

# Judicial Appointments and Constitutional Boundaries: A Critical Analysis of the Collegium System in India

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## Abstract

The collegium system governing judicial appointments in India represents one of the most significant developments in Indian constitutional law. While it has been justified as a mechanism to safeguard judicial independence, it has also attracted sustained criticism for its opacity, lack of accountability, and perceived deviation from the constitutional text. This paper critically examines whether the reinterpretation of the term “consultation” into “concurrence” under Article 124(2)<sup>1</sup> aligns with the constitutional intent of the framers. Through a doctrinal analysis supported by dictionary interpretation, examination of landmark judicial decisions, and comparative constitutional perspectives, the paper argues that the collegium system reflects a substantive shift in the balance of constitutional power. The paper further evaluates whether such transformation can be justified within the framework of judicial interpretation or whether it amounts to a structural alteration requiring constitutional amendment. It concludes by proposing a need for a transparent, accountable, and constitutionally aligned mechanism for judicial appointments.

**Keywords:** Collegium, Interpretation, Constitution, Consultation, Concurrence

## 1. Introduction

The Constitution of India embodies a carefully designed framework for the distribution of powers among the Legislature, the Executive, and the Judiciary. While the Constitution does not strictly enforce a rigid separation of powers, it ensures that each organ functions within its defined constitutional limits, thereby maintaining institutional balance and preventing concentration of authority.

Judicial appointments form a critical component of this constitutional structure. The legitimacy, independence, and credibility of the judiciary are intrinsically linked to the process by which judges are appointed. Article 124(2)<sup>1</sup> of the Constitution vests the power of appointing judges of the Supreme Court in the President of India, subject to consultation with such judges of the Supreme Court and High Courts as deemed necessary.

However, over time, judicial interpretation has transformed this consultative process into a system where the judiciary exercises primacy in appointments through what is now known as the collegium system. This

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transformation raises fundamental constitutional questions: whether such reinterpretation aligns with the original intent of the Constitution, and whether judicial interpretation can legitimately result in a redistribution of constitutional powers without formal amendment.

This paper seeks to examine these questions by analysing the constitutional text, judicial precedents, and the broader implications of the collegium system on the doctrine of separation of powers.

## 2. Constitutional Framework and Textual Interpretation

Article 124(2)<sup>1</sup> of the Constitution provides that every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such judges of the Supreme Court and High Courts as the President may deem necessary. A plain reading of this provision reveals two important elements: first, that the appointing authority is the President; and second, that consultation is a procedural requirement.

The interpretation of the term “consultation” becomes central to understanding the constitutional scheme. Standard legal and general dictionaries consistently distinguish between “consultation” and “consent.” Black’s Law Dictionary defines consultation as the act of seeking advice or opinion, without necessarily being bound by it. Similarly, the Oxford English Dictionary describes consultation as a process of deliberation or discussion. In contrast, terms such as “consent” or “concurrence” imply agreement or approval that carries binding force.

This distinction is not merely semantic but has significant constitutional implications. The Constitution itself demonstrates deliberate use of these terms. Article 127(1), for instance, uses both “consultation” and “consent” within the same provision, thereby clearly indicating that the framers understood the difference and intentionally employed different expressions to convey different degrees of authority.

Further, the Hindi version of the Constitution uses the term “परामर्श” for consultation, which linguistically corresponds to advisory interaction rather than binding approval. The absence of words such as “अनुमति” or “स्वीकृति,” which denote consent, reinforces the argument that the constitutional text was drafted with precision and clarity.

Considering this, the reinterpretation of “consultation” as “concurrence” represents a significant departure from the textual meaning of the provision. Such reinterpretation raises the question whether it constitutes a legitimate exercise of judicial interpretation or an effective alteration of constitutional intent.

## 3. Evolution of the Collegium System

The transformation of the constitutional framework governing judicial appointments has taken place through a series of judicial pronouncements, commonly referred to as the Judges Cases.

In *S.P. Gupta<sup>2</sup> v Union of India* (1981), popularly known as the First Judges Case, the Supreme Court held that the term “consultation” under Article 124(2)<sup>1</sup> does not mean “concurrence.” The Court affirmed that the executive retained primacy in judicial appointments, and the opinion of the Chief Justice of India was not binding on the President.

This position, however, underwent a fundamental shift in *Supreme Court Advocates-on-Record Association v Union of India* (1993), known as the Second Judges Case<sup>3</sup>. In this decision, the Court reversed its earlier interpretation and held that the opinion of the Chief Justice of India, formed collectively with senior judges, would have primacy in judicial appointments. The Court effectively interpreted “consultation” as “concurrence,” thereby transferring the decisive authority from the executive to the judiciary.

The process was further institutionalised in the Presidential Reference of 1998 (Third Judges Case), where the Court expanded the collegium to include a plurality of judges and laid down procedural guidelines for appointments and transfers.

The position was reaffirmed in *Supreme Court Advocates-on-Record Association v Union of India* (2015), commonly referred to as the NJAC Case, where the Court struck down the National Judicial Appointments Commission as unconstitutional. The Court held that judicial independence forms part of the basic structure of the Constitution and cannot be compromised.

Through these decisions, the constitutional scheme evolved from an executive-led appointment process to a judiciary-dominated system.

A notable paradox emerges in the reasoning adopted in the NJAC decision. The Court expressed concern that the inclusion of members from the executive and legislature within the appointments commission could introduce external influence. However, the system that was reaffirmed—the collegium—operates without formalised procedures, recorded deliberations, or structured transparency.

A commission-based system comprising multiple constitutional stakeholders, operating with recorded proceedings and potential public accountability, introduces structured checks. In contrast, a system that functions without documented reasoning raises concerns regarding opacity and concentration of authority.

This contrast invites a deeper inquiry: whether apprehensions of external influence justify the preference for an internally controlled system that operates with limited transparency and concentrated institutional control

#### **4. Critical Analysis: Interpretation or Constitutional Transformation**

A critical examination of this evolution raises an important constitutional question: whether the reinterpretation of “consultation” as “concurrence” constitutes a legitimate exercise of judicial interpretation or an effective reconfiguration of constitutional power.

A plain reading of Article 124(2)<sup>1</sup> does not support the view that consultation is binding. The provision does not indicate that the opinion of the judiciary is determinative. On the contrary, the wording suggests that consultation is advisory in nature, with the final authority resting with the President.

The reinterpretation introduced in the Second Judges Case<sup>3</sup> fundamentally alters this arrangement. By assigning primacy to the judiciary, the Court effectively shifts the centre of decision-making authority. This is not merely a clarification of ambiguity but results in a substantive change in the operational structure of the Constitution.

The drafting history of the Constitution further strengthens this argument. The Constituent Assembly considered multiple alternatives, including vesting appointment powers in the judiciary. However, after detailed deliberation, the power was consciously assigned to the President, with consultation serving as a safeguard rather than a controlling mechanism.

In this context, the transformation brought about by judicial interpretation raises concerns regarding constitutional legitimacy. If the effect of interpretation is to alter the balance of power between constitutional authorities, it becomes necessary to examine whether such change should instead be executed through the formal amendment process prescribed under the Constitution.

#### **4A. Limits of Judicial Interpretation**

While constitutional interpretation is an essential judicial function, it is equally important to delineate its limits. Interpretation is intended to clarify meaning, resolve ambiguity, and ensure effective application of constitutional provisions. It is not designed to substitute or supplant the constitutional text itself.

A distinction must therefore be maintained between interpretation and constitutional alteration. Interpretation operates within the framework of the Constitution, whereas alteration changes the framework itself. When the meaning of an expression is expanded to such an extent that it results in a redistribution of constitutional authority, the exercise may cease to remain interpretative in nature.

In the context of Article 124(2) <sup>1</sup>, the transformation of the term “consultation” into “concurrence” effectively alters the decision-making structure envisaged by the Constitution. This raises a fundamental concern: whether judicial interpretation can assume a role that constitutionally belongs to the amending authority.

The Constitution provides a structured mechanism for amendment under Article 368. Structural changes to institutional roles are ordinarily expected to be executed through this process. If interpretation is permitted to achieve outcomes that resemble constitutional amendment, it risks eroding the distinction between judicial review and constitutional revision.

#### **4B. Jurisdiction as a Precondition to Interpretation**

A foundational principle of constitutional adjudication is that jurisdiction precedes interpretation. A court must first establish that it possesses the authority to adjudicate upon a matter before proceeding to interpret the relevant legal provisions. Interpretation cannot be employed as a tool to create or expand jurisdiction where none exists.

In the context of Article 124(2)<sup>1</sup>, the question is not merely how the term “consultation” should be interpreted, but whether the judiciary possesses the constitutional jurisdiction to alter the functional allocation of appointment powers through interpretative reasoning. If interpretation results in conferring upon the judiciary a determinative role not evident from the constitutional text, it raises concerns regarding the legitimacy of such jurisdiction.

Therefore, the sequence is critical: jurisdiction must be established within the constitutional framework before interpretative authority is exercised. Reversing this sequence risks transforming interpretation into a mechanism for jurisdictional expansion.

## 5. Nature of Institutional Shift and Functional Consequences

The practical consequence of the collegium system is a functional transfer of authority. While the formal appointment continues to be made in the name of the President, the effective decision-making power lies with the judiciary.

This creates a situation where the role of the executive becomes a formally participatory but substantively limited function. The President acts on recommendations made by the collegium, with limited scope for independent evaluation. The consultative framework envisaged by the Constitution is thereby transformed into a system of judicial determination.

Such a shift raises a broader constitutional concern: whether the exercise of interpretative power can extend to altering institutional roles to this extent. If the judiciary assumes a role that was originally designed to be exercised by the executive, it may blur the lines of separation of powers that the Constitution seeks to maintain.

It is important to clarify that this concern does not question the intent behind safeguarding judicial independence. Rather, it questions the method through which such safeguards are introduced. A distinction must be maintained between protecting constitutional values and restructuring constitutional design.

## 6. Judicial Independence: Scope and Limits

Judicial independence is widely recognised as a cornerstone of constitutional democracy and has been affirmed as part of the basic structure of the Constitution. However, judicial independence does not imply insulation from all forms of scrutiny. Rather, it signifies freedom from undue external influence that may distort impartial decision-making.

Independence ensures that judicial reasoning remains uninfluenced by coercive or improper pressures; it does not preclude the existence of institutional accountability. A system that equates independence with absolute autonomy risks conflating independence with non-accountability.

The functioning of the lower judiciary provides an important reference point. Judges in the subordinate judiciary operate within a framework where the executive has a role in appointments and administration,

yet the expectation of independence remains intact. This suggests that independence and executive participation are not inherently incompatible.

The constitutional vision of independence is therefore better understood as freedom from influence, not freedom from evaluation.

## **7. Historical Experience: Reasoning versus Justification**

One of the most frequently advanced arguments in support of the collegium system is the historical experience of executive interference in judicial appointments. It is argued that such interference necessitated a structural shift to protect judicial independence.

However, it is important to distinguish between *reasoning* and *justification*. Historical instances of interference may provide a reason for concern, but they do not automatically constitute sufficient justification for a permanent reallocation of constitutional power.

For such reasoning to evolve into a valid justification, it must be supported by consistent and demonstrable evidence indicating systemic failure under the earlier framework. Isolated or episodic instances, however significant, may not be adequate to warrant a structural transformation of constitutional design.

Moreover, the constitutional framework itself provides mechanisms to address excesses by any organ of the State. The possibility of misuse of power by the executive does not necessarily justify the complete transfer of that power to another organ without a corresponding system of checks and accountability.

In the absence of comprehensive empirical support, reliance on historical experience alone may not be sufficient to justify the continued operation of a system that significantly departs from the constitutional text.

## **8. Institutional Competence and the Limits of Exclusivity**

Another argument advanced in favour of the collegium system is that the judiciary is best suited to assess the professional competence, integrity, and suitability of candidates for judicial office.

While this argument carries weight, it does not necessarily lead to the conclusion that such assessment must be exercised exclusively by the judiciary. Institutional competence does not inherently require institutional exclusivity.

A collaborative model, where inputs from multiple constitutional authorities are considered, may achieve a more balanced and accountable outcome. The presence of multiple stakeholders can introduce diverse perspectives and reduce the risk of opacity or concentration of power.

Thus, the issue is not whether the judiciary should have a role in appointments, but whether that role should be determinative to the exclusion of all others.

## 9. Transparency and Accountability

The collegium system has been subject to sustained criticism for its lack of transparency and absence of clearly articulated criteria for selection. Decisions are often made without recorded reasons, and the process remains largely insulated from public scrutiny.

Transparency is a fundamental component of institutional legitimacy by aligning decision-making with principles of reasoned accountability. A system that operates without openness risks eroding public confidence, regardless of the intentions behind it.

Importantly, transparency does not undermine judicial independence. On the contrary, it strengthens the credibility of the institution by making its processes visible, understandable, and open to informed evaluation.

Concerns regarding opacity are not merely external. Observations from within the judicial system itself have highlighted the lack of clarity surrounding procedural aspects of the collegium. Such concerns underscore the need for a more structured and transparent framework.

An independent judiciary must also be an accountable institution. Accountability, in this context, does not imply control but rather the presence of mechanisms that ensure fairness, consistency, and reasoned decision-making.

## 10. Comparative Constitutional Perspectives

A comparative analysis of judicial appointment systems across constitutional democracies reveals that most jurisdictions adopt a balanced approach involving multiple institutions.

In the United Kingdom, the Judicial Appointments Commission operates as an independent body that ensures transparency and merit-based selection. The process is structured, criteria-driven, and subject to oversight.

In the United States, judicial appointments involve nomination by the President and confirmation by the Senate. This system introduces a system of checks and balances, ensuring that no single authority exercises complete control.

In South Africa, the Judicial Service Commission includes representatives from the judiciary, executive, and legislature, thereby creating a participatory framework that balances independence with accountability.

In contrast, the Indian collegium system stands out as a model where the judiciary exercises predominant control over appointments. While this may have been intended to safeguard independence, it also raises concerns regarding concentration of power and absence of institutional checks.

## 11. Reconciling Judicial Independence with Constitutional Balance

The central challenge in the debate on judicial appointments is not merely to identify the appointing authority but to design a system that preserves independence while ensuring accountability and transparency.

Judicial independence and accountability are not mutually exclusive. A system that ensures independence must also incorporate mechanisms that prevent opacity and concentration of power.

A balanced approach may involve:

- Establishing a reformed judicial appointments commission;
- Ensuring meaningful participation of the judiciary without exclusive control;
- Introducing clearly defined criteria and recorded reasons for selection;
- Providing limited but structured oversight mechanisms.

Such a framework would align more closely with the constitutional scheme while addressing the concerns that led to the evolution of the collegium system.

## 12. Conclusion

The collegium system represents a significant departure from the constitutional text governing judicial appointments. While it may have emerged as a response to concerns regarding executive interference, its continued operation raises important questions about constitutional legitimacy, institutional balance, and accountability.

The reinterpretation of “consultation” as “concurrence” has the effect of transferring decision-making authority from the executive to the judiciary. This transformation, achieved through judicial interpretation, closely resembles a structural modification of the constitutional framework.

In a constitutional democracy, such structural changes are ordinarily expected to be carried out through the amendment process, which reflects the will of the people through their elected representatives.

A further conceptual tension arises in the reliance on the basic structure doctrine to justify judicial primacy in appointments. Judicial independence, as part of the basic structure, is itself a principle developed through interpretative evolution rather than explicit textual articulation. However, the reinterpretation of Article 124(2) <sup>1</sup> directly affects a provision that is textually precise.

This gives rise to a paradox: an interpretatively evolved constitutional principle is used to modify the operational meaning of an express constitutional provision. While the objective of protecting judicial independence is constitutionally valid, the method adopted raises a critical question—whether interpretative doctrines can be employed to alter explicit constitutional directives.

Such an approach risks creating a hierarchy where interpretative constructs assume precedence over constitutional text, thereby eroding the distinction between constitutional interpretation and constitutional modification.

The objective, therefore, should not be to weaken judicial independence but to ensure that it is preserved within a framework that is transparent, accountable, and consistent with constitutional intent.

A re-examination of the current system, informed by constitutional principles and comparative experience, is essential to restore balance and reinforce public confidence in the process of judicial appointments.

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