

Parliament and the Judiciary

Background Note for the Conference on Effective Legislatures

Parliament, the Judiciary and the Executive are the three key arms of the state, with well-defined spheres of authority under the Constitution. Parliament represents the law making arm, the Executive is responsible for enforcement of laws, and the Judiciary is in charge of interpretation of the Constitution and laws as well as dispute resolution. Each institution acts as a check and balance on the others' powers, which may create tension in their relationships. In this note, we examine how the relationship between Parliament and the Judiciary has evolved over the years.

Parliament and the Judiciary: The Constitutional Relationship

The Constitution provides for a separation of powers between Parliament and the Judiciary by demarcating their roles and responsibilities. It also lays down various ways by which (i) the Judiciary may guard against the unconstitutional exercise of power by Parliament, and (ii) Parliament may legislate on or act as a check in matters related to the Judiciary.

Parliament's Powers and Privileges

Powers: Parliament enacts laws, exercises oversight over the Executive, sanctions government expenditure and represents citizens. It also has the power to amend the Constitution. Note that Parliament has the power to legislate on matters related to the Judiciary such as its powers, jurisdiction, organisation and service conditions of judges. It also has the power to remove judges on grounds of proved misbehaviour or incapacity.

Immunity from court proceedings: To grant Parliament autonomy in its functioning, the Constitution guarantees certain protections to parliamentary proceedings and those participating in them. For example, Members of Parliament (MPs) enjoy immunity from court proceedings for anything that they say or any vote that they make in Parliament. The Constitution bars the courts from examining validity of parliamentary proceedings on grounds of irregularity of procedure. The courts also cannot hold any person liable for any material (e.g. reports and proceedings) that is published under the authority of Parliament. They also cannot question any officer of Parliament or MP regarding actions taken by them for regulating business or maintaining order in Parliament.

Judiciary's Responsibilities and Powers

Powers: The Judiciary adjudicates disputes and administers justice under criminal law. In addition, the higher judiciary (Supreme Court and High Courts) acts as the custodian of the Constitution because it is responsible for its interpretation and enforcement. The higher judiciary also has the power to strike down laws of Parliament and actions of the Executive as invalid, if they violate the Constitution. This is called the power of judicial review.

For example, a law may be declared as invalid if it violates the fundamental rights guaranteed by the Constitution. A law may also be declared invalid if its subject-matter is outside Parliament's area of competence (e.g. a central law on police may be invalid because police falls within the state legislatures' domain).

Striking down of Section 66A of the Information Technology Act, 2000: An exercise of judicial review

Section 66A of the Information Technology Act, 2000 stated that any person who by means of a computer or device sends any information that is: (i) grossly offensive, (ii) false and meant for the purpose of causing annoyance, inconvenience or danger, (iii) meant to deceive the recipient, shall be punishable with imprisonment up to three years and fine.

The Supreme Court exercised its power of judicial review and struck down this provision as unconstitutional. It held that Section 66A violates Article 19(1)(a) of the Constitution that protects freedom of speech and expression.

Sources: Shreya Singhal vs Union of India, Supreme Court, Writ Petition (Criminal) No. 167 of 2012, March 24, 2015; PRRS.

Separation of powers

A rigid idea of separation of powers as exercised in the United States means that institutions for law making, executive action and judicial power are distinct and do not have overlapping powers. This enables them to exercise a check on each other. However, the United Kingdom (UK) follows a looser model which is based on supremacy of Parliament. No court of law in the UK can strike down a law on grounds that it violates the UK Constitution. The courts may examine validity of subordinate legislation against their parent laws and on other grounds.

India follows a third model of separation of powers. It recognises separate legislative, executive and judicial bodies, but allows some overlap in powers. For example, the Executive may exercise legislative powers by promulgating ordinances.

Source: Justice (Retd.) Ruma Pal, Separation of Powers, The Oxford Handbook of the Indian Constitution; PRRS.

Judicial independence: The Judiciary needs to be free from any pressure in order to decide cases independently. Therefore, the Constitution creates a structure to protect judges from being influenced by Parliament and the Executive. For example, the conduct of a Supreme Court or High Court judge cannot be discussed in Parliament unless it is for the purpose of presenting a motion for his removal. Further, a higher court judge can only be removed by Parliament on grounds of proved misbehaviour or incapacity during his term of office. Similarly, Parliament's power to fix judges' conditions of service (e.g. allowances, pension and leave) is limited to the extent that they cannot be reduced after his appointment.

Key aspects of Parliament-Judiciary relations

Limitations on Parliament's power to amend the Constitution

Parliament has the power to amend the Constitution. To check against the misuse of this power, a higher threshold of support is required to amend the Constitution as compared to a simple law. A Constitution Amendment Bill needs the support of more than half the members in each House of Parliament, and at least two-thirds of the members present and voting. Additionally, ratification by more than half the states is required for amendments that affect powers of the states and the Judiciary. A recent example of this is the Constitution (101st Amendment) Act, 2016 that enabled introduction of the Goods and Service Tax.

The Supreme Court has held that Parliament's power to amend the Constitution is limited, that is, Parliament cannot amend the 'basic structure' of the Constitution.¹ Note that this 'basic structure' principle is not expressly mentioned in the Constitution. The Judiciary has used its power of interpretation to identify fundamental aspects of the Constitution that cannot be amended. These include 'supremacy of the Constitution', 'separation of powers', 'judicial review' and 'judicial independence' (this is an open list to which the Judiciary may add new aspects).²

It may be argued that when the Constitution does not expressly limit the power of Parliament to amend it, such limitations may not be imposed through judicial interpretation. On the other hand, it may be argued that this interpretation is a protection against excessive use by a government with a large majority; for example, this limitation prevents a government holding substantial majority from extending the term of Parliament indefinitely.

Table 1: Key Supreme Court (SC) decisions and constitutional amendments

Year	Event
1951	Shankari Prasad vs Union of India: Parliament has absolute power to amend the Constitution including fundamental right provisions (reiterated in subsequent decisions) under Article 368 of the Constitution.
1967	Golak Nath vs State of Punjab: Earlier decision reversed to say that power to amend the Constitution has limitations, and fundamental rights cannot be taken away or abridged.
1971	24th Constitutional Amendment Act: Parliament amends Article 368 to provide that Parliament has constituent power to amend <i>any provision of the Constitution</i> , by way of addition, variation or repeal.
1973	Kesavananda Bharati vs State of Kerala: 24 th Constitutional Amendment Act held as valid. Parliament has power to amend any provision including fundamental rights, but this power is subject to inherent limitations. Parliament cannot use this power to change the basic structure or framework of the Constitution (called the 'basic structure' doctrine).
1975	Indira Gandhi vs Raj Narain: After Allahabad High Court invalidates Ms. Indira Gandhi's election on grounds of corrupt practices, the 39 th Constitutional Amendment Act, 1975 was enacted to exclude judicial review in election disputes involving the Prime Minister. SC held that power of judicial review cannot be taken away as it is key to democracy.
1976	42nd Constitutional Amendment Act: Parliament amends Article 368 to bar courts from exercising judicial review over constitutional amendments, and provide that there will be no limitations on power to amend.
1980	Minerva Mills vs Union of India: 42 nd Constitutional Amendment Act held invalid. Power of judicial review and a limited amending power are basic features of the Constitution.

Sources: Shankari Prasad vs Union of India AIR 1951 SC 458; Sajjan Singh vs Union of India AIR 1965 SC 845; Golak Nath vs State of Punjab AIR 1967 SC 1643; Kesavananda Bharati vs State of Kerala AIR 1973 SC 1461; Indira Gandhi vs Raj Narain AIR 1975 SC 2299; Minerva Mills vs Union of India AIR 1980 SC 1789; PRS.

Law-making by Judiciary

Law-making is the domain of the legislature which represents various citizens. When debating a Bill, MPs deliberate on its objectives, legal and financial implications, impact on various stakeholders and possible implementation issues. Finally, a Bill becomes a law when it has the support of a majority of MPs from both Houses of Parliament. However, the Judiciary has on occasion laid down the law or directed that laws be made.

For example, in *Vishaka vs State of Rajasthan*, the Supreme Court framed guidelines on how sexual harassment at the workplace needs to be addressed by employers.³ In another case, the court gave directions to state governments to set up various authorities to decide appointments, transfers and complaints related to police.⁴ In 2011 the court directed that a law on hawking and street vending be made by June of that year for Delhi.⁵

Earlier this year, the Supreme Court also imposed a cess on the registration of diesel vehicles in the National Capital Region.⁶ Note that the Constitution states a tax may be imposed only by a law framed by Parliament.⁷

The Judiciary has generally issued such directions under Articles 32 and 142 of the Constitution. These provisions empower the Judiciary to protect fundamental rights and issue any order to do complete justice.

Oversight over Executive by Parliament and Judiciary

Both Parliament and the Judiciary exercise oversight over policy making and implementation by the Executive. Parliament may examine the constitutionality and legality of executive actions. It also debates whether the policies address the needs of the people, financial allocations and issues with implementation. For example, Rajya Sabha took up a discussion on demonetisation of currency during the Winter Session 2016 and MPs raised questions around implementation of the decision.⁸

The Judiciary also exercises oversight over the Executive, when it decides matters related to constitutionality and legality of executive actions. Occasionally it has also set up investigative and monitoring committees to monitor and oversee executive decisions.⁹ For example in 2011, it set up a Special Investigation Team to investigate money laundering and unaccounted money held abroad by Indians.¹⁰ In another case, the Supreme Court required the state governments to report on forest conservation and industrial activities around forests.⁹

Judicial Review of Parliamentary Privileges and Proceedings

The Constitution guarantees certain rights and immunities to the House and individual MPs so that they may discharge their parliamentary duties effectively. These rights and immunities are called parliamentary privileges. For example, MPs enjoys a wide power of freedom of speech and expression on the floor of the House, or while working in Parliamentary Committees. They cannot be held liable for anything that they say or any vote that they make in a court of law.¹¹ Other examples of parliamentary privileges may include: freedom to publish parliamentary proceedings without incurring any liability and freedom from arrest in civil cases.¹²

Further, parliamentary proceedings may not be called into question in any court of law for irregularity of procedure so that a separation of powers is maintained.¹³

However, in several decisions, the courts have asserted their power to exercise judicial review over parliamentary privileges and proceedings (and state legislative assembly privileges and proceedings).¹⁴ For example, the Supreme Court has held that the Speaker's decision to disqualify an MP for defection is subject to judicial review as the Speaker is discharging an adjudicatory function.¹⁵

Power to appoint judges

According to the Constitution the President must appoint judges of the Supreme Court and High Courts after consultation with the Chief Justice of India (CJI) and other judges of the Supreme Court and the High Courts (the Governor of the state is also consulted for High Court appointments).¹⁶ The term 'consultation' has been interpreted by the Supreme Court to mean that judicial appointments recommended by a collegium of judges will be binding on the President (i.e. Executive).¹⁷ The President may ask for reconsideration once, but in case the collegium reiterates the recommendation, he is bound to accept it. In light of this interpretation, the Judiciary has granted itself primacy in deciding judicial appointments. Today, a collegium of judges comprises the CJI and: (i) four Supreme Court senior-most judges in case of Supreme Court appointments, and (ii) two senior-most Supreme Court judges in case of High Court appointments.

In 2014, Parliament enacted the Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission (NJAC) Act, 2014 to replace the collegium with an independent commission, the NJAC (comprising representatives of the Judiciary, the Executive and independent members). Subsequently the Supreme Court struck down the two laws as unconstitutional, and re-instated the collegium process.¹⁸ The court held that the Constitution (99th Amendment) Act, 2014 violates the basic structure of the Constitution because it does not secure primacy of the Judiciary in judicial appointments.

Judicial Review of Legislative Privileges

In 1964, the Supreme Court gave an advisory opinion to the President in light of an escalating conflict between the Uttar Pradesh (UP) Legislative Assembly and the Allahabad High Court. The UP Assembly had initiated contempt proceedings against an MLA (for defaming a fellow legislator and disrespecting the Assembly), his advocate and two judges (for intervening in the contempt proceedings), which was subsequently stayed by a 28-judge bench of the High Court.

In its advisory opinion the Supreme Court held that the Judiciary has the power to interpret the nature, scope and effect of the privileges guaranteed to the legislature. It also held that the Judiciary may examine whether exercise of privileges is consistent with fundamental rights of the citizens. Subsequent cases have held that these observations are also applicable to parliamentary privileges.

Sources: Powers, Privileges and Immunities of State Legislatures, Re AIR 1965 SC 745; Raja Ram Pal vs Speaker, Lok Sabha and Others (2007) 3 SCC 184; PRS.

Table 2: Key SC decisions and laws related to judicial appointments

Year	Highlights
1982	SC holds 'consultation' not 'concurrence' of CJI required in judicial appointments. Executive has primacy in appointments.
1994	SC overrules above judgement. Collegium comprising CJI and two senior-most SC judges to make binding recommendations.
1999	SC reaffirms collegium process of appointments. Collegium to consist of CJI and four senior-most SC judges for making SC appointments, and CJI and two senior-most SC judges for HC appointments.
2014	Parliament enacts the 99 th Constitution Amendment and the NJAC Act to set up an independent commission to appoint SC/HC judges. Composition of NJAC: CJI, two senior-most SC judges, Union Law Minister and two eminent persons (nominated by the Prime Minister, CJI and Leader of Opposition in Lok Sabha).
2015	SC holds that the 99 th Constitution Amendment violates 'judicial independence' that is protected by the basic structure of the Constitution. Rules that the NJAC does not secure judicial primacy in appointments, and therefore does not provide for judicial independence. Strikes down the NJAC Act as well, and re-instates collegium process.

Sources: Various court judgements and laws of Parliament; PRS.¹⁹

It could be argued that the collegium system protects judicial independence by allowing judges to appoint themselves, and thereby eliminates scope for political interference. However, this process reduces accountability and transparency with regard to judicial appointments. The challenge is to create a system that ensures greater accountability of and scrutiny in judicial appointments, while protecting the Judiciary from political influence. In this context, we present how different countries address judicial appointments.

Table 3: Appointment of higher court judges in various countries

Country	Method of appointment
UK	SC judges appointed by a five-person selection commission. Consists of SC President, his deputy, one member each appointed by Judicial Appointments Commissions (JACs) of England, Scotland and Northern Ireland. JACs comprise lay persons, members of the Judiciary and the Bar, and they make appointments of judges of lower courts.
Canada	Appointments are made by the Prime Minister. A seven-member independent advisory board (one retired judge, two lawyers, a legal scholar, and three members nominated by Minister of Law) makes recommendations to the Prime Minister.
USA	Supreme Court Justices are nominated by the President and confirmed by the Senate. The system for State Supreme Courts varies across states with some having elections, some having a selection commission and others following the federal model.
Germany	Appointments are made by election. Half the members of the Federal Constitutional Court are elected by Bundestag (Parliament elected by German people) and half by Bundesrat (Parliament of representatives of state governments).

Sources: Constitutional Reform Act, 2005; Website of Prime Minister of Canada; Canada Supreme Court Act, 1985; Constitution of the United States of America; Basic Law for the Federal Republic of Germany; PRS.

1. Kesavananda Bharati vs State of Kerala, AIR 1973 SC 1461.
2. DD Basu, Commentary on the Constitution of India, Vol. 10, 10th Edition, 11305.
3. Vishaka vs State of Rajasthan, (1997) 6 SCC 241.
4. Prakash Singh vs Union of India, Supreme Court, Writ Petition (Civil) No. 310 of 1996, September 22, 2006.
5. Gaiinda Ram vs Municipal Corporation of Delhi, Supreme Court, Writ Petition (Civil) No. 1699 of 1987, October 8, 2010.
6. MC Mehta vs Union of India, Supreme Court, Writ Petition (Civil) No. 13029 of 1985, August 12, 2016.
7. Article 265, Constitution of India.
8. Parliamentary Bulletin I, Rajya Sabha, November 16, 2016.
9. TN Godavarman Thirumulpad vs Union of India, (1997) 2 SCC 267.
10. Ram Jethmalani vs Union of India, (2011) 8 SCC 1.
11. Article 105, Constitution of India.
12. VN Shukla, Constitution of India, 11th Edition, 442.
13. Article 122, Constitution of India.
14. Raja Ram Pal vs Speaker, Lok Sabha, (2007) 3 SCC 184; Powers, Privileges and Immunities of State Legislatures Re, AIR 1965 SC 745.
15. Kihoto Hollohan vs Zachillhu, 1992 SCR (1) 686.
16. Article 124 (2) and Article 217 (1), Constitution of India.
17. SC Advocates-on -Record Association vs Union of India, AIR 1994 SC 268; In Re: Special Reference, AIR 1999 SC 1.
18. SC Advocates-on -Record Association vs Union of India, Supreme Court, Writ Petition (Civil) Nos. 13-14 of 2015, October 16, 2015.
19. SP Gupta vs Union of India, AIR 1982 SC 149; SC Advocates-on -Record Association vs Union of India, AIR 1994 SC 268; In Re: Special Reference, AIR 1999 SC 1; Constitution (99th Amendment) Act, 2014; National Judicial Appointments Commission Act, 2014; SC Advocates-on -Record Association vs Union of India, Supreme Court, Writ Petition (Civil) Nos. 13-14 of 2015, October 16, 2015; PRS.

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