give any defense to a process so secretive as to compromise accountability, a sense of trust by the population, and democratic

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<sup>14</sup> Union of India v. Madras Bar Ass'n, (2010) 11 SCC 1.

<sup>15</sup> E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.

<sup>16</sup> I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

integrity<sup>17</sup>?

The paper thus proceeds in four phases. It initially puts judicial appointments in the constitutional dilemma of independence and legitimacy. It then follows the history of the collegium in the Judges Cases and whether the evolution was an interpretation or a constitutional redesign. It then goes on to criticize the industries of opacity, elitism, and democratic deficit with a specific focus on the NJAC scandal as a constitutional challenge. Lastly, it suggests a reform-based structure that maintains decisional autonomy but opposes institutional monopoly.

The bigger argument is simple: a constitutional democracy simply cannot permit an overall perpetuation of a system where those charged with the responsibility of the Constitution have effective control over their own institutional reproduction without plain criteria or significant accountability. It is not merely that the collegium is imperfect as its dilemma. It is because it is ill-posed at the junction of constitutional principle and institutional power<sup>18</sup>.

## **CHAPTER II - Judicial Self-Appointment: From Interpretation to Institutional Control**

### **2.1 Textual Minimalism and Constitutional Silence: Re-reading Articles 124 and 217 beyond Formalism**

Articles 124 and 217 give a constitutional basis to the appointment of judges to the Supreme Court and High Courts<sup>19</sup>. In both clauses, the President is the formal authority of appointment and that it is to take place after consultation with specified constitutional functionalities. This is a language that means a lot and means a lot not to say much. It does not directly give primacy to the judiciary<sup>20</sup>. There is no mention of collegium. It does not establish an appointments commission. It creates a consultative structure to a constitutional design that assumes inter-institutional interaction as opposed to unilateral domination<sup>21</sup>.

This restraint of text has a constitutional significance. It indicates that the framers were not aiming to put a comprehensive appointments process into writing but rather developed a

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<sup>17</sup> INDIA CONST. arts. 124, 217.

<sup>18</sup> Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 SCC 441.

<sup>19</sup> INDIA CONST. arts. 124, 217.

<sup>20</sup> Id.

<sup>21</sup> H.M. Seervai, Constitutional Law of India 2978 (4th ed. 1996).

framework that could strike a balance between conflicting factors<sup>22</sup>. On the one hand there was the necessity of maintaining the competence and independence of the judiciary, and on the other there was the necessity of not turning the judiciary into a self-sustaining ghetto<sup>23</sup>. It is therefore possible to understand the language of consultation to be an effort at creating constitutional dialogue instead of exclusive power.

The subsequent history of the collegium must consequently be explained by this original plan. Judicial monopoly was not explicitly established by the Constitution; it was not closed off to institutional interaction. When that is accepted, the onus falls on to the holders of the collegium as a constitutional imperative. They need to demonstrate not just that the independence of the judiciary is significant, but that the silence of the Constitution on the primacy can be validly addressed by a mechanism which in effect and practice barred other participants to decisive involvement. That is a much greater assertion than is commonly acknowledged<sup>24</sup>.

## **2.2 Executive Primacy as the Original Constitutional Design and Its Doctrinal Displacement**

The early constitutional stance was very much in favour of executive primacy but limited by consultation. This was given its most eminent acceptance in *S.P. Gupta v. Union of India*, otherwise the first Judges Case<sup>25</sup>. The Court decided that the views of the Chief Justice of India were not of primacy and that the executive still had the final say when it came to appointments<sup>26</sup>. This decision was based on a strict interpretation of the written constitution and on the supposition that politically responsible bodies were capable of occupying the last phase of the procedure as long as consultation was real and substantial<sup>27</sup>.

Structurally, this was not an unrealistic approach. It considered appointments to be a constitutional role that entailed expertise and responsibility. This opinion of the judiciary was important due to its institutional expertise. The role of the executive was important as it was a democratically accountable arm of government. However imperfect the working system might be, the constitutional rationale of mutual participation was not lost.

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<sup>22</sup> M.P. Jain, *Indian Constitutional Law* 1831 (8th ed. 2018).

<sup>23</sup> *Id.*

<sup>24</sup> *Constituent Assembly Debates* vol. VIII, Dec. 24, 1948.

<sup>25</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.

<sup>26</sup> *Id.*

<sup>27</sup> A.G. Noorani, *Appointment of Judges and the Constitution*, 16 *Econ. & Pol. Wkly.* 1231 (1981).

But the flaws of executive primacy were soon made apparent. The issue of transfers, supersessions and politicization of appointments brought about anxiety on whether consultation was serving as an effective check or a mere ritual before executive will. These fears did not arise. They arose out of real life incidents that created doubts over the susceptibility of judicial independence. But the cure which the Supreme Court ultimately resorted to was more than a cure of abuse. It changed the centre of gravity in the constitution<sup>28</sup>.

The flight of S.P. Gupta was not only evolution of doctrine. Institutional displacement. It was not a balanced reform that was put in place of executive primacy, but judicial primacy. The motive of this replacement might have been a natural suspicion of political power, but lack of confidence in one institution is no excuse to put power in another. The test of the constitution has always been to devise measures that do not foster domination yet do not grant monopoly. The collegium was unable to create such a balance.

### **2.3 Judicial Fiat Mutation of the Doctrine: The Construction of Collegium Sovereignty.**

Break was at the Second Judges Case, Supreme Court Advocates-on-Record Association vs. Union of India<sup>29</sup>. In deciding the issue of appointing judges, the Court reversed the case of S.P. Gupta and ruled that the Chief Justice of India would have the first say in his case. The very word consultation had been virtually changed to mean concurrence, and the constitutional interpretive reason had been shifted on to the judicial. This primacy was subsequently institutionalized in subsequent reasoning as collegial and not individual in the sense that the senior judges had to consult but the principle of change remained the same: the judiciary was institutionalized as the heart of the appointments<sup>30</sup>.

The Presidential Reference also ruled in this structure in the Third Judges Case. It had expanded the collegium and provided that the executive should leave judicial advice under very few and exceptional conditions<sup>31</sup>. What emerged of this series was not an exquisite interpretive subtlety but an entire institutional structure of domination over the upper court system<sup>32</sup>. The appointments process was radically restructured, even before the Constitution was amended<sup>33</sup>.

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<sup>28</sup> Granville Austin, Working a Democratic Constitution: The Indian Experience 124–28 (1999).

<sup>29</sup> Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 SCC 441.

<sup>30</sup> Upendra Baxi, The Avatars of Indian Judicial Activism, in Exploring Human Rights 156 (2007).

<sup>31</sup> Aharon Barak, The Judge in a Democracy 78 (2006).

<sup>32</sup> Arun K. Thiruvengadam, The Constitution of India: A Contextual Analysis 176 (2017).

<sup>33</sup> Sujit Choudhry, Constitutional Courts After the Rights Revolution 97 (2019).

That is why the development can be considered to be a mutation of the doctrines. In general, judicial review involves the act of meaning clarification within the constitutional limits. The collegium jurisprudence did not end there. It used interpretive authority to come up with a system that was not required in the text of the constitution or clearly implied. The result was the judges made a constitution in the Constitution - a binding, operative and insulated one by the authority of the Supreme Court.

Those who defend this action also add that it was intended to be so to make sure the independence of the judiciary was not compromised. Such is a legitimate argument, but necessity is silent. It should be evaluated in line with the expenses of the mechanism embraced. The collegium may have drawn the judiciary apart to the intrusion of the executive but it brought about a system in which the judiciary acquired decisive power to itself. This is a fantastic institutional power. In constitutional theory, the most fundamental type of power is the authority of self-definition. Reproductive freedom unusual in democratic systems was a gift given to the judicial system by limited access to the constitutional court system.

## **2.4 From Interpretive Expansion to Constitutional Appropriation: Limits of Article 141 Authority**

The article 141 states that the law established by the Supreme Court shall be legal to all the courts in India<sup>34</sup>. The collegium is partially founded on this provision since after the Supreme Court construed Articles 124 and 217 to provide judicial primacy, this interpretation took effect. However Article 141 cannot be interpreted outside of constitutional structure<sup>35</sup>. The binding force does not necessarily justify all interpretive results as constitutionally problem-free. The underlying issue is whether or not interpretive authority encompasses the ability to restructure institutional forms in a fashion not explicitly authorized by the constitutional text.

Here the line between interpretation and appropriation will come in handy. Constitutional meaning is made clear through interpretation. Appropriation happens when an institution, in the name of interpretation, is in fact, sucking in power. Critics say the collegium comes close to the latter category. The Court transformed a consultative scheme into one of judicial

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<sup>34</sup> INDIA CONST. art. 141.

<sup>35</sup> Nick Robinson, Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts, 61 Am. J. Comp. L. 173, 191 (2013).

dominance not just to remove ambiguity, but to transfer constitutional power<sup>36</sup>.

This issue is echoed in wider principles described in other cases like *State of Rajasthan v. Union of India* where the Court acknowledged the significance of institutional boundaries in exercising judicial review<sup>37</sup>. What the judiciary can do is to make a strong interpretation of the Constitution, but it can not afford to ignore the implications of institutional acquisition as the turning of interpretive power into institutional acquisition. When the institution that interprets the constitutional structure can also reconstitute the constitutional structure in a way that puts its own power at the heart of it, then the separation of powers will be exposed to the centralization of judicial power.

It is not the essence of the matter that Article 141 rendered the collegium binding. The issue is, was what was then made binding an interpretive power within itself constitutionally legitimate use? With this in place, the question is no longer whether or not the lower courts should obey precedent, but whether or not the courts are constitutionally limited in their creativity. The collegium exists as it is legal. But the question is whether it is good constitutional law that has been the perennial question<sup>38</sup>.

### **CHAPTER III - Power Without Accountability: Secrecy, Elitism and the Legitimacy Crisis**

#### **3.1 Opaque Constitutionalism: The Collegium as a Non-Transparent Decision-Making Structure**

The greatest criticism of the collegium is not that it is judge made but that it is an opaque structure. The decisions made regarding elevation, transfer and non-selection are made via deliberations which are not fully visible to the general population<sup>39</sup>. Informal decisions can now be posted in abridged form, yet the criteria used, the relative evaluations provided and the grounds of rejection or preference of candidates are frequently unknown<sup>40</sup>. This undermines constitutional legitimacy since the choice of personnel in terms of judicial appointments is not normal personnel choice. They fix the entry to one of the most significant places of government

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<sup>36</sup> Mark Tushnet, *Weak Courts, Strong Rights* 24 (2008).

<sup>37</sup> *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

<sup>38</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1406–09 (2006).

<sup>39</sup> *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 SCC 1.

<sup>40</sup> Fali S. Nariman, *India's Legal System: Can It Be Saved?* 61 (2017).

in the Republic<sup>41</sup>.

Constitutional decision-making opaqueness is of particular concern, as it impedes rational consideration. Certain power held by public institutions with constitutional authority needs to be justifiable, as to why discretion is exercised. The collegium tends, however, to be running on informal assessments, institutional memory and internal consensus with a relatively weak public record. This model can serve the administrative convenience, yet convenience is not a constitutional value. In situations where the decisions to be appointed behind the doors are to be explained only vaguely, the discretion may start to seem like prerogative.

The conflict with Article 14 is self-evident. The doctrine of arbitrariness does not apply to the facial irrationality alone<sup>42</sup>. It goes to uninformed, unbalanced or unreasoned procedures<sup>43</sup>. A procedure can give rise to qualified judges and still be constitutionally suspect when its logic is not subject to public examination. The issue does not lie in the fact that all the details should be disclosed. Partially, confidentiality is justifiable. The issue is that confidentiality has gone so broad that it eats up accountability in many instances<sup>44</sup>.

The Supreme Court in the NJAC judgment recognised the criticism of the lack of transparency in the collegium and opened the way to discussing the way to improve it with the help of the Memorandum of Procedure. That recognition was significant, but it was also indicative of something more: even the Court admitted that the system which it was protecting was one to which transparency was lacking. The challenge is that transparency cannot be a promise that is continually pushed to the background. When a structure endures constitutional scrutiny due to its supposed safeguarding of independence, but remains indefensible in practical terms, then independence starts to appear less as a value and more as a justification cloak<sup>45</sup>.

### **3.2 Democratic Displacement and Lack of Participatory Legitimacy.**

Secrecy does not exhaust the legitimacy crisis of the collegium. Democratic displacement enhances it. Not all institutions in a constitutional democracy necessarily have to be elected. However institutions that have constitutional power should be placed within a framework that

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<sup>41</sup> Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash. U. Global Stud. L. Rev. 1, 36 (2009).

<sup>42</sup> INDIA CONST. art. 14.

<sup>43</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 45 (2004).

<sup>44</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

<sup>45</sup> *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 SCC 1.

enables public accountability, either direct or indirect<sup>46</sup>. That structure is disrupted by the collegium since politically accountable actors are not included in any meaningful final role in judicial appointments<sup>47</sup>.

This exclusion is often justified by the fact that political engagement will be politicized. That is a legitimate concern, which is frequently exaggerated. The constitutional question of whether politics ought to be supreme in the process of appointments is irrelevant; the question is whether democratic accountability is entirely avoidable without eroding legitimacy. Indian system says yes to the question, however, comparative practice and constitutional theory say no.

The lack of participatory legitimacy is important since judicial appointments are not only a way of filling benches. They determine the social structure, ideological variations and institutional acumen of constitutional courts. A process that is completely controlled by the judiciary may end up losing touch with the democratic society under which constitutional adjudication is done. That disengagement does not always manifest itself in individual appointments, but it is evident when applied to the structure: the system turns inward where it should look outward<sup>48</sup>.

What has been produced is a vacuum of democracy. Judges do not have to be elected and are not. The burden of justification is increased, however, when judges are successful in controlling the choice of future judges. The institutional virtue cannot be left to the public to remain on assertions all the time. It has to be backed by the procedures that reflect fairness, openness, and constitutional reciprocity. The collegium is weak on three points.

### **3.3 The Sociology of Power: Nepotism, Elite Reproduction and Institutional Insularity**

The issue of legitimacy of the collegium is further complicated by a sociological aspect that is usually disregarded in the debate about doctrine: the self-perpetuating nature of closed institutions<sup>49</sup>. Where there is selection based on limited networks, informal knowledge and unstructured evaluation, the chances of elite reproduction becomes a major factor. It is not even whether nepotism can be established in special instances. Whether the institutional design can

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<sup>46</sup> Alexander M. Bickel, *The Least Dangerous Branch* 16 (2d ed. 1986).

<sup>47</sup> John Hart Ely, *Democracy and Distrust* 73–77 (1980).

<sup>48</sup> Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 *Am. J. Comp. L.* 103, 109 (2009).

<sup>49</sup> Pierre Bourdieu, *The State Nobility* 4–6 (1996).

result in the conditions where inherited privilege, professional ancestry, and network proximity can disproportionately affect results.

It is this anxiety that is expressed in public debates about the so-called uncle judge syndrome. Whether or not the term is always analytical accuracy, it reflects a common sense that the higher judiciary is susceptible to insularity<sup>50</sup>. Some families, chambers, and legal circuits seem to have a repeat appearance in the appointments discourse<sup>51</sup>. The perception may be constitutionally poisonous even in cases of individual decision-making justifiable. The courts heavily rely on popular belief. When access to the bench is perceived to be organized by informal elite connections, then the moral authority of the institution is destroyed.

This is made worse by the lack of clear criteria. There is no standard metric by which appointments could be evaluated without the released standards in terms of merit, integrity, professional competence, diversity and representation. In such a vacuum, informal influence is more likely, and social suspicion is harder to refute. The institutions do not maintain their authority by being right, and they maintain their authority by being perceived to act in accordance with fair and understandable norms<sup>52</sup>.

The contemporary constitutional judiciary must not only be technically excellent but also institutionally receptive to a broader societal and professional constituency. That aspiration is more difficult to achieve by the closed-loop nature of the collegium. It is not, however, simply an optical problem. That is the foginess of processes and power concentration form structural reproduction incentives instead of renewal.

### **3.4 Institutional Threat or Constitutional Correction? Challenging Judicial Hegemony: The NJAC.**

The most direct constitutional effort to change the collegium system was the National Judicial Appointments Commission<sup>53</sup>. Articles 124A to 124C were added through the 99th Constitutional Amendment, establishing a commission that consisted of judicial members, the participation of the executive, as well as eminent persons<sup>54</sup>. It is questionable whether the NJAC was well-conceived. Nevertheless, there is no doubt that it attempted to address much

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<sup>50</sup> Pierre Bourdieu, *Distinction* 471 (1984).

<sup>51</sup> Abhinav Chandrachud, *Supreme Whispers* 211 (2018).

<sup>52</sup> Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in *Judicial Independence* 590, 603 (2001).

<sup>53</sup> Constitution (Ninety-Ninth Amendment) Act, 2014.

<sup>54</sup> INDIA CONST. arts. 124A–124C.

more popular anxieties about the lack of transparency and democratic deficit by decentralizing the appointments power.

In 2015 case of Supreme Court Advocates-on-Record Association, the Supreme Court invalidated the amendment and the statute. The Court based this on the understanding that judicial primacy in appointments was necessary to judicial independence and that the incorporation of non-judicial individuals created an unacceptable chance of political influence. The case was reaffirming the primacy of independence as an element of the fundamental framework, and introduced the NJAC as a danger to the underlying guarantee.

The argument is logically consistent to a certain extent. There is indeed judicial independence. The decision is also indicative of a high level of institutional defensiveness. It regards reform as an extremity, constitutional experimentation as usurpation. It is here the problem of legitimacy reappears. The Court struck down a constitutional amendment intended, among other things, to correct the shortcomings of a judicially-created system. By doing so, not only did it maintain judicial primacy but it more or less shut down the other mechanism that aimed to bring about some balance<sup>55</sup>.

This scene is important as it reveals the boundaries of inward change<sup>56</sup>. When the collegium was established by the judiciary itself, and a constitutional amendment that was supposed to abolish it was struck down by the same judiciary, it seems to be playing the role of architect and protector. That is a phenomenal constitutional posture. It does not establish bad faith, nevertheless, it does aggravate hegemony concerns. A system which purports to be the one to define itself, to maintain itself and to nullify such efforts to change it is likely to look less like a constitutional guardian, and more like a constitutional player who does not want to share power.

### **3.5 Independence as Doctrine, or Defensive Shield? A re-consideration of the Basic Structure Argument.**

The greatest defence of the collegium is that it maintains judicial independence, of which the fundamental framework. This should be considered a serious argument<sup>57</sup>. History of the Indian constitution gives sufficient grounds of executive overreach to make fears of political influence

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<sup>55</sup> Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 5 SCC 1.

<sup>56</sup> Gautam Bhatia, The NJAC Judgment and the Basic Structure Doctrine, 8 NUJS L. Rev. 1 (2015).

<sup>57</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

entirely plausible. However, that is not the end of the conversation of the basic structure doctrine. It begins it. When independence is conceded as fundamental, the actual issue then is institutional: what are the best institutions that will safeguard it without harming other constitutional values?

The weakness of most of the collegium defence lies in the fact that it mixes up independence and exclusivity. Judicial independence refers to the lack of undue influence in adjudication. It does not rationally imply that it is the judiciary that should only control appointments<sup>58</sup>. Various institutional designs can maintain independence with limited external involvement, formal control and open standards. The demand that judicial primacy alone can achieve independence, is to transform a constitutional principle into an institutional absolute.

Such conversion is problematic in the sense that it alters the very nature of the doctrine. Basic structure review was not to be a limit to concentrated power, but to become a kind of a procedural monopoly by one institution. When independence has become a formula to which all reforms are opposed, it ceases to be a constitutional guarantee and starts to be a defensive shield<sup>59</sup>.

The constitutional question is thus to separate the principle with the current mechanism. It can be stated without any doubt that the judiciary has to be independent and still repudiate the argument that it has to be so that opaque judicial monopoly be achieved with regard to appointments. We cannot weaken the judiciary by making that distinction. The insistence is that the constitutional values should be maintained in such a way that structures are justifiable within a democratic order<sup>60</sup>.

## **CHAPTER IV - Reimagining Judicial Appointments: Restoring Constitutional Balance**

### **4.1 Comparative Anti-Monopoly Models: Why Mature Democracies do not want Judicial Exclusivity.**

Comparative constitutional practice shows that democratic systems tend to be suspicious when a single institution is given the power to monopolize judicial appointments<sup>61</sup>. The forms differ.

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<sup>58</sup> Tarunabh Khaitan, Executive Aggrandizement in Established Democracies, 64 Am. J. Comp. L. 789, 804 (2019).

<sup>59</sup> Mark Tushnet, Weak Courts, Strong Rights 24 (2008).

<sup>60</sup> Upendra Baxi, The Avatars of Indian Judicial Activism, in Exploring Human Rights 156 (2007).

<sup>61</sup> Nuno Garoupa & Tom Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, 57 Am. J. Comp. L. 103, 105 (2009).

There are systems based on commissions, and systems based on executive nomination and legislative confirmation and systems based on a mix of institutions. But among these models there lies a shared assumption: the validity of judicial appointments is enhanced when the power is not centralized<sup>62</sup>.

An example of an attempt to professionalize appointments, but not to subject judges to blatant political influence, and also to shun judicial monopoly, is the Judicial Appointments Commission in the United Kingdom. The United States, in its turn, welcomes a more openly political process, which it balances by institutional separation between nomination and confirmation<sup>63</sup>. There are pathologies in each system, but both of them indicate a cognizance that appointments involve more than in-house know-how. Constitutional trust is also involved<sup>64</sup>.

The collegium in India is unique as it vests decisive power in the judiciary itself. This exceptionalism is usually vindicated with a reference to the political situation of India, yet the contextual sensitivity does not deny the necessity of constitutional justification. The copying of comparative practice is not necessary, but it does demonstrate that independence and accountability are not mutually exclusive. Other democracies have tried to defend the former and not to kill the latter.

#### **4.2 Recalibration of Separation of Powers: Institutional Supremacy to Constitutional Equilibrium.**

The Indian Constitution does not adopt any hard form of separation of powers, but it definitely pledges to a partition of power among different organs<sup>65</sup>. Article 50 is a figurative strengthening of the independence of the judiciary and the executive<sup>66</sup>. Separation, however, was not meant to bring about isolation. Constitutionalism relies on the differentiated institutions working in a system of mutual restraint<sup>67</sup>.

The case of *Union of India v. R. Gandhi* was a case dealing with institutional design in relation to tribunals and restated the significance of keeping judicial functions beyond improper

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<sup>62</sup> Kate Malleson & Peter H. Russell, *Appointing Judges in an Age of Judicial Power* 3–9 (2006).

<sup>63</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>64</sup> Constitutional Reform Act 2005, c. 4, §§ 61–94 (U.K.).

<sup>65</sup> *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

<sup>66</sup> INDIA CONST. art. 50.

<sup>67</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* 13 (2d ed. 1998).

executive influence<sup>68</sup>. The relevance of that judgment does not lie in the fact that the collegium is addressed by it, but in the fact that the institutional design has to be balanced. The safeguarding of a single branch cannot be at the expense of constitutional disequilibrium<sup>69</sup>.

The collegium disrupts this balance and considers separation as a foundation of exclusivity. Separation of powers in the true sense does not give power to monopoly. It requires that every institution should be independent enough to carry out its role and at the same time be constitutionally placed within an extended system of accountability. Neither, then, is recalibration a concession to politics. It is a return to constitutional balance.

### **4.3 Planning Responsible Independence: To an Open, Standards-based Appointments System.**

The reform of the appointments process should start with the rejection of two erroneous options: the appointments process should be reformed to offer either judicial monopoly or political capture, and that transparency is inconsistent with independence. An appointments system that is constitutionally sound can maintain the decisional autonomy and expose the selection process to principled protections<sup>70</sup>.

The articulation of objective criteria is the first reform imperative<sup>71</sup>. Merit can not be just a mere invocation. It has to be stated in terms of publicly known standards of integrity, legal capacity, constitutional temperament, variety of experience, and adherence to judicial ethics. There can be no uniform assessment without criterion. Without evaluation, there can be no accountability<sup>72</sup>.

Second, the institutional design should share authority. A new structuring of commission or appointments body must maintain a significant judicial presence without judicial exclusivity. The involvement of the executives can be organized and restricted<sup>73</sup>. Independent members can be added by using transparent selection processes. This is not to bring politics to adjudication; it is to avoid the emergence of any single constitutional arbiter as the gatekeeper into the higher

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<sup>68</sup> Union of India v. R. Gandhi, (2010) 11 SCC 1.

<sup>69</sup> I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

<sup>70</sup> Stephen Breyer, Making Our Democracy Work 82–84 (2010).

<sup>71</sup> Bangalore Principles of Judicial Conduct, U.N. Doc. E/CN.4/2003/65 (2003).

<sup>72</sup> OECD, Public Integrity Handbook 41 (2020).

<sup>73</sup> Kate Malleon, The New Judicial Appointments Commission in England and Wales, 38 Pub. L. 103 (2006).

judiciary.

Third, procedural transparency needs to be normalized. All deliberative details do not require publication, but causes of suggestions, general grounds of rejection, and files of institutional deliberation ought to be embraced in the appointments culture. Transparency does not need to be theatrical. It involves the art of justification<sup>74</sup>.

Lastly, reform has to be judged based on constitutional ends<sup>75</sup>, rather than the institutional convenience. Independence of the judiciary is important since it safeguards rights, liberty as well as the rule of law. Once the mechanism designed to assure that independence is undermined and distorts trust, omits accountability, and recreates elitism, then reform is not only acceptable but essential.

#### **4.4 Conclusion: Reconciling Independence with Democratic Legitimacy.**

The collegium system was the result of a real apprehension: that the supremacy of the executive in appointments would endanger judicial independence<sup>76</sup>. It was not imagined that fear. However, the constitutional design cannot be evaluated only through the dangers that it is aimed to prevent. It also needs to be evaluated based on the emerging threats that it poses. The collegium created a problem out of another. In protecting the judiciary against politics, it generated the effects of opacity, the lack of democracy and the self-insulation of the institution<sup>77</sup>.

The question of the constitutional dilemma is not then whether or not the independence of the judiciary should be maintained. It must be. The question is, is the current structure the sole or most effective way of doing so. This paper has contended that it is not. The collegium is not essential in the constitution. It is a judge-created device based upon a broad interpretation of constitutional text, which is maintained by basic structure logic, and is weighed down by unaddressed issues of legitimacy<sup>78</sup>.

A republic devoted to constitutionalism cannot forever maintain a government in which the people who interpret the Constitution have a decisive hand over their own institutional

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<sup>74</sup> Joseph Raz, *The Authority of Law* 214 (1979).

<sup>75</sup> Etienne Mureinik, *A Bridge to Where?* 10 S. Afr. J. Hum. Rts. 31, 32 (1994).

<sup>76</sup> Granville Austin, *Working a Democratic Constitution: The Indian Experience* 146–52 (1999).

<sup>77</sup> Fali S. Nariman, *India's Legal System: Can It Be Saved?* 59 (2017).

<sup>78</sup> H.M. Seervai, *Constitutional Law of India* 2987 (4th ed. 1996).

reproduction without having clear standards, transparent reasoning or meaningful accountability. The power of judicial power is not only based on independence but also justification. When autonomy is cut off of responsibility, it runs the danger of becoming privilege<sup>79</sup>.

The Indian judicial system should not depend on executive restoration or judicial entrenchment to appoint judges, but the solution to the future of judicial appointment in India is constitutional equilibrium. The balance demands an institutional structure that will guard against the propensity of courts to domination without shielding them against examination. It is only such a framework that would enable the authority of the judiciary to be in harmony with the democratic premises of the constitutional order.

And in that regard, the issue of the collegium is not institutional only. It is constitutional on a constitutional level. It questions whether the custodians of the Constitution can be left unguarded by the very principles which they are sworn to enforce. Until such a question is answered, the Indian judiciary will still wear the crown whose power is constitutional, but whose legitimacy is disputed<sup>80</sup>.

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<sup>79</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 220 (2004).

<sup>80</sup> Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* 179 (2017).