TOWARDS A MODEL OF JUDICIAL REVIEW FOR COLLEGIUM APPOINTMENTS: THE NEED FOR A *FOURTH JUDGES' CASE*?

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ABSTRACT

The Emergency marked a significant turning point in the development of the Indian Supreme Court's ['SC'] jurisprudence. Since the defining decision in *ADM Jabalpur* v. *Shivakant Shukla,*[1] the Court has worked towards progressively insulating itself from executive or legislative interference. In a similar vein, the SC has consciously shifted the self-conception of its role from a narrow positivism,[2] towards an expansive, natural law perspective.[3] The shift has seen the SC transforming from an enforcer and interpreter of the law, to a "good governance court",[4] often

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[1] ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207 ['ADM Jabalpur'].

[2] *See* A.K. Gopalan v. State of Madras, AIR 1950 SC 27, in holding the Preventive Detention Act, 1950 constitutional, said that the phrase "procedure established by law" may be any procedure enacted by the Legislature, and is not subject to judicial review on grounds of fairness; *Also see* Shankari Prasad v. Union of India, AIR 1951 SC 458, holding that the term "law" in Article 13 does not include Constitutional amendments, and thus, Amendments abridging Fundamental Rights are valid; *Also see* ADM Jabalpur, AIR 1976 SC 1207, holding that the impugned Presidential order suspending the right to life and liberty under Article 21 and the writ of habeas corpus, is a valid exercise of Emergency powers.

[3] *See* Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295, holding that while the right to privacy is not guaranteed as part of Article 21 under the Constitution, it still remained a common law right and cannot be violated without appropriate authority; *Also see* Satwant Singh v. Assistant Passport Officer, AIR 1967 SC 1836, holding that the right to travel abroad is an essential part of the right to liberty granted under Article 21 of the Constitution; *Also see* I.C. Golaknath v. State of Punjab &Ors., AIR 1967 SC 1643, holding that constitutional amendments could not abridge the Fundamental Rights provided under Part III of the Constitution; *Also see* Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225 ['Basic Structure Case'], holding that the Constitution possesses a basic structure of principles and values that cannot be amended by the Parliament; *Also see* Maneka Gandhi v. Union of India, AIR 1978 SC 597, overturning the decision in *AK Gopalan v. State of Madras,* the Court held that "procedure established by law" under Article 21 must be just, fair and reasonable;S.P. Sathe, *Judicial Activism: The Indian Experience,* 6(29) WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 29, 40 (2001); Burt Neuborne, *The Supreme Court of India,* 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 476, 477 (2003).

[4] *See* N. Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* 8(1) WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW (2009); *Also see* P.B. Mehta, *The Rise of Judicial Sovereignty,* 18(2) THE JOURNAL OF DEMOCRACY 70, 73 (2007), states that "the Supreme Court, moreover, managed to legitimize itself not only as the forum of last resort for questions of governmental accountability, *but also as an institution of governance*." This conversion of the court into a "governance institution" is often seen as an alternative mechanism for socio-economic justice, and a strong counter-majoritarian force, *see* V. Sripati, *Towards Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000),* 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 413 (1998); *also see* U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,* 1985 THIRD WORLD LEGAL STUDIES 107, 132 (1985); However, the unelected nature of the Court has naturally raised concerns about accountability and democratic values, as will be dealt with in Part II of this paper. For an analysis of the debate, *see* Shubhankar Dam, *Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Nature of the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic),* 13 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 109 (2005).

acting as a law-maker of the last resort and a sanctuary from the transgressions and omissions of the other organs.

However, this progressive expansion of the SC's power has occurred without it taking on proportionate accountability and scrutiny. *Judicially*, this has manifested in increasing 'activism' and 'legislative-void jurisprudence'.[5] *Administratively*, this lack of accountability reflects best in the highly insulated process of judicial appointments[6] and roster-allocation in the SC.[7] This insulation from other organs of the state has had important implications for the internal integrity of the judiciary as an institution as well as for individuals within it - generating a long-standing credibility-crisis. The open letter from four senior SC justices to the Chief Justice of India ['CJI'] –alleging violation of SC conventions and arbitrariness in allocation of cases - marks the most recent chapter in the unfolding of this crisis.[8]

One of the central concerns raised in the open letter [hereinafter, referred to as the '*Four Judges' Controversy*'] was a 2-judge bench SC order in the case of *R.P. Luthra*v. *Union of India.*[9]The order rejected a challenge to the judicial appointments that were made pending the finalization of the Memorandum of Procedure ['MoP'],[10]but also recommended expedition of the finalization process. While the open letter primarily raised doubts regarding the composition of the bench,[11]it also criticized the order, stating that the Government's silence on the MoP is to be construed as

[5]Vishakha v. State of Rajasthan, AIR 1997 SC 3011, laying down guidelines for preventing sexual harassment at the workplace; *But see* Rajesh Sharma v. State of Uttar Pradesh, Appeal (Crl.) 1265 of 2017 (Supreme Court of India), laying down guidelines against the 'misuse' of S.498-A. These decisions reflect the absence of a necessary correlation between judicial lawmaking and liberal rights-jurisprudence, countering the most common argument in favour of judicial-activism.

[6] Supreme Court Advocates-on-Record Association v. Union of India, Writ Petition (Civil) 1303 of 1987 ['Second Judges' Case]; In re Principles and Procedures Regarding Appointment of Supreme Court and High Court Judges, (1998) 7 SCC 739 ['Third Judges' Case'].

[7]*Supreme Court to Examine PIL Challenging Roster Practice of Allocation of Cases by CJI,* INDIAN EXPRESS (April 13, 2018), *available at* http://www.newindianexpress.com/nation/2018/apr/13/supreme-court-to-examine-pil-challenging-roster-practice-of-allocation-of-cases-by-cji-1801043.html.

[8] Letter from J. Chellameswar and others, to CJI Deepak Misra (January 12, 2018), available at https://qz.com/1178370/full-text-of-the-letter-four-supreme-court-judges-write-to-the-chief-justice-of-india

[9]RP Luthra v. Union of India, 2017 SCC OnLine SC 1254.

[10]Supreme Court Advocates-on-Record Association v. Union of India, W.P. (Civil) 13 of 2015 (Supreme Court of India), ¶569 ['NJAC Case']. The Court directed that the Memorandum of Procedure, as laid down in the Second and Third Judges' Case, be revised in collaboration with the Government.

[11]*Supra* note 8. The 2-judge bench constituted of Justices U.U. Lalit, and A.K. Goel, neither of who were a part of the constitutional bench that heard the NJAC Case. The letter states, "When the Memorandum of Procedure was the subject matter of a decision of a Constitution Bench of this Court in Supreme Court Advocates-on-Record Association and Anr. vs. Union of India [(2016) 5 SCC 1] it is difficult to understand as to how any other Bench could have dealt with the matter."

acceptance, eliminating any need to direct an expedition. The order had already been recalled by a three-judge bench.[12] This recall, along with the statement in the open letter and the Government's continued position that there is no consensus on the MoP,[13]has thrown the status of the new MoP into confusion.

It is clear that there is an increasing recognition of the need for a balance between judicial independence and accountability in the appointments process. While the MoP is one means of creating external accountability, I argue that subjecting the appointment decisions to internal judicial review would further supplement the effectiveness of the MoP. The thesis of this paper is twofold -

First, the SC precedents can be interpreted to envisage the power of the Court to review the decisions of the collegium, even though such power was expressly eliminated in the *Second Judges' Case;*

Second, the standard for this review may be higher than the one for judicial review of executive action, though it must fall short of a *de novo* review.

The collegium's recent resolution to make its decisions and reasons thereof available as public record, in response to the aforementioned credibility-crisis, reinstates the viability of the implementation of the above argument.[14] As the collegium moves towards transparency of its deliberations, it becomes possible to question and challenge its decisions on the basis of information now made available. In this light, this thesis attains greater significance and relevance in the current reformative stage of the collegium system.

The *first* segment of my argument briefly analyzes the collegium system and its (un)constitutionality. The *second* segment deals with the *instrumental* justifications[15] for judicial reviews of appointments. The *third* segment, deriving its legitimacy from the above instrumental

[12]R.P. Luthra v. Union of India, 2017 SCC OnLine SC 1295.

[13]Jatin Gandhi, *MoP in Limbo as Govt, Top Judges Lock Horns,* HINDUSTAN TIMES (February 9, 2018), *available at* https://www.hindustantimes.com/india-news/memorandum-of-procedure-in-limbo-as-govt-top-judges-lock-horns/story-YDgHxTqFs2aq5D7Tza1iIO.html.

[14] Re:Transparency in collegium system, Minutes of Chief Justice of India, http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf.

[15]By *instrumental* justifications, I mean arguments that are essentially consequential in nature - dealing with the implications of, and reasons for judicial review, that are external to the autonomous disciple of law.

justifications, lays down *intrinsic* justifications[16] for it. The *fourth* segment establishes the standard of review suitable for such decisions. *Finally*, I suggest some solutions to possible logistical issues and link them to past reform measures, outlining the road ahead.

THE THREE JUDGES' CASES AND CONSTITUTIONALISM

Due to the aforementioned transformation of the judiciary into a 'good governance court', the scope of SC's 'legitimate power' has now become a focal point of the debate on separation of powers.

The opinions of the SC in the *Second Judges' Case*, and the *Third Judges' Case* regarding judicial appointments form an important aspect of the SC's understanding of the above debate. The Court, briefly, ruled that the opinion of the CJI regarding judicial appointments and transfers in the higher judiciary, would be binding on the President.[17]The opinion of the CJI has to be formed in consultation with the four (earlier, two) other senior-most judges of the SC - leading to the establishment of the collegium system.[18] The Central Government may object to these recommendations only on producing positive material as reasons.[19] If, however, upon perusing the material, the other members of the collegium agree with the view taken by the CJI, the recommendation would become binding on the Government.[20]

In order to establish this system of appointments, the SC interpreted "consultation" with the CJI to mean "concurrence" with him/her, while also reading in the collegium as a consultative body.[21]This amounts to a constitutional amendment by a 9-judge bench of the SC and an encroachment on the "essential functions" of the Legislature,[22] as conferred on it by Article 368

[16] By *intrinsic* justifications, I mean arguments that are internal to the autonomous disciple of law. This segment will argue that judicial review isconsistent and compatible with the existing legal principles and frameworks in place, without looking at such review as a means (instrument) to certain goals (consequences).

[17]Third Judges' Case, (1998) 7 SCC 739; Second Judges' Case, W.P. (Civil) 1303 of 1987.

[18]*Id.*

[19]Per J. Verma, Second Judges' Case, W.P. (Civil) 1303 of 1987.

[20]*Id.*

[21] Second Judges' Case, W.P. (Civil) 1303 of 1987.This interpretive exercised pertained to Articles 124, 217 and 222 of the Constitution of India which provide for appointments to the SC, and High Courts and transfers between High Courts, respectively.

[22]Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 54 ['Jawaya'], holding that the 'essential' functions of an organ of the State may not be exercised by any other organ, as opposed to functions that are merely incidental.

of the Constitution of India ["Constitution"].[23]In fact, in order to depart from the text of the Constitution, the Court interpreted the "*Basic Structure*" of the Constitution[24]to include judicial independence - a doctrine that itself does not find full textual support in the Constitution.[25]

INSTRUMENTAL JUSTIFICATIONS FOR JUDICIAL REVIEW OF APPOINTMENT DECISIONS

The judges-appoint-judges system institutionalized by the above decisions is largely unique to India. The judges of the SC of the United States are nominated by the President subject to the Senate rejecting or confirming the nominee.[26] In the United Kingdom, the independent Judicial Appointments Commission[27] has significantly increased judicial autonomy in appointments.

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[23]The SC's abovementioned interpretation was in violation of the intent of the Constitutional drafters. This is clear from the rejection of the "concurrence model" by Dr. B.R. Ambedkar, as it assumed the impartiality of the CJI's judgment by granting him a veto. Constituent Assembly Debates, 24th May, 1949, Vol. VIII, *as cited in*, Per J. Chelameswar, Supreme Court Advocates-on-Record Association v. Union of India, W.P. (Civil) 13 of 2015 (Supreme Court of India) ['NJAC Case']; M.E. Bari, *Collegium System of Appointment of Superior Courts' Judges Established in India by way of Judicial Interpretation and Aftermath: A Critical Study*, 2013 LAWASIA JOURNAL 1, 10 (2013).

[24] Basic Structure Case, (1973) 4 SCC 225.

[25]Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* 8(1) WASHINGTON UNIVERSITY GLOBAL STUDENT LAW REVIEW 1, 27 (2009); Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine, in* SUPREME BUT NOT INFALLIBLE 107, 108 (B.N. Kirpal et al. eds., 2000).*But see* S. Krishnaswamy, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

[26] Article II, Section 2(2), UNITED STATES CONSTITUTION, 1787. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and *by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, *Judges of the supreme Court*, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[27]Schedule VIII, ¶1(1), Constitutional Reform Act, 2005. Regulation 4, The Judicial Appointments Commission Regulations, 2013. "Composition of the Commission (1) Of the 14 other Commissioners—

(a)7 must be holders of judicial office,

(b)5 must be lay members, and

(c)2 must be persons practising or employed as lawyers.

(2) Of the 7 Commissioners who are appointed as holders of judicial office—

(a)1 must be a Lord Justice of Appeal;

(b)1 must be a puisne judge of the High Court;

(c)1 must be a senior tribunal office-holder member;

(d)1 must be a circuit judge;

(e)1 must be a district judge of a county court, a District Judge (Magistrates' Courts) or a person appointed to an office under section 89 of the Senior Courts Act 1981(4);

However, the Lord Chancellor still enjoys one opportunity to reject and one to direct reconsideration, after consultation with various politicians and judges whose opinion was sought by the Commission.[28] Therefore, in both these jurisdictions, judicial appointments are subject to checks and balances, albeit to differing degrees. Naturally, a mere deviation from general practices in other jurisdictions does not provide a justification for change in *status quo,* and is only intended to be a background for subsequent justifications.

The gradual strengthening of the SC has seen its encroachment into the domains of the legislature and the executive through 'public interest litigation' jurisprudence,[29] and 'legislative void jurisprudence'.[30]This encroachment must be seen in light of the rise of the SC as an autopoietic institution[31] and its complete insulation, *democratically* and *politically*. Political insulation is achieved through the exclusion of the legislature or the executive from the process of judicial appointments. The impact of this is multiplied through democratic insulation due to draconian contempt laws,[32] and loose norms on declaration of assets.[33]This has resulted in a SC that is self-regulating, and more or less immune from accountability or external criticism.

In such an activist but unaccountable SC, it may be pointed out that the administrative and the judicial functions of the Court cannot be easily divorced. This is because, as the SC takes on functions that are increasingly political or governance-based,[34] making the politics of the

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(f)1 must be a holder of an office listed in paragraph (3);

(g)1 must be a non-legally qualified judicial member…"

[28] Sections 28, 29, Constitutional Reform Act, 2005.

[29] Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India,* 33(169) BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 170, 176 (2015).

[30]AbhinavChandrachud, *The Insulation of India's Constitutional Judiciary,* 45(13) ECONOMIC AND POLITIC WEEKLY 38, 38 (2010).

[31] Ralf Rogowski, *Constitutional Courts as Autopoietic Organizations,* 1 (Working Paper 2013/04, University of Warwick, 2013). The author argues that "constitutional courts are autopoietic social systems guided by an underlying concern for autonomy and self-reproduction." While the author uses the German Federal Constitutional Court and the U.S. Supreme Court to illustrate his point, it can be generalized to Indian context, to a certain extent.

[32] V. Venkatesan, *Of Criticism and Contempt,* 19(6) FRONTLINE (2002), *available at* http://www.frontline.in/static/html/fl1906/19060270.htm.

[33]SamanwayaRautray, *Half of SC Judges have not made Assets Public 10 Years after Resolution,* ECONOMIC TIMES (October 9, 2017), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/half-of-sc-judges-havent-made-assets-public-10-years-after-sc-resolution/articleshow/60998416.cms.

[34]This is true of a system where the Court exercises expansive powers to form guidelines and fill in for the omissions (and not just transgressions) of the executive and the legislature. A good example would be the Basic Structure Case, in which the SC decided what parts of the Constitution are '*essential*' to the document - a decision that is naturally political and determined by the specific political ideologies and interpretive schools the individual

individual judge on the bench critical, administrative decisions like appointments and roster-allocation heavily influence the specific form that SC jurisprudence takes.[35]

Given the above, the criticisms of opaqueness and unaccountability of the collegium system[36] pose important constitutional questions. In his dissent in the NJAC Case, Justice Chelameswar pointed out that "*the consultation between the Chief Justice of India and the Government, and the record of the consultation process is one of the best guarded secrets of this country,*" with even the other SC judges barred from accessing its records.[37]Retd. Justice Ruma Pal has also criticized the prevalence of nepotism and lobbying in the consultative process, enabled by this black-boxing of the collegium's deliberations.[38]

The collegium is not required to record "strong cogent reasons" for departing from seniority - as long as some positive reasons are stated for the recommended judge.[39]Justice A.P. Shah, one of the senior-most High Court judges, was bypassed for elevation, despite some landmark rulings including the legalization of homosexuality, and inclusion of the office of CJI under the Right to Information Act, 2005.[40]Another example is the transfer of Justice Jayant Patel 10 months before his retirement, preventing his appointment as the Chief Justice of the Karnataka HC. It is

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judges on the bench come from. It is not a logical leap to suggest, thus, that the process of appointing judges, as well as deciding the bench, becomes a decision with *political* implications.

[35]One of the well-known instances of this influence was the manner in which the first Lord Chancellor, Lord Hailsham used his administrative powers of bench allocation for the purposes of curtailing the progressive/reformist jurisprudence of Lord Atkin. A. Peterson, THE LAW LORDS, 11 (Springer, 1983); ArghyaSengupta, *A Question of Probity,* THE HINDU (November 15, 2017), *available at* http://www.thehindu.com/opinion/lead/a-question-of-probity/article20445800.ece. Another source of empirical validation for this proposition is the careful selection of U.S. Supreme Court judges keeping in mind their political ideologies, and the emphasis placed on the same for Senate confirmations, betraying a generally accepted connection between personal ideologies and the higher judicial roles. *See* J.A. Segal and others, *Ideological Values and the Votes of the U.S. Supreme Court Justices Revisited,* 57(3) THE JOURNAL OF POLITICS 812 (1995). "While we find that the ideological values of the Eisenhower through Bush appointees correlate strongly with votes cast in economic and civil liberties cases, the results are less robust for justices appointed by Roosevelt and Truman."

[36] V.R. Krishna Iyer,*Needed: Transparency and Accountability,* THE HINDU (February 19, 2009), *available at* http://www.thehindu.com/todays-paper/tp-opinion/Needed-transparency-and accountability/article16336871.ece.

[37]Per J. Chelameswar, NJAC Case, W.P. (Civil) 13 of 2015.

[38]SamanwayaRautray, *Judicial Secret out in the Open: Former Judges Skewers Appointment Process,* TELEGRAPH (November 11, 2011) *available at* https://www.telegraphindia.com/1111111/jsp/frontpage/story_14735972.jsp.

[39]Third Judges' Case, ¶44, (1998) 7 SCC 739.

[40]UtkarshAnand, *With Sense of Hurt, Chief Justice A.P. Shah, Author of Landmark Rulings Retires from HC,* THE INDIAN EXPRESS (February 12, 2010) *available at* http://indianexpress.com/article/news-archive/web/with-sense-of-hurt-chief-justice-a-p-shah-author-of-landmark-rulings-retires-from-hc/.

speculated that it was a political decision to punish him for his order of a CBI probe in the Ishrat Jahan case.[41]

A judicial review for decisions of appointment would be a first and critical step towards eliminating the abovementioned issues. *First,* a judicial review would dilute the concentration of discretion in the collegium, thus ensuring an internal check on arbitrariness or favoritism within the small collegium. *Second,* this internal check and the resultantly imposed transparency would ensure fairer and better reasoned decisions at the collegium stage itself. It would effectively compel the collegium to provide reasoning for its decisions for fear of reversal - which it is not obligated to do currently in the case of a rejection.[42]*Third,* a judicial review would make the MoP a more enforceable and binding process. Further, the recent collegium resolution to upload its reasoned decisions on the SC website[43] will gain actionable value due to the possibility of a review.

INTRINSIC JUSTIFICATIONS FOR JUDICIAL REVIEW OF APPOINTMENT DECISIONS

While the U.S. and U.K. have developed strong systems of checks-and-balances on the judiciary's composition by the other organs of the state, it must be recognized that the SC's strong self-regulatory jurisprudence[44] is likely to prevent any strong *external* check on the system.[45]In that light, a process of judicial review would be more compatible with the judiciary's self-regulatory precedents, and would thus have stronger justifications *intrinsic* to the jurisprudence.[46]

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[41] SpecialCorrespondent,*Justice Jayant Patel Resigns,* THE HINDU (September 26, 2017), *available at* http://www.thehindu.com/news/national/other-states/justice-jayant-patel-resigns/article19756361.ece; S. Yamunan, *Supreme Court Collegium should Explain why Justice Jayant Patel's Transfer was in Public Interest,* SCROLL (September 29, 2017) *available at* https://scroll.in/article/852239/supreme-court-collegium-should-explain-how-justice-jayant-patels-transfer-was-in-public-interest.

[42]While the collegium needs to record positive reasons for a recommendation, there is no such requirement where a senior judge is rejected.

[43]*Supra* Note 14.

[44] It is valuable to note that Article 141 of the Constitution effectively makes SC's jurisprudence 'law', thus providing it with considerable binding value.

[45]The effect of this self-regulatory jurisprudence was most expressly clear when the SC declared the National Judicial Appointments Commission Act, 2014 unconstitutional and the 99th Constitutional Amendment as in violation of the Basic Structure of the Constitution in its invasion on 'judicial independence'.

[46]This paper does not comment on the possibility that there might be better instrumental justifications for an external check on the appointments, like in the U.S. The limited point I have made is that there are significant instrumental justifications for an internal check in the form of judicial review; and that the intrinsic justifications, given the current SC jurisprudence, may be *significantly* stronger in favour of internal checks, as opposed to external ones.

However, the *Second Judges' Case* indicated that the need for judicial review is completely eliminated *merely* due to the transfer of primacy in appointments to the collegium, from the executive.[47] The *Third Judges' Case* further clarified that a judicial review could only probe whether or not the required consultations were done, and could not review the content or fairness of the same.[48] This is a part of the judiciary's self-insulation from scrutiny, under an assumption of the infallibility of a judge's integrity, straying from Dr. B.R. Ambedkar's rejection of this assumption in the Constituent Assembly Debates.[49]I argue that there are strong grounds that the current stated position of the SC on reviewability of appointments has considerably weakened in light of later precedents.

I. Legal Nature of the Judicial Appointments Function

In arriving at a conclusion regarding reviewability of the collegium's functioning, an enquiry into the nature of its functions is critical. The difference between quasi-judicial and administrative functions, though increasingly blurry, determines the scope of principles of natural justice and other grounds for review. Administrative functions, unlike quasi-judicial ones, are devoid of generality, and are only concerned with the particular facts of the situation. Further, administrative action is not subject to the collection of evidence, and weighing submissions made by parties. It does not adjudicate on a right, even though it may *affect* one.[50]

In *A.K. Kraipak*v. *Union of India*,the SC laid down the following factors that determine whether a certain function is administrative or quasi-judicial - "*nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised*."[51] The SC has further held that the functions of appointment and selection are *administrative* in nature.[52]Given that the *nature of the power* of appointment has itself been held to be administrative, in the absence of any precedent to the contrary, there is at least a presumption that judicial appointments be similarly

[47] Per J. Verma, Second Judges' Case, W.P. (Civil) 1303 of 1987.

[48] Third Judges' Case, (1998) 7 SCC 739.

[49]Constituent Assembly Debates, 24th May, 1949, Vol. VIII.

[50]I.P. Massey, ADMINISTRATIVE LAW, 48 (EBC, 2001).

[51] A.K. Kraipak v. Union of India, (1969) 2 SCC 262.

[52] National Institute of Mental Health and Neurosciences v. K. Kalyana Raman, 1992 Supp (2) SCC 481, holding that the Selection Committee's appointing NIMHANS professors was an administrative function; State of Andhra Pradesh v. S.M.K. ParasuramaGurukul, AIR 1973 SC 2237, holding that appointment of trustees to charitable and religious institutions is an administrative function.

classified. Moreover, I argue that mere facts that the power is conferred on judicial officers, or that the framework of law conferring it is constitutional do not, by themselves, lead us to a conclusion that the nature of the power changes to quasi-judicial from an administrative one. There are administrative functions that can be exercised by judicial officers (roster-allocation, for example), as well as conferred by the Constitution. The mere fact that the appointed officers are conferred with judicial functions also does not make the appointment itself a quasi-judicial function.

Regardless, however, decisions on judicial appointments do not require an adjudication of the *rights* of the candidate, as no right of appointment exists - making a strong case for the administrative nature of this function.

II. Procedural Fairness and the Right to a Judicial Review

Notwithstanding the absence of any right to be appointed to judicial office, there are certain rights to procedural fairness and natural justice that stem from the very nature of judicial appointments as 'administrative action'.[53]This would entail the imposition of a correlative 'duty' on the collegium,[54] and a simultaneous review process to enforce the duty/right.

SC has laid down the standard of judicial review for administrative action. In the *Barium case* pertaining to the administrative decisions of the Company Law Board, the Court held that it was insufficient for the Board to declare that there was *some* material to justify its opinion, to escape judicial scrutiny. The SC stated that the final decision was subjective and the "*sufficiency*" of the material forming the basis of such decision could not be reviewed. However, the SC would require objective proof of circumstances or material being *relevant* (even if not sufficient) to the inference reached.[55]This was upheld in the case of *Ram Dass* v. *Union of India,*[56]where it was held

[53]Maneka Gandhi v. Union of India, AIR 1978 SC 597, in holding that the Passport Office was bound by the *rule of audialteram partum* before impounding someone's passport, stated "Earlier, the courts had taken a view that the principle of natural justice is inapplicable to administrative orders. However, subsequently, there is a change in the judicial opinion. The frontier between judicial and quasi-judicial determination on the one hand and an executive or administrative determination on the other has become blurred. *The rigid view that principles of natural justice apply only to judicial and quasi-judicial acts and not to administrative acts no longer holds the field.*"

[54]David Lyons, *The Correlativity of Rights and Duties,* 4(1) NOUS 45, 46 (1970).

[55]Barium Chemical Ltd. v. Company Law Board, AIR 1967 SC 295 ['Barium Case']. The case involved a challenge to the Board's decision to order investigation against a company using discretion granted to it under Section 237 of the Companies Act, 1956. The Legislature "*could not have left to subjectivity both the formation of the opinion, and the existence of circumstances on which it is to be founded.*"

[56] Ram Dass v. Union of India, AIR 1987 SC 593.

that the Court could review an administrative decision against any extraneous considerations or irrelevant material.

This doctrine has been specifically upheld by the SC for administrative decisions of the judiciary, in its recent decision in *Indira Jaising* v. *Supreme Court of India.*[57]The petition challenged the legality of the appointment process for Senior Advocates on grounds of arbitrariness. The Court *struck down* the current process of secret ballot vote, citing *fairness and transparency*, laying down new, detailed procedures. The Court held that while there was no requirement for a hearing, there was a requirement for objective, relevant material basing the decision. Admittedly, on a plain reading, the case seems to support only the proposition that the procedure of selection is subject to review, and not the selection itself. However, on a full reading of the decision, the Court also approvingly cited its decision in *Sheonath Singh* v. *Appellant Assistant,*[58]which upheld the same standard of reviewing *particular* decisional outcomes as the *Barium* case. The citation provides conclusive approval of the reviewability of the judiciary's administrative decisions (in this case, appointments of Senior Advocates), *at par with other administrative decisions*.

In this light, the question of reconciliation of these decisions above with the SC's express rejection of judicial review of the collegium's decisions in the *Second Judges' Case*, arises. The only review allowed is whether the collegium was consulted at all, not extending to the functioning of the collegium itself.

One possible argument that could achieve reconciliation in favour of the *Second Judges' Case* may be found in the SC decision in the *Bommai Case,*[59]regarding the reviewability of the President's declaration under Article 356.The Court stated that the decision can be challenged only on two very limited grounds - *malafide,* or when it is *ultravires* Article 356 itself. It is often used as authority for the proposition that the standard of review in the *Barium Case,* cannot be held to be applicable to the exercise of constitutional powers.[60] However, an extension of this reasoning to the collegium's powers would run into several legal issues.

First, the rationale for rejecting the *Barium Case* standard was that Article 356 of the Constitution grants *extraordinary powers* to the Executive for grave emergencies and thus cannot be equated with powers in the ordinary administrative field. Further, the SC reasoned, it is not possible for

[57] Indira Jaising v. Supreme Court of India, W.P. (Civil) 454 of 2015 ['Senior Adv. Case'].

[58]SheoNath Singh v. Appellant Assistant, AIR 1971 SC 2451, *as cited in* Senior Adv. Case, W.P. (Civil) 454 of 2015.

[59] S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[60]Per J. Chelameswar, NJAC Case, W.P. (Civil) 13 of 2015.

the judiciary to evolve metrics to review decisions that are essentially political. It is, thus, clear that the intention was not to make an exception for constitutional powers generally, but for those extraordinary powers that are of a fundamentally political nature - being beyond the expertise of the judiciary. None of these considerations apply to the collegium's appointment powers. The hesitance at replacing the executive's expertise with its own judgment, will not stretch to judicial appointments where the judiciary claims to be in the best position to assess candidates.[61]

Second, in the *Second Judges' Case*, the SC eliminated judicial review on the sole ground that it became dispensable due to the mere primacy of the judiciary in the process,[62] and did not make any link to the constitutional nature of the power, as was made in *Bommai.* Therefore, *Bommai* clearly does not aid in the reconciliation.

Further, this rationale that eliminates the *need* for a judicial review, merely due to the primacy of judicial members in the decision, has been unequivocally rejected by the SC in its decision in the *Indira Jaising Case.* Thus, I argue that the validity of the proposition in the *Second Judges' Case* has become questionable due to the invalidation of its supporting reasoning by the SC itself - making the proposition contestable in any future challenge.[63]Further, it must be noted that the process of judicial review would still be consistent with the primary *ratio* underpinning the *Second Judges' Case,* that is, the primacy of the judiciary, as it does not include any external check or interference.

Thus, constitutionally, it has been established that there are intrinsic justifications within the framework of existing precedents for the reviewability of collegium's decisions.

III. The Appropriate Standard of Review

Jurisprudentially, courts have evolved widely differing *standards* of review to reflect the appropriate amount of court intervention in a variety of situations.[64]The *de novo* standard,[65] a

[61] Second Judges' Case, W.P. (Civil) 1303 of 1987."It is obvious, that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced *because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior judge*."

[62] Per J. Verma, Second Judges' Case, W.P. (Civil) 1303 of 1987.

[63]Admittedly, the *Second Judges' Case* had a larger bench than the *Indira Jaisingh Case.* However, the limited argument that I make is that any subsequent challenge to the impugned proposition in *Second Judges'*stands on strong ground, due to the SC's rejection of the reasoning forming its basis - though it does not, and cannot amount to an automatic overturning.

[64] Daniel Solomon, *Identifying and Understanding Standards of Review,* GEORGETOWN UNIVERSITY LAW CENTRE 1 (2013).

"clearly erroneous" standard,[66]"arbitrary and capricious",[67]presence of *some* relevant material,[68] presence of *substantial/sufficient* material - may be some differing standards.[69] It may be noted that review may be of questions of fact, or only on questions of law with a bar on reassessment of facts. Enquiries into facts may be restricted solely to the records of the lower court, or may allow further evidence.[70]

The analysis of precedents in the previous section may indicate that the applicable standard would be the one laid down in the *Barium Case*. This would allow the SC to assess the relevance of the material relied on by the collegium, but would prohibit an examination of its sufficiency. However, the question of the adequacy of this standard deserves separate consideration.

However, it must be noted that the jurisprudential rationale for a very limited review of administrative decisions is the constraints imposed by the doctrine of separation of powers, and deference for the administrative body's expertise in that decisional area.[71]This rationale does not apply in cases of administrative decisions made by the collegium, as there is no question of

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[65]This is the standard usually employed in first appeals. It essentially confers, on the first appellate court, powers co-extensive with that of the trial court in India. In the USA, the *de novo* standard is employed by first appellate courts for questions of law, as well as mixed questions of law and fact. Lawrence v. Dept. of Interior, 525 F.3d 916 (9th Circuit, 2008); Janet Lewis v. USA, 641 F.3d 1174, 1176 (9th Circuit, 2001); Suzy Zoo v. Commissioner of Internal Revenue, 273 F.3d 875, 878 (9th Circuit, 2001).

[66]This standard, employed in the USA, is used for an appellate consideration of questions of fact decided by the trial court. It involves a certain degree of deference to the lower court, due to the simple fact that the trial court is best placed to assess and appreciate evidence, given the presence of the three essential elements - cross-examination, demeanour and oath. L.H. Tribe, *Triangulating Hearsay,* 87(5) HARVARD LAW REVIEW 957, 963 (1974). Courts have described a "clearly erroneous" standard to be that the review court may not reverse the findings of the trial court as long as they are *plausible,* even though the review court would have *weighed* the evidence differently. It is only complete implausibility that is a ground for reversal. Husain v. Olympic Airways, 315 F.3d 829, 835 (9th Circuit, 2002); Anderson v. City of Bessemer, 470 U.S. 564 (1985); Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 384 (9th Circuit, 1994).

[67]This standard would essentially require *some* rational link between the facts forming the material for the conclusion and the conclusion itself. Some grounds for reversal would be where relevant material has not been considered, or irrelevant/impermissible factors have been, or where the reasoning given is counter to the evidence on record. Siskiyou Regional Education Project v. United States Forest Service, 565 F.3d 545, 554 (9th Circuit, 2009); Arizona Cattle Growers Association v. United States Fish and Wildlife Services, 273 F.3d 1229, 1236 (9th Circuit, 2001).

[68] Barium Case, AIR 1967 SC 295. This is approximately similar to the way the "arbitrary and capricious" standard for reviewing agency decisions is defined in the US. This similarity is evidenced by the SC's decision in Rohtas Industries Ltd. v. S.D. Agarwal, AIR 1969 SC 707. "The authority must form the requisite opinion honestly and after applying its mind to the relevant materials before it… It must act reasonably and not *capriciously or arbitrarily*."

[69]Marha S. Davis, *Standards of Review: Judicial Review of Discretionary Decision-making*2 JUDICIAL APPELLATE PRACTICES AND PROCESS 47 (2000).Some of them may roughly overlap with minor differences across jurisdictions.

[70] George Seefeld, Judicial Review of Administrative Decisions, 24(2) MARQUETTE LAW REVIEW 61, 62-63 (1940).

[71]*Id,* at 64.

encroachment on the executive's territory or its expertise. This makes a wider scope of review than was laid down in the *Barium* case jurisprudentially arguable - begging the questioning of the *desirability* of the same.

The policy considerations that must be kept in mind are conflicting. *First,* a full review would lead to undue delays and frivolous appeals, in a judiciary where large-scale vacancies are a major concern.[72] *Second*, a *de novo* review would amount to the replacement of the opinion of the collegium with that of the bench constituted for the review, which runs counter to the intent of the Constitution. Further, such a review would effectively amount to an appeal - which is not an inherent right, and must be statutorily vested.[73] *However*, a counter-consideration needs to be taken into account. There is a growing blurring of the "*bright line*" between the administrative and judicial aspects of Court due to the heavy role that the individual judges' politics and ideologies play in an expanding, activist judiciary - as opposed to in a judiciary that is merely involved in the technical application/interpretation of the law. This changing role of the judges means that decisions of appointments and roster-allocation can be (and have been in the past) tailored to suit certain outcomes.[74]

Thus, it is important to balance these countering considerations and institute a process of review that ensures transparency and merit-based selection, while also accounting for delays. In that light, I suggest that the power to review selection must be subject to the standard of "*clearly erroneous"*. Courts have described it as a standard of review prohibiting reversal of the findings of the trial court as long as they are *plausible*, even though the review bench may have weighed the materials-on-record differently.[75]This standard has been arrived at upon a consideration of other possible standards and a need to balance the conflicting concerns outlined above. While the wide

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[72] *Appointment of Judges a Major Concern, Vacancies Affecting Court's Efficiency, says CJI Khehar,* THE HUFFINGTON POST (January 11, 2017), *available at* http://www.huffingtonpost.in/2017/01/11/appointment-of-judges-a-major-concern-vacancies-affecting-court_a_21652481/.

[73] Anant Mills Co. Ltd. v. State of Gujarat, AIR 1975 SC 1234 (Supreme Court of India); Ganga Bai v. Vijay Kumar, AIR 1974 SC 1126.

[74] *Infra,* at page 6. AbhinavChandrachud, *Does Life Tenure Make Judges more Independent: A Comparative Study of Judicial Appointments in India,* 28(297) CONNECTICUT JOURNAL OF INTERNATIONAL LAW 299, 321 (2013); Hon. Wayne Martin AC, J., *Court Administrators and the Judiciary – Partners in the Delivery of Justice,* 6(2) INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 3, 14 (2014); G.E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States,* 83 GEORGE WASHINGTON LAW REVIEW 1517, 1524 (2014).

[75] It is only complete implausibility that is a ground for reversal. Husain v. Olympic Airways, 315 F.3d 829, 835 (9th Circuit, 2002); Anderson v. City of Bessemer, 470 U.S. 564 (1985); Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 384 (9th Circuit, 1994); Daniel Solomon, *Identifying and Understanding Standards of Review,* GEORGETOWN UNIVERSITY LAW CENTRE, (2013), *available at* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Standards-of-Review.pdf.

de-novo standard is easily eliminated as argued above, the severe need for transparency in an activist-judiciary makes a strong case for a departure from the very limited scope of the *Barium* standard as well. Thus, the mere showing of presence of *some relevant material* would not be sufficient to pass the review.However, the bench will have no power to reassess the materials and come to its own conclusion under a "*clearly erroneous*" standard. Its scope will be limited only to the consistency and plausibility of the collegium's decision, and the bench will have to prove the implausibility of the outcome (as opposed to *insufficiency of the material,* which is an easier standard) to effect a reversal. Further, it is clear that in this standard, the reviewing bench will not have the power to compare the relative merits of different considered candidates, and will only restrict its review to whether there was any plausible reason for individual selections/rejections.

However, it is important for the SC to have an *in limine* standard for admission or rejection of applications for review, before it gets into the standard set out above, in order to prevent frivolous applications. I argue that the test for admission should be a *prima facie* case for patent unreasonableness of the outcome - bypassing of experience without ascribing of sufficient reasons in the minutes of the deliberations, selection of a judge with allegations of misconduct, or in cases of appearance of bias, or allegations of political influence. The exercise of admission would be a subjective exercise by the review bench, while the review itself on standards of "clearly erroneous" will require an objective assessment.

THE ROAD AHEAD

Through the course of this paper, I looked at the conflicted origin of the collegium system of judicial appointments, and argued that its functions fall squarely within the domain of what is known as "administrative action". The paper recognized that the "bright line" between the judiciary's administrative functions and its judicial role is increasingly blurring in an activist-judicial system. This is because appointments and roster-allocation determine the politics of the judges on the bench, and thus now determine the SC's jurisprudence. It is from this recognition that the paper's central thesis stemmed – that in order to render transparency and accountability to this 'political' process, the collegium's decisions must be subject to judicial review. However, this thesis needs to be put in the perspective of recent developments.

The present collegium bench, in a recent resolution, has stated that it will make available all its decisions regarding appointments/transfers on its website.[76] This step is an essential element

[76] *Supra* Note 14.

towards making judicial reviews of the collegium's decisions even possible. This is evidenced by the successful petition filed by the Helen Suzman Foundation in the Constitutional Court of South Africa, to mandate the release of full recording and transcript of the Judicial Service Commission's deliberations on proceedings under review. One of the grounds taken was that, in not allowing this, the JSC is curtailing a full and proper judicial review.[77]However, it is important to note that the online records provide the bare minimum of the deliberations - the final decision with bare reasoning. The resolution does not provide for disclosure of minutes of the meetings of the collegium - making it inadequate for a review, when compared to the comprehensive disclosure requirement in South Africa. However, a counter-consideration is the necessity to protect the confidentiality of the proceedings and the discussions about individual judges, in order to protect the judiciary's esteem.[78]Thus, balancing both considerations, I propose that the SC must disclose the full minutes of the collegium's deliberations on the challenged selection/rejection, to the aggrieved party, only once the review application is admitted upon the showing of the clear "*prima facie"* case.

Another logistical hurdle is reflected in the recent MCI Scam row, where CJI Deepak Misra overturned the orders passed by a bench headed by Justice Chelameswar that had ordered setting up of a larger bench, stating that the CJI was the master of the rolls and had sole power to allocate business, by established convention. This led to an uproar due to possibilities of conflict of interest, as there were rumors of allegations against Justice Misra himself.[79] This, admittedly, does call into question the viability of the review process of the collegium's decision, as the CJI would always be an interested party, while allocating the bench that would review his own decision as the head of the collegium. Thus, in deciding bench allocation for the review of the collegium's decisions, convention must give way to notions of substantive justice,[80] and the CJI's default power must be handed to the senior-most judge outside the collegium.

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[77] Helen Suzman Foundation v. Judicial Service Commission, Case CCT 298/16 (Constitutional Court of South Africa).

[78]This was the primary reason relied on by both Indian and South African Courts to oppose the publication of deliberations during appointment decisions. *See* The Helen Suzman Foundation v. Judicial Services Commission, Case No. 145/2015 (The Supreme Court of Appeal of South Africa). This decision was overturned by the Constitutional Court decision, but the concerns remain. Ajmer Singh, *'Transparency' can't trample 'Rights': Two SC judges tell CJI*, ECONOMIC TIMES (December 20, 2017) *available at* https://economictimes.indiatimes.com/news/politics-and-nation/transparency-cant-trample-rights-two-supreme-court-judges-tell-cji/articleshow/62141401.cms.

[79] Harish V. Nair, *MCI Scam Row: CJI DipakMisra Shows Who's the Boss amid High Drama in Supreme Court,* INDIA TODAY (November 11, 2017), *available at* http://indiatoday.intoday.in/story/mci-scam-cji-dipak-misra-high-drama-supreme-court/1/1087204.html.

[80]Sengupta, *supra* note 1.

Another last issue must be addressed. In order to protect against challenges to the validity of any Orders passed by the judge whose appointment is challenged, any application for review may be admitted only before any such Order is passed. Alternatively, the Orders can be held to be valid unless the grounds for review are materially linked to the judge's ability to pass that Order impartially and on merit.

The SC, today, has acquired the role of a governance court, stepping into the shoes of the Legislature, and the Executive very frequently. This not only makes it important for it to be democratically accountable, but also means that administrative decisions like appointments and business allocation have a deep influence on its jurisprudence. Court administration is today no longer divorced from adjudication and jurisprudence, and it is in this context that this paper's significance must be assessed.