Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry

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Introduction

The appointment of judges to the Supreme Court of India and the High Courts has over the years been a subject of intense conflict between the judiciary and the executive. Much of the conflict has stemmed from the need to preserve judicial independence, a term oft-used but little explicated in India's constitutional literature. Judicial independence has meant different things to different people over time— to several members of the Constituent Assembly, it was a principle to allow judges to adjudicate free from extraneous considerations, to a majority of judges of the Supreme Court over time, a requirement of the rule of law enshrined in the basic structure of the Constitution and to several popularly elected governments, a principle which had to be carefully bypassed, while appointing sympathetic judges to the higher judiciary. Today, these differences have been put in sharp relief in the context of the continued operation of the Supreme Court collegium as the focal body for judicial appointments, with judicial independence being used both by judges to justify its perpetuation as well as by the political classes and sections of the civil society activists to explain its purported failures.

Neither does this article analyse each of the senses in which the term has been used by judges, politicians and academics in the last sixty years nor does it delve into a detailed legal analysis of the seminal cases relating to judicial appointments decided by the Supreme Court. Instead, it is concerned with a conceptual enquiry into judicial independence with a view to outlining its precise relevance to the process of judicial appointments in India. To this end, this article is divided into three Parts: Part A provides a brief narrative of judicial appointments in India to set the context for the article; Part B proposes a conceptual understanding of judicial independence, both on the basis of a theoretical enquiry as well as by analysing its role in a formal

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separation of powers framework analogous to India; Part C uses this understanding to assess whether the ways in which judicial independence has been used in India, specifically in justifying the current collegium method of appointment are conceptually well-founded. Through this three-part analysis, it is hoped that a certain degree of conceptual clarity regarding the role of judicial independence in the context of judicial appointments will emerge, thereby providing both an argument as well as a theoretical foundation for reform of the current appointments process.

I. Judicial Appointments in India: The Context

The narrative of judicial appointments in India is rich and varied in characters and issues. Judges of diverse ideologies and upbringing, Law Ministers with varying degrees of inclination to interfere in the judicial process, Prime Ministers both non-interventionist as well as authoritative, controversies that have riven the nation, judicial decisions that have united it and continuing attempts at finding the ideal and hitherto elusive system of appointment which will secure the independence and high quality of the judiciary are some of its constituent features. To provide a coherent account of this narrative, discern the key issues that have arisen and set the context for the article, this part will briefly discuss three crucial phases relating to judicial appointments: Pre-constitutional discussions (1946-1950), the phase of executive-led appointments (1950-1993) and the current collegium mode of appointment of judges (1993-present).

Appointment of judges to the Supreme Court of India and High Courts is provided for in Art. 124(2)[1] and Art. 217(1)[2] of the Constitution respectively. These articles, which provide that the power of appointment vests in the President, in consultation with the Chief Justice of India for Supreme Court appointments, and in consultation

1 Art. 124(2) reads:
'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted...'

2 Art. 217(1) reads:
'Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court...'

with the Governor of the concerned state, the Chief Justice of the concerned High Court in addition to the Chief Justice of India for High Court appointments, were products of vigorous debate in the Constituent Assembly. The key issue before the Assembly was to institute a system which would secure judicial independence.[3] During the debates on how to achieve these ends, there was broad consensus that the power of appointment would vest focally, albeit not entirely in the executive. The underlying reasons for this view were clear— the system of executive-led appointments which was widely prevalent at the time across the world was seen by the drafters as incorporating a degree of public accountability in the process. At the same time, the unfavourable colonial experience regarding unfettered executive discretion in judicial appointments convinced the drafters that efficient checks and balances on executive power would have to be instituted. This would ensure that judges, in Nehru's words, would be "people who can stand up against the executive government and whoever may come in their way".[4]

After briefly considering and dismissing a legislative role in appointments for being practically unwieldy and reducing the status of judicial office by making it an object of political bargain,[5] the Constituent Assembly agreed on a system by which the President would appoint judges, albeit after mandatorily consulting the Chief Justice of India. The Chief Justice of India was entrusted with this constitutional role since he could provide the necessary apolitical antidote to politically motivated selections by the executive, if they were mooted. However, Ambedkar himself, speaking in the Assembly, was careful to stress that consultation did not amount to a veto being exercised by the Chief Justice of India, since that would result in an untrammelled power being vested in a single person, a constitutionally unwise precedent.[6] In this way, a careful inter-institutional equilibrium in the process of judicial appointments was envisaged by the Constituent Assembly— a multiplicity of authorities across the wings of government, checking and balancing each other to ensure that the dignity of the judiciary was maintained and judicial independence remained sacrosanct.

3 The key discussions on the issue of appointments were held between the 24th and 27th of May, 1949. See *Constituent Assembly Debates, Vol. VIII* (New Delhi: Lok Sabha Secretariat, 2003) 229-399 (hereinafter "CAD").

4 CAD vol VIII, 246-247 (24th May 1949).

5 *Ibid.*, 258 (24th May 1949).

6 *Id.*

In the early years of the operation of the constitutionally envisaged system of appointments in independent India, concerns were raised that the role of the executive, especially in the states, was leading to the erosion of the independence of the judiciary.[7] This marked the genesis of a belief that the judiciary itself, through its representatives, was best placed to decide on its own composition, and thereby secure judicial independence. Further credence was attached to this view when during the Prime Ministership of Indira Gandhi, armed with a super-majority in the legislature and having made promises of social justice, the government began to actively interfere with the composition of the higher judiciary. Justifying this move, the Law Minister, Mohan Kumaramangalam proposed a radical re-interpretation to the appointment process, by which the political philosophy of judges, as determined by the government, would be a relevant criterion for appointment.[8]

Fearing that this determination was a superficial guise for creating a judiciary 'made to measure'[9] the Supreme Court responded, albeit belatedly, at a time when its public image was at its nadir.[10] Through two landmark decisions the Court clarified the nature of the consultation process for appointment of judges under Art. 217(1)[11] and transfers under Art. 222[12] and held judicial independence to be part of the basic structure of the Constitution. Specifically, in *S. P. Gupta v Union of India*[13] (*'Gupta/ The First Judges' Case'*), the majority of the Court held that while judicial independence did not require the view of the Chief Justice of India in the matter of appointments and transfers to be determinative, nonetheless consultation with him would have to be full and effective and his opinion should not ordinarily be departed from. The power of the executive in appointing judges was accordingly circumscribed although it continued to have the last word on who would be appointed.

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7 Law Commission of India, 'Reform of Judicial Administration' (14th Report 1958) 34.

8 Mohan Kumaramangalam, *Judicial Appointments: An Analysis of the Recent Controversy over the Appointment of the Chief Justice of India* (Oxford & IBH Pub Co, New Delhi 1973) 83.

9 Nani Palkhivala, *Our Constitution: Defaced and Defiled* (MacMillan, New Delhi 1974) 93.

10 This was primarily owing to its perceived capitulation before the government during the Emergency in the infamous *Habeas Corpus* case holding that Art. 21 was the 'sole repository' of the right to life and the government, by law, could validly suspend the same. *A.D.M. Jabalpur v. Shivkant Shukla,* (1976) 2 SCC 521.

11 *S. P. Gupta v Union of India,* AIR 1982 SC 149.

12 *Union of India v Sankalchand Sheth* (1977) 4 SCC 193.

13 AIR 1982 SC 149.

This decision, which adhered to a literal interpretation of the constitutional provisions for appointment and transfer of judges, was widely perceived as failing to sufficiently secure judicial independence. Academics, lawyers and political commentators all felt that it gave primacy to the executive in the process of appointment of judges and failed to institute adequate safeguards.[14] Acting on these widely held fears and perceived executive overreach in appointments, the Supreme Court in the case of *Supreme Court Advocates-on-Record Association v Union of India*[15] (*'SCAORA/ The Second Judges' Case'*) substantially overruled *The First Judges' Case* and fundamentally altered the nature of the appointments process. It established a judicial collegium consisting of the Chief Justice of India accompanied by the seniormost judges of the Supreme Court as the focal body for appointment after tracing the need for vesting the Chief Justice of India, acting as the *paterfamilias* of the judiciary, with primacy in the appointments process. In doing so, it expounded its conception of judicial independence, echoing a view expressed by the Law Commission three decades earlier, that the judiciary itself, without executive interference was best placed to determine its own composition and thereby secure its independence.

The modalities of how the judicial collegium would actually perform this task were unclear in the decision; hence, in an advisory opinion in *Special Reference No. 1 of 1998*[16] (*'The Third Judges' Case'*) the Supreme Court unanimously clarified its earlier decision. According to this ruling, the Chief Justice of India would have to consult his four seniormost colleagues for Supreme Court appointments and his two seniormost colleagues for High Court appointments. Additionally, the seniormost judge of the Supreme Court acquainted with the High Court from which the potential candidate hailed (for Supreme Court appointments) and to which High Court the candidate was proposed (for High Court appointments) would have to be consulted. Further, the Chief Justice of the High Court too, in forming his opinion, would have to consult his two seniormost colleagues. No detailed reasoning was provided

14 For illustrative examples see Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (NM Tripathi Pvt. Ltd., Bombay 1985) 23, 55; HM Seervai, *Constitutional Law of India vol III* (4th edn Universal Law Publishing, New Delhi 2008) 2854; Arun Shourie, *Mrs. Gandhi's Second Reign* (Vikas Publishing House, New Delhi 1983) 266-268.

15 (1993) 4 SCC 441.

16 (1998) 7 SCC 739.

for the differential sizes of the collegium except to state its rationale - to select the best available judicial talent in the country for the higher judiciary, in keeping with the need for the independence of the judiciary. Though nominally the formal warrant of appointment would continue to be issued by the President, these decisions ensured that the substantive power lay in the hands of the judicial collegium, ostensibly to safeguard judicial independence.

It is this process laid down by *The Third Judges' Case* that governs judicial appointments today. However, owing to several questionable selections, the lack of transparency of proceedings and the limited accountability for decisions taken, this process has created considerable public resentment.[17] Reform seems imminent, motivated by the fundamental need to protect judicial independence and restore public confidence in the judiciary as an impartial arbiter of disputes.

This brief history of judicial appointments in India points to the significance of judicial independence to the appointments process. The need for an independent judiciary provided the underpinning for the initial system envisaged by the drafters, and every reform instituted or recommended thereafter by the Supreme Court, the Law Commission of India or the government. Today, as the collegium system of appointment faces considerable strain, judicial independence is again at the forefront, used both by advocates and critics of the collegium to buttress their position. Thus it is an apposite juncture to analyse judicial independence closely and attempt to formulate a conceptual understanding to delineate its precise role in the appointments process. It is this conceptual enquiry concerning judicial independence which Part II deals with, taking a step back from the current controversies surrounding judicial appointments, with the ultimate aim of carrying the discussion a step forward.

II. Judicial Independence: A Conceptual Analysis

A. First Principles

Judicial independence, like rule of law or accountability, is a catchphrase of our times. Concern for judicial independence is near-universal, extending to developed and developing countries, old legal

17 For a succinct summary of problems of the collegium system, see TR Andhyarujina, 'Appointment of Judges by Collegium of Judges' *The Hindu* (New Delhi 18th December 2009) <http://beta.thehindu.com/opinion/op-ed/article66672.ece> accessed on 13th March 2011.

systems and new. This wide usage of judicial independence is however accompanied by considerable disagreement regarding its meaning. Of course, a large proportion of differences in understanding can be attributed to context and the differing nature of threats to judicial independence in different countries. But it would be fallacious to assume context to be a catch-all explanation for prevalent differences. People have different ideas in mind when they use the term judicial independence because they perceive threats differently and accord different values to a range of interests which require protection. In order to conceptually understand judicial independence, it is necessary to sift through the super-structure of differences, primarily complicated by different definitions used by commentators and analysts, and delve into the sub-structure of the concept. This, I believe, is best done by asking the focal question: 'Why judicial independence?' Attempting to answer this question will require a careful analysis of first principles regarding the independence of the judiciary, in the course of which it is hoped that the rationale for judicial independence in a system governed by the rule of law will become evident.

To arrive at a conceptual understanding of judicial independence, let us take a hypothetical case situation of a judge with two parties who have come before him to adjudicate a private dispute. Assume that the society in which the judge and the parties live prizes the value of justice and expects its courts to apply the law to reach just results. Now X, a detached observer, non-interested in the dispute and with no knowledge of its particulars, is asked what the judge should do in this case. Though X would most likely not have an opinion regarding the substantive outcome of the case, she would certainly believe that the judge should adjudicate the dispute impartially. In addition she will want the decision given by the judge to be effective and capable of being enforced. Since the latter depends on conditions extraneous to the judge, conditions regarding which no information is provided in this example, it will not be pressed further. If however pressed further on the first point of what adjudicating the dispute impartially demands, she would most likely believe the following:

1. The judge should not be related to either of the parties in any way
2. He should not be in a position to be influenced by the parties or their agents

3. He should be safeguarded from threats from the parties or their agents
4. He should carry on proceedings openly
5. He should hear the parties fully and adequately
6. He should base his decision on reasons which are valid and relevant

Of course, there could be further points which X believes are necessary to ensure impartial adjudication of the dispute. But as a rational person, the afore-mentioned points would, in all likelihood, figure in her list of necessities. If these six points, broadly understood as aspects of fairness, are scrutinised; then they can be sub-divided into two types of requirements: independence (points 1-3) and accountability (points 4-6). The requirement of independence in this respect connotes a certain degree of detachment between the judge and the parties. Of course the judge and the parties are members of the same society and it is possible that they (or any combination of them) share certain objective commonalities such as age, gender etc. But these commonalities should be almost entirely irrelevant for the purpose of adjudicating impartially between the parties. This has been explained in terms of a judge showing a party impartiality which is necessary and issue impartiality which is not.[18] The requirement of independence hence seeks to ensure the exclusion of improper influences on particular decisions, thereby making the judge a detached and impartial arbiter of the dispute.

Accountability factors equally seek to ensure that extraneous considerations are not grounds for the decision. However the approach is markedly different from independence, being based on external checks to the exercise of judicial power rather than reducing restrictions on judicial power as independence factors tend to do. Through these checks, appropriately established, the judge is to be made answerable for his decision, thereby mitigating the possibility of improper influences affecting him. It is in this narrow, literal sense of answerability for decisions taken effectuated through external checks on power, that accountability is used here. Accountability with respect to the judgment in this example flows from the judge both to

18 This is a broad distinction, for further qualifications of which see Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing, Aldershot 1999) 64.

the public through the medium of open hearings and reasoned judgment as well as to the higher courts (if any) which may reverse the decision on appeal.[19] Other forms of accountability may equally exist, which are however not relevant for the present discussion.[20]

Two points become clear from this analysis: First, independence of an individual judge is required to ensure impartial adjudication of a dispute; second, independence is one of several factors (accountability is another key factor which has been identified for the purpose of this analysis, but it need not be the only one) which leads to impartial adjudication.

This understanding of the rationale for judicial independence helps greatly in understanding what judicial independence means.[21] Without this prior question being answered, judicial independence, taken literally could logically mean a judge deciding to come to court not dressed in his traditional black-and-white robes or even a judge ignoring precedent, since both would be expressions of his independence. But since we know that judicial independence is needed to ensure impartial adjudication of disputes, we begin to see clearly what kinds of independence are necessary for this purpose and why sartorial habits of the judge or his desire to defy precedent are unwarranted expressions of his independence. Three further points emerge: First, that absolute independence is not necessary and may not be desirable for a judge; second, following from the first, is that the key question to ask of a judiciary is not whether it is independent or not but rather how independent it is and whether the extent of independence serves the rationale of impartial adjudication adequately; third, independence and accountability are two independent variables which are both relevant to impartial adjudication, though they follow different approaches to reaching it.

These points can be further developed through a second, modified example in a context analogous to India's constitutional framework. Suppose the respondent before the judge is the state in a

19 This is termed 'decisional accountability' which can either flow to the public and the litigants (public accountability) or to higher courts (legal accountability). Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 Case Western Reserve Law Review 911.

20 Richard Mulgan, 'Accountability: An Ever-Expanding Concept?' (2000) 78 Public Administration 555.

21 The concept of independence as impartiality has been explained in Irving R Kaufman, 'The Essence of Judicial Independence' (1980) 80 Columbia Law Review 671.

case involving a challenge to the constitutionality of a statute by a private citizen. Assume further that the society to which the judge belongs has adopted a model of constitutional government based on the separation of powers with judges being appointed by the executive, capable of being removed by the legislature and having the power of judicial review of legislative and executive action. Now if X, our detached observer, is asked the same question as to what the judge should do in this case, her first answer would likely be the same—the judge must adjudicate the dispute impartially and in an effective manner. But in the substantiation of what such adjudication requires, though the points relating to accountability (points 4-6) may remain unchanged, her points relating to independence (points 1-3) become *prima facie* problematic. The judges, being part of the judiciary, are state functionaries and hence by implication 'related to' the state, the actions of which, albeit performed by another organ, are being called into question. Equally the questions of being influenced or threatened by the other organs of government assume an institutional dimension within the state paradigm, especially because judges are appointed and can be removed by other organs of the state, which is a litigant before the court. The question of effectiveness and enforcement of the decision too acquires an institutional dimension, especially if the decision by the court is adverse to a co-ordinate wing of the government which is responsible for enforcing it. Concluding on this basis however that the system is not independent and there will be no impartial and effective adjudication is too quick. Instead, as the previous example showed, the key issue is not a binary determination of whether the institution of the judiciary is independent or not but rather how independent it is and whether such independence serves the end of impartial and effective adjudication. This is the question we turn to next, which requires an analysis of the role of the judiciary and the checks and balances imposed on it within a formal separation of powers framework.

B. Separation of Powers and Judicial Independence

This section aims to provide a basic conceptual sketch of the separation of powers; understands the role of the judiciary within it and finally examines the need for judicial independence in furthering the rationale of a government based on a theory of separation of powers. Through this analysis, it is hoped that the institutional dimension of judicial independence will become clear thereby assisting X, our

detached observer, to come to a conclusion regarding whether the hypothetical fact situation extracted above allows the judge to adjudicate impartially and effectively, allowing us to understand the role judicial independence plays conceptually in the appointments process.

The Judiciary in a Separated Framework I: Montesquieu

As a doctrine, various rationales have been propounded to justify the separation of powers.[22] For the purpose of this article, Montesquieu's seminal understanding of separation of powers as essential for preservation of liberty, an understanding widely employed by the Indian Supreme Court in separation of powers questions, will be used as a basis.[23] According to Montesquieu, if legislative, executive and judicial powers are exercised by a single person, there is no liberty.[24] Thus power sources need to be checked by countervailing sources of power, which is only possible if the sum total of political power is divided and subsequently balanced. This division, according to Montesquieu, is optimally threefold consisting of 'legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right.'[25] The second type of the executive power is alternatively referred to as 'the power of judging.'[26] These compartments are not water-tight but allow for inter-dependencies between the organs such that they can check and balance each other. This non-adoption of a sacrosanct separation of powers is significant for two key reasons. First, it promotes the need for balance between organs of government by introducing mutual checks and balances. Second, it introduces a concern for efficiency, another fundamental rationale for constitutional government.

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22 For a conspectus of rationales see, Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633, 642; for a historical development of rationales for separation of powers see, WB Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to its Adoption in the United States Constitution* (Tulane University, New Orleans 1965) 28.

23 See *Kesavananda Bharati v State of Kerala*, (1974) 4 SCC 1461) at ¶1873 (Per M.H. Beg J.); *IR Coelho v State of Tamil Nadu*, (2007) 2 SCC 1. Montesquieu's doctrine is in contra-distinction to a 'pure doctrine' where powers, organs and persons are absolutely separated. See MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund, Indianapolis 1998) 14.

24 Montesquieu, *The Spirit of Laws* (Anne Cohler, Basia Miller and Harold Stone (eds), CUP, Cambridge 1989) 157 [hereinafter 'Montesquieu']

25 *Supra* Montesquieu, 156.

26 *Supra* Montesquieu, 157.

In this structural web of differentiated governmental organs and separated powers envisaged by Montesquieu and commonly used subsequently, the judiciary has long been considered 'the least dangerous' and 'the weakest of the three departments of power.'[27] This understanding can be traced to the fact that in early separation of powers theory, the judiciary was not seen as a distinct branch of government. In most early accounts, the judicial power was seen as a component of executive power.[28] The patent conflict of interest and unfairness as a result of vesting the executive with the power to judge was seldom a contentious matter since the content of judicial power was limited. Though this restricted content of judicial power was not explicitly contested by Montesquieu,[29] its consolidation with the executive power was challenged by him on grounds of unfairness and impracticability.

For Montesquieu, if the judge and executor were the same, 'the judge could have the force of an oppressor...and it (sic) can destroy each citizen by using its particular wills.'[30] Hence he envisaged a limited separation, which albeit not divesting the fundamental executive nature of judicial power, would ensure that it was not exercised by the same body of persons as those who were responsible for executing laws. From this context, the fundamental rationale for separating the judicial power from the executive is evidenced— the maxim that no person shall be a judge in his own cause. This rationale was sought to be fortified by securing a degree of judicial independence so that separation did not become a sham. In Montesquieu's scheme, this was achieved by drawing jurors directly from the people, to whom they owed their direct allegiance, and limiting their tenure to particular disputes at hand. Thus the need for independence of jurors had both an inherent and an instrumental dimension. Inherently it flowed from separating powers between organs of government, which implied a certain degree of independence for each organ. Instrumentally, it was necessary to secure the fundamental requirement of natural justice that no person shall be a judge in his own cause, not merely formally

27 Alexander Hamilton, James Madison and John Jay, *The Federalist* (The Belknap Press, Cambridge 2009) 510 [hereinafter 'The Federalist'].

28 John Locke, 'An Essay Concerning the True Original, Extent, and End of Civil Government' in Peter Laslett (ed), *Two Treatises of Government* (CUP, Cambridge 1988) 265, 364-66.

29 The 'power of judging' involved punishing crimes and judging disputes between individuals. *Supra* Montesquieu, 157.

30 *Supra* Montesquieu, 157.

but substantively, by preventing a slide back to executive control of judges and consequently capricious government.

Though judicial independence was significant in ensuring impartial decision-making, it did not play a role in the mutual checks and balances scheme which Montesquieu envisaged would be necessary to ensure moderate government preserving the liberty of its citizens, owing to the constricted nature of judicial power. Judging was a crucial governmental function, but given the judiciary's semi-permanent status, limited powers and shifting composition of lay jurors, it was seen as distinctly inferior in nature to legislative and other executive functions and thereby incapable of balancing them. The potential to transform the judges from a disparate group of varying individuals to an independent institution however existed, if its status, powers and composition were suitably modified. This transformative potential was seized upon by the authors of the Federalist Papers, key preparatory documents to the final text of the Constitution of the United States of America.[31]

The Judiciary in a Separated Framework II: The American Federalists

According to Hamilton, one of the authors of the Federalist Papers, judges of the Supreme Court, as the telling title of Federalist No 78 suggests, were to be 'Guardians of the Constitution'.[32] To enable them to fulfil this task, two significant departures from Montesquieu's theory were proposed. First, judges would have the final power to test the constitutionality of legislative and executive action, i.e. the power of judicial review;[33] second, the judiciary would be an independent institution, a co-equal branch of government, separated from the executive.[34] In this manner, the judiciary was contemplated as a separate and independent branch of government, instrumental in effectuating checks and balances on its co-ordinate wings and in turn being subject to reciprocal checks. Three questions, relevant for understanding judicial independence conceptually, arise as a result of this changed perception of the judiciary: First, why was this change

31 For the influence of the Federalist Papers on the American Constitution, see Sam J Ervin Jr, 'Separation of Powers: Judicial Independence' (1970) 35 Law and Contemporary Problems 108.

32 Federalist No 78 in *Supra* The Federalist 508. For critical perspectives regarding the concepts in Federalist No 78, see Stephen B Burbank, 'The Architecture of Judicial Independence' (1998-99) 72 Southern California Law Review 315, 318.

33 Federalist No 80 in *Supra* The Federalist 521, 522.

34 Federalist No 78 in *Supra* The Federalist 508.

from the earlier understanding of the judicial role in separation of powers theory contemplated? Second, how was this change to be made effective? Third, what reciprocal checks would be imposed on the judiciary as a result of this change? These questions are now taken up one by one.

Like Montesquieu, a chief concern expressed by the authors of the Federalist Papers was a need for moderated government. To achieve this, Madison believed that wings of government should check each other so that 'ambition... [is] made to counteract ambition.'[35] In this interplay of competing ambitions, it was the legislature which was viewed as the most powerful and hence necessitating maximal controls from co-ordinate wings of government. As the executive veto of legislative actions, which was a proposed check, was deemed inadequate, Hamilton proposed that the judiciary be established as a co-equal branch of government, with ultimate authority to interpret the Constitution.[36] Two significant functions would be accomplished by this institutional modification. First, it would firmly ensure impartiality in adjudication, especially in litigation involving the government, as the judiciary would be institutionally more secure. Second, it would deter non-compliance with the Constitution by the legislature. If any statute passed by the legislature was at variance with the Constitution, the courts could strike it down. Thus by interpreting the Constitution, the Court would obviate the possibility of legislative tyranny and promote the ends of moderate government.

In order to enable the judiciary to effectively perform this role, a substantially bolstered understanding of judicial independence was proposed. The inherent weakness of the judiciary attributable to neither having control over finances nor the army, would be offset by a fortified conception of judicial independence which would allow judges to exercise their judgment freely, thereby effectively ensuring legislative and executive compliance with the Constitution. This would specifically entail that judges of the Supreme Court were appointed during good behaviour, with fixed salaries that could not be reduced to their disadvantage by the government, no retirement age and

35 Federalist No 51 in *Supra* The Federalist 341. For an analysis of this aspect see David F Epstein, *The Political Theory of the Federalist* (The University of Chicago Press, Chicago 1984) 136.

36 Federalist No 78 in *Supra* The Federalist 508.

removal only by impeachment.[37] Permanence in office would ensure that an independent spirit pervaded the judiciary and possibilities of governmental interference reduced substantially. Non-reduction of compensation would be equally crucial to maintain this spirit, since pecuniary control over the judge would imply the potential to influence his judgment. The procedure for impeachment too was complex and multi-layered, such that the threat of removal could not be used as a stick by the government to ensure conformity. In this manner, governmental intervention in judicial functioning was restricted.[38]

Judicial independence, both in terms of functioning as well as authority, thus had two goals: it promoted impartial decision-making by ensuring effective separation between the judiciary and other wings of government, which would be litigants before it. Crucially it also ensured effective adjudication, i.e. decisions rendered were capable of exercising constitutional control over the legislature and the executive and enjoy public confidence.[39] However the authors of the Federalist Papers were aware of the deficiencies of securing a constitutional setup on the foundation of such high principle alone. To ensure that adjudication was effective, apart from the principled requirement of judicial independence, a key pragmatic element was extended to the judiciary—mutual checks and balances.

Mutual checks and balances were deemed necessary to promote moderate government by appropriately conditioning the autonomy of each organ and promoting accountability *inter se*. Specifically for the judiciary, while judicial independence was secured and extensive powers of judicial review provided on the one hand, checks in the form of legislative removal by impeachment, the executive power of appointment, and the Senate's power of confirmation of members of the federal judiciary on the other, ensured inter-dependence between

37 Federalist No 79 in *Supra* The Federalist 518, 520.

38 These provisions were significantly, albeit not wholly, influenced by the Act of Settlement, 1701 in the United Kingdom which was a landmark development relating to the protection of judicial independence, providing that appointment of judges would be *quamdiu se bene gesserint* (during good behavior) which was a radical change from the earlier pleasure doctrine by which judges were in office only during the pleasure of the monarch. See Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence' (2001) OUCLJ 253.

39 Both impartial and effective decision-making fostered the efficiency rationale for the judiciary, i.e. how the independence of the judiciary gave the institution the necessary form to efficiently perform its constitutional function. For more see Nick Barber, 'Prelude to the Separation of Power' (2001) 60(1) Cambridge Law Journal 59.

wings of government. This inter-dependence was necessary to ensure that adjudication by the judiciary remained effective. Having invested significant powers in the judiciary and ensured sufficient guarantees of its independence, the possibility of abuse of judicial power needed to be guarded against. Though the judiciary was the weakest branch, nonetheless such abuse would denude public confidence in the judiciary, create friction and hence, render it an inefficacious checking mechanism on the other branches of government. To obviate this possibility, the judiciary would thus be checked, to a specified degree, by its co-ordinate branches. Equally, the legislative and executive role in judicial removal and appointments respectively would ensure that these organs had a stake in judicial functioning thereby leading them to act in concert in the wider scheme of exercise of governmental power, without each following its independent and possibly mutually hostile trajectory. The need for mutual checks and balances, in addition to judicial independence would thus ensure that the cornerstone of the judicial function in a formal separation of powers framework, i.e. effective adjudication, was securely founded and the equilibrium in the political system maintained.

From this account, we begin to see the role of judicial independence in a formal separation of powers framework. Having had the benefit of this analysis, X, our detached observer in the second hypothetical example, will want the judge to not only adjudicate impartially, but also in a manner such that the judiciary is effective in exercising constitutional control over the legislature and the executive and enjoying public confidence. In construing the independence factors which lead to this end, X should ask whether these factors lead to the right amount of independence. In ascertaining this right amount, the balance between independence and the need for mutual checks and balances, both of which lead to impartial and effective adjudication, has to be considered. It is evident that judicial independence on the one hand and mutual checks and balances on the other, though congruent in aims, may often be opposing forces in application— the more of the former may often *per se* lead to less of the latter and vice-versa. However, this opposition does not necessarily lead to undue compromise of either. The mere fact that the judge is appointed by the executive and can be removed by the legislature should not lead to the conclusion that the judge is related to other organs of government, capable of being influenced and threatened

by them and hence not independent. Such measures may, on the contrary, be necessary to create an inter-institutional equilibrium and promote accountability in the particular system. Unless, as a consequence of independence, mutual checks and balances or any other interest being promoted, another value relevant for impartial and effective adjudication is *patently emasculated*, a specified degree of independence must not be denounced but rather seen in its particular context, with its inter-relationship between mutual checks and balances leading to the conclusion as to whether the particular schema relating to the judiciary promotes impartial and effective adjudication.

It is to this extent that judicial independence can be explained conceptually— a non-exclusive, spectral value necessary for impartial and effective adjudication. Accountability of individual judges, as well as mutual checks and balances, in the system by which such accountability may be secured, are equally relevant in ensuring that adjudication remains systemically effective. Where on the spectrum of independence, the balance between the two values lies cannot be determined in abstraction but is contingent on the specific political and constitutional setup in a particular context. Having established this conceptual foundation and its doctrinal consequence, the final part of the article returns to the issue of appointment of judges in India, delineates the practical relevance of this understanding with specific emphasis on the key theoretical flaws underlying the collegium system and thus suggests the basis on which appointment reform should proceed.

III. Revisiting Judicial Independence and Judicial Appointments in India

As Part I has showed, the view that judicial independence is the key value to be secured in the process of judicial appointments has been widely held in India. However the term judicial independence has been used in many different senses leading to different systemic arrangements for appointment of judges. Thus understanding the term conceptually as a value leading to impartial and effective adjudication which is to be balanced with the need for mutual checks and balances, provides a touchstone against which these understandings and their consequent systems of appointment can be assessed. This Part undertakes such an analysis, starting with the original understanding

adopted by the Constituent Assembly, and with specific emphasis on the judicial collegium method of appointments which exists currently. It finds that a conceptual folly regarding the role and rationale of judicial independence, brought into sharp relief in the creation and perpetuation of the collegium method, lies at the heart of judicial appointments. Remedying this flawed conceptual understanding is thus crucial if appointment reform, which is being currently contemplated, is to succeed.

In the Constituent Assembly, judicial independence was seen as a necessary requirement for the judiciary to adjudicate impartially, insulated from political interferences. Such non-politicisation was deemed necessary given the experience of colonial appointment of judges which was at the unfettered discretion of the executive and consequently led to the appointment of several judges favourable to the colonial government.[40] Despite the need to prevent the recurrence of such politicisation that would adversely affect the impartiality of the judiciary, if not the perception thereof, the Assembly invested the power of appointment focally with the President, who would act on the aid and advice of the Council of Ministers, who were political persons. This seemingly counter-intuitive formulation can be explained by a view which resonated widely in the Assembly, that the appointment of judges was fundamentally an executive function.[41] The threat of politicisation which was concomitant with the vesting of such a power would have to be neutralised without divesting the executive of the power altogether. Thus the pragmatic requirement of the President having to consult the Chief Justice of India for all appointments was introduced. This combination of factors, it was envisaged, would ensure the independence of the judiciary without resulting in its institutional insulation.

Thus there appears to be a natural fit between the role of judicial independence in the appointments process understood theoretically in Part II and the understanding of the drafters of the Indian Constitution. Judicial independence as a requirement to ensure an impartial i.e. non-political judiciary demonstrated a clear cognizance of independence as an instrumental virtue which would allow the judiciary to adjudicate unaffected by partisan political compulsions.

40 See Tej Bahadur Sapru (ed.), 'Constitutional Proposals of the Sapru Committee' (Bombay 1945).

41 CAD vol VIII, 258 (24th May 1949).

At the same time, the device to secure such independence, i.e. the vesting of the appointment power in the President, in consultation with the Chief Justice of India, would mean that an inter-institutional equilibrium was established in the process, wrought by the interplay of the executive and judiciary balancing each other in the process of appointment. This equilibrium, it was believed, would not only ensure an independent judiciary but also one which was selected through an accountable process, checked by the executive. The requirements of processual accountability through the role of the executive were thus harmonised with the requirements of judicial independence, and both these values were deemed significant for the higher judiciary to adjudicate in a manner that enjoyed public confidence.

In the early stages of the working of this executive-centric model of appointment post-independence, a disjunct soon developed between factors which preserved judicial independence and those which sought to preserve executive control, with the former alone being seen as necessary for the judiciary to adjudicate impartially and effectively. This was primarily owing to the findings of the 14th Law Commission Report which reported that executive influence in appointments had led to communal and regional considerations being taken into account.[42] The corollary to such a view was that reducing such influence while at the same time augmenting the role of the Chief Justice of India by requiring his concurrence for all appointments would be necessary to tilt the balance in favour of judicial independence. This disjunct widened when the executive expressly sought to neutralise the consultative role of the Chief Justice of India by appointing a person whose socio-political views matched its own, breaking the long-established seniority convention in appointment of the Chief Justice.[43] This governmental quest for a 'committed judiciary', appointing judges on the basis of their social and political philosophy as determined by the executive, thus conclusively resulted in the view that any executive role in the appointments process would lead to an automatic erosion of judicial independence.

Two consequences ensued as a result of these developments. First, judicial independence came to acquire a settled meaning,

42 Law Commission of India, 'Reform of Judicial Administration' (14th Report 1958) 34.

43 For an account of the supersession of Justices Hegde, Shelat and Grover in favour of Justice A. N. Ray, see Kuldip Nayar, *Supersession of Judges* (Indian Book Co, New Delhi 1973).

understood widely as non-politicisation of the appointments process. Thus a conceptual debate over the need for judicial independence in India's constitutional setup was foreclosed, its meaning limited to preserving the judiciary against the immediate threat of politicisation which confronted it. Second, preserving such independence consequently became inextricably intertwined with the view that greater weight should be attached to the opinion of the Chief Justice of India in proposed appointments. The role of the Chief Justice, envisaged by the drafters as the key apolitical check on unfettered executive discretion thus assumed greater significance as the potential threat of politicisation it was instituted to guard against, actually manifested itself. At the same time, its efficacy came under severe scrutiny since the executive overtures in appointing a sympathetic Chief Justice, breaking the seniority convention, meant that the inter-institutional equilibrium carefully wrought by the drafters became amenable to political manipulation.

The pressure on the consultative process owing to the history of executive dominance, led to the intervention of the Supreme Court in *The First Judges' Case*. In this case, the Supreme Court had the occasion to clarify its understanding of judicial independence, circumscribe the executive role in appointments within constitutionally permissible limits and in the process restore the inter-institutional equilibrium which had been displaced by an overreaching executive. In a judgment spanning 724 pages of written text, containing seven cross-cutting opinions, the Supreme Court laid down the constitutional position regarding appointments and its interface with judicial independence, albeit not entirely authoritatively, given the ambiguity which characterised several opinions on crucial questions of law.

Each of the seven judges held that independence of the judiciary was a basic feature of the Constitution. However only four of the seven judges proceeded beyond rhetorical enunciations, to advance a view of what judicial independence entailed in the constitutional framework.[44] No consensus emerges from these opinions however regarding such meaning. Noteworthy among them were the view of Bhagwati J. who extended his conception of independence from his earlier view in *Sankalchand*,[45] to include independence not only from executive pressures but also 'fearlessness of other power centres, economic or political, and freedom from prejudices acquired and

nourished by the class to which the Judges belong...'[46] and Desai J. who held that judicial independence was necessary to prevent transgressions of the Constitution by government organs through the institution of an independent body which can adjudicate such questions 'untrammelled by external pressures or controls.'[47] However it was one amongst a number of values, over-emphasising which to the extent of 'idolising it, would (hence) be counter-productive.'[48]

In terms of a conceptual understanding of judicial independence, these opinions demonstrate recognition of the distinction between the concept *per se* and the threat of politicisation of the judiciary, the immediate threat it had to repel. In the aftermath of executive dominance of the appointments process, such an understanding presented a nuanced view of judicial independence which hitherto had assumed its equation with non-politicisation of the judiciary as natural and non-problematic. This nuance also allowed the majority judges to see judicial independence as one in a conspectus of values sought to be protected by the appointments process. Accountability, identified by Bhagwati J. was another such value protected by the exercise of the power of appointment by the President.[49] Such a view would not have been possible had the enquiry relating to judicial independence not been steered to a deeper questioning of its constitutional rationale and the optimal amount of independence that is necessary for the judiciary to function impartially and effectively.

Insofar as the inter-relation between the authorities in the appointments process was concerned, the Court split both on the legal question on whether judicial independence required primacy of the Chief Justice of India in the consultative process, primacy understood as pre-eminence in terms of weight attached to his opinion, as well as the factual question of whether the constitutionally-mandated requirement for consultation prior to appointment (and transfer) had taken place in the cases brought before it. The majority refused to incorporate the language of primacy in the constitutional

44 Justices Gupta, Tulzapurkar and Pathak did not offer a view of what judicial independence meant, stressing instead on its importance in the constitutional framework. *Gupta* [119] (Gupta J.), [618] (Tulzapurkar J.), [866] (Pathak J.).

45 (1977) 4 SCC 193.

46 *Gupta* [26] (Bhagwati J.).

47 *Gupta* [704] (Desai J.).

48 *Id.*

49 *Gupta* [29] (Bhagwati J.).

interpretation of Art. 217 with the implication that the President, Chief Justice of India, Chief Justice of the concerned High Court and the Governor of the concerned state were co-ordinate authorities, all of whose opinions would be given the greatest weight, the ultimate decision in case of disagreement lying with the President. However the President could only validly take a decision after full and effective consultation with the aforementioned constitutional authorities and the advice provided by the Chief Justice would ordinarily be accepted; if rejected, it would have to be accompanied by a reasoned justification. Thus, it can be inferred from the majority opinions that judicial independence did not require the executive to be divested of its focal power of appointment; circumscribing such power would suffice to ensure independence while at the same time retaining an element of accountability in the process, given the popularly elected nature of the government.[50]

The widely perceived failure of this decision in circumscribing unwarranted executive interference in the appointments process led to its overruling in *The Second Judges' Case.* As described in Part I of this paper, by this decision, a majority of the Supreme Court speaking through Verma J., conclusively established the primacy of the Chief Justice of India in the process of judicial appointments operationalised through the judicial collegium, which would henceforth be the focal body for appointments. This collegium, comprising the seniormost puisne judges of the Supreme Court (for Supreme Court and High Court appointments) and the seniormost puisne judges of the concerned High Court (for appointments to that High Court alone) would recommend judges for appointment. Doubts have been raised regarding the interpretive correctness and legitimacy of the Court in reaching this conclusion elsewhere.[51] However, in this article, only the understanding of judicial independence which facilitated such a conclusion in the lead opinion of Verma J., will be analysed closely, as a result of which the weak conceptual foundation of the collegium system of appointment will become evident.

According to Verma J., any decision on the proper process for judicial appointments must be seen in the backdrop of the need to protect judicial independence. Such need flows from the fundamental

50 *Id.*

51 These doubts have been succinctly captured in the note by the *amicus curiae* A. K. Ganguli in *Suraz India Trust v Union of India,* W/P (Civil) No. 204 of 2010, proceedings initiated in the Supreme Court to reconsider *The Second Judges' Case.*

necessity of the rule of law which provides the underpinning to India's constitutional democracy. The relevance of the rule of law to the appointments lies in the need to ensure that discretionary authority in the appointments process be kept to a minimum. This had not happened in all occasions on the past, leading to questionable selections that had in turn led to public questioning of the executive-centric process of judicial appointments itself. Thus to correct the existing lacunae and fulfil the constitutional purpose of ensuring judicial independence in the appointments process, primacy would be accorded to the view of the Chief Justice of India, who would be in the best position to assess the merit of a candidate. According such primacy would also obviate any political influence which may arise otherwise. However, cognizant of the drafters' mandate for multiplicity of authorities, this decision would not be a personal prerogative of the Chief Justice of India, but would be 'the opinion of the judiciary symbolised by [his] view'[52] and would be arrived at after consultation with the seniormost puisne judges. The executive would continue to have a role, albeit a highly circumscribed one, by which they could refuse to accept the recommendation of the Chief Justice of India for cogent reasons and ask for reconsideration. However, even in cases where such power was exercised (and the opinion is clear that ordinarily it should not) and the Chief Justice refused to reconsider the decision, the executive would be bound to accept it.

There are three striking aspects with relation to the understanding of judicial independence and the impact it had on the decision. First, there was an implicit belief that since a focal role for the executive was antithetical to judicial independence, replacing the executive with the judiciary would *per se* ensure that judicial independence would be protected. This was not an unnatural assumption, since the expectation that judges themselves would best protect judicial independence in the appointments process, has intuitive appeal. However, the arguments made by the Attorney-General outlining comparative experiences in other jurisdictions and how judicial independence was secured despite an executive role, showed that there was no exact correlation between the appointing authority and the protection of judicial independence. Thus a mere vesting of the power of appointment in the judiciary itself could scarcely guarantee judicial independence. By failing to countenance

52 *SCAORA*, [56].

this argument, the Supreme Court relied on an intuitive understanding of how judicial independence would be best protected, rather than a theoretically and comparative well-founded one, an understanding which has seemingly been belied two decades hence when collegium appointments have been engulfed in controversy adversely affecting public confidence in the system.

Second, following closely from the first, is the failure to adequately recognise the importance of the actual process of judicial appointment, focusing solely on the appointing authority, in the protection of judicial independence. The majority judges espoused a view, adopted in the early years of judicial appointments that the protection of judicial independence could be best achieved by investing the power of appointment with high constitutional authorities. However, as pointed out earlier in Part I, this mandate of multiplicity of authorities was only one strand of the drafters' design to ensure judicial independence in appointments. An equally key element was the need for an inter-institutional equilibrium which would be wrought through a complex process of multiple authorities checking and balancing each other.[53] Key to the operationalisation of such checks and balances was the intricacies of the process of judicial appointments and how the Chief Justice of India, as an apolitical authority would act as a check on executive discretion in appointment.

The decision to make the collegium, headed by the Chief Justice of India, the focal body for judicial appointment reversed the relation between the executive and the judiciary in the process. Such a reversal would thus require a concomitant check by the executive on the collegium, thereby instituting a process by which no single authority could ride roughshod over the other. However in the process of establishing the primacy of the Chief Justice of India and the judiciary in judicial appointments and eliminating political influence, the judges constricted the role of the executive to such an extent that it ceased to remain an effective check on the power of the collegium. Replacing executive control with judicial control of appointments, without setting out an appropriate process by which checks and balances could be implemented was thus a key failing of this decision and its attempt to secure judicial independence in the appointments process.

53 It is not being suggested that the equilibrium initially designed was an optimal one. Rather, that there was a need for an equilibrium which was envisaged, a view which was largely lost sight of by the majority judges in establishing the collegium and vesting it with untrammeled power to appoint.

Third, was the rhetorical understanding of judicial independence which was adopted in this decision. The understanding of judicial independence as a requirement of the rule of law is unproblematic, but is of little explanatory value. Seeking to explain a normative concept such as judicial independence in terms of an even more complex normative concept such as rule of law is philosophically poor practice. Even then, the particular requirement of rule of law identified as key in this case, i.e. the requirement that discretionary authority be limited, does not encapsulate the role and rationale for judicial independence in the appointments process entirely. It is axiomatic to state that unfettered discretion is anathema to the rule of law. But the key questions in the protection of judicial independence in the appointments process are: What is the extent to which discretion is permissible? On what legal basis is the judiciary to be vested with the said discretion? How will the limits on the exercise of such discretion be enforced? Equally, there are other facets of judicial independence which are not captured by the rule of law as limits on discretion formulation does judicial independence require appointment power to be exercised by the judiciary? Is judicial independence the most significant value to be protected in the scheme of appointments? Might there be other values which are equally worthy of protection? Having underlined the importance of judicial independence to appointments but without answering these key questions, the majority opinion elevates judicial independence to the level of dogma without explaining the concept appropriately. As a result, the collegium system of appointment which operates today is founded on an obscure and inadequately explicated understanding of judicial independence which asks more questions than it answers.

The operation of the collegium mode of appointment has, since *The Second Judges' Case* which established it, created considerable public disquiet.[54] Paradoxically however, the understanding of judicial independence adopted in the case has not been questioned, even in *The Third Judges' Case* which qualified it, leading to judicial independence being a dogmatic, yet scarcely understood concept in

54 The case of Justice P.D. Dinakaran, recommended by the collegium as a judge of the Supreme Court despite consistent adverse reports against him including allegations of a spate of illegalities and the confirmation as permanent judge of Justice Ashok Kumar of the Madras High Court despite adverse reports and without consultation are illustrative examples of the shortcomings of the collegium process. See Fali S Nariman, 'Before Memory Fades: An Autobiography' (Hay House India, New Delhi 2010) 387; See also VR Krishna Iyer, 'For a National Judicial Commission- I' *The Hindu* (New Delhi 30 October

relation to judicial appointments. Such a development is not sudden or unexpected. As the previous history of appointments showed, in India, judicial independence, subject to a nuanced view adopted in the Constituent Assembly Debates and the majority judges in *The First Judges' Case*, has remained wedded to the elimination of politicisation in the appointments process. Such has been the intensity of the correlation that at a time when politicisation by the executive is not necessarily the key threat in the appointments process, this view still prevails. As a result, the collegium today operates largely unchecked, despite concerns of the lack of intra-institutional independence within the judiciary, expressly contravening the constitutional and theoretical understanding of judicial independence as a value leading to impartial and effective adjudication.

Specifically, the operation of the collegium has marked the complete breakdown of the inter-institutional equilibrium envisaged in Art. 124 and Art. 217. The collegium system enshrines *de facto* judicial supremacy over appointments. Though the executive must formally confirm the appointment, its role is marginal as its objections can be overridden by the collegium, whose decision is determinative in practice. This is clearly demonstrable by the non-acceptance by a recent collegium of the objection raised by the Prime Minister's Office regarding the appointment of Justices Dattu, Ganguly and Lodha to the Supreme Court over the more senior Justices Shah, Patnaik and Gupta, an objection which was disregarded.[55] The constrained role of the executive hence denudes the possibility of an inter-institutional check and balance on the judiciary and also renders public questioning of the executive in relation to judicial appointments futile as the executive inevitably pleads helplessness. In addition the system itself has limited process-related safeguards. The process is initiated by the Chief Justice of India (or the Chief Justice of the High Court as the case may be) and does not incorporate any form of public participation. There are no open hearings, no public consultations and no provision for objections to be invited.[56] Though it is specified in *The Third Judges' Case* that all documents must be in writing, the said documents will not be made public, even in a court judgment. Further, judicial review

2002) <http://www.hinduonnet.com/2002/10/30/stories/2002103000121000.htm> accessed on 21st March 2011.

55 Diwakar and Dhananjay Mahapatra, 'PMO returns 3 names mooted for SC judges' *The Times of India* (New Delhi 11th November 2008) <http://timesofindia.indiatimes.com/articleshow/3697198.cms?> accessed on 21st March 2011.

too is limited to the ground of non-consultation with constitutional functionaries as held by the Supreme Court in the case of *Shanti Bhushan v. Union of India*.[57] The tendency of the judiciary in this case, which challenged the decision of the Chief Justice of India to appoint Justice Ashok Kumar to the Madras High Court despite adverse reports against him and without consultation with the collegium in clear violation of *The Third Judges' Case,* to shield the Chief Justice who had clearly made an erroneous decision, by making its orders prospective without a semblance of legal reasoning, is also indicative of the relative inefficacy of judicial review as a means of checking the power of the collegium. It has also meant that improprieties and biases operating within the judicial collegium, (instances of which have been communicated to the author by judges, both within the collegium previously and outside, on the condition of anonymity) have no channel for being publicly disclosed. Thus in the final analysis, with the aid of a dogmatic understanding of judicial independence, the collegium system, as it operates today, emasculates any hope of checks and balances and with it an inter-institutional equilibrium in the process of appointments, and immunises the appointing judges from public and judicial scrutiny for decisions taken, thereby giving rise to the overwhelming perception of the higher judiciary being an institution in abject disorder. A conceptually clear understanding of judicial independence in the constitutional schema, recognition of its inter-relation with checks and balances and consequently a realisation of the practical implications of such an understanding in terms of the judicial and executive role in the process of appointment, are thus imperative, if judicial appointments in India are to proceed on a footing which is theoretically justified and practically efficacious.

Conclusion: Where do we go from here?

This article is being written at a time when reform of the appointments process is being widely contemplated. The Supreme Court is seized of a matter which calls for reconsideration of *The Second Judges' Case* and the collegium system of appointment that has operated since then. With the Attorney-General supporting the submission of the *amicus curiae* seeking reconsideration, the matter has now been posted before the Chief Justice for further directions,

56 The closed nature of the process has been criticised in Editorial, 'Closed Brotherhood' *Economic and Political Weekly* (New Delhi 21st March 2009) 6.

57 (2009) 1 SCC 657.

with the possibility of a larger Bench being constituted to re-examine the issues decided in *The Second Judges' Case*.[58] Calls from civil society to include higher judiciary appointment reform in the judicial reforms roadmap have also been widely articulated.

I have argued in this article why such reform is needed from the point of view of securing judicial independence and provided a conceptual foundation for it. Though judicial independence has been seen as the key factor to be secured in the appointments process, it has seldom been understood conceptually, beyond requiring the appointments process to be immune from political manipulation. As a result today, this view of judicial independence as non-politicisation in the appointments process is anachronistic, since the operation of the collegium, despite not being overtly politically coloured, suffers from an acute lack of transparency and accountability, which bring into question the independence of the judiciary.

A conceptually sound understanding, which sees judicial independence as a value leading to impartial and effective adjudication, to be optimally balanced with mutual checks and balances, is thus necessary for the appointments process to operate in a practically effective manner, relevant to the current circumstances. This has two specific ramifications for proposed reform of the appointments process: first, any system of appointment must understand judicial independence not only as an end in itself, or simply repelling the immediate threat that confronts the judiciary but rather as a value which is both inherently and instrumentally necessary for the judiciary to adjudicate impartially and effectively; second, any reform must be equally focussed both on the appointing authorities as well as the process by which such authorities interact and not only on the former as has happened previously. Such equal focus was the intention of the drafters of the Constitution as well, seeking a multiplicity of authorities checking and balancing each other while appointing judges. By explicitly articulating such an understanding conceptually in terms of what judicial independence means and requires, this article hopes to bring the discussion regarding judicial appointments full circle, laying the foundation for a new process of judicial appointments, theoretically justifiable and practically efficacious in the current circumstances, much like the Constituent Assembly Debates did in its time, sixty-two years ago.

58 *Suraz India Trust v. Union of India*, W/P (Civil) No. 204 of 2010, available at http://indiankanoon.org/doc/1391599/.