

JUDICIAL APPOINTMENTS IN INDIA AND PAKISTAN: THE NEED FOR RESPONSIVE JUDICIAL REVIEW AND INSTITUTIONAL DIALOGUE

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Judicial Appointments were and continue to remain a hotly contested issue even after four landmark pronouncements by the Supreme Court. In the latest judgement on judicial appointments in 2015, the Supreme Court of India ('SCI'), in SCORA v. Union of India declared the National Judicial Appointment Commission, brought in by the 99th Amendment, as unconstitutional for violating the basic structure. The judgement has been highly criticised by scholars for ignoring the principles of separation of powers and ignoring "parliamentary supremacy" by striking down a constitutional amendment in toto. Interestingly, the Supreme Court of Pakistan ('SCP') was faced with a similar question in Nadeem Ahmed regarding the constitutional validity of the 18th Amendment, which, inter alia, introduced a Judicial Appointments Commission. The SCP acted in stark contrast to the SCI by engaging in institutional dialogue as opposed to striking down the Amendment. This paper attempts to provide multiple suggestions and ways as to how the SCI could have decided the case differently by drawing on jurisprudence from Pakistan. The article attempts to compare and contrast the approach adopted by the SCI with that of the SCP and argues for engaging in institutional dialogue on questions like judicial appointments, which do not form the "democratic minimum core" in a democracy.

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INTRODUCTION

* Cite it as: Batra, *Judicial Appointments in India and Pakistan: The Need for the Responsive Judicial Review and Institutional Dialogue*, 8(1) COMP. CONST. L. & ADMIN. L. J. 103 (2023).

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The issue of judicial appointments has surfaced in national discourse multiple times over the past few years. However, the most recent criticism comes from the highest constitutional functionaries in the country, who seem to argue that the Supreme Court of India (“**SCI**”) did not follow the principles of separation of powers in its judgement on judicial appointments.² In light of these circumstances, it becomes important to relook at the cases involving judicial appointments from the perspective of separation of powers.

As of today, India follows a Collegium system of appointments, wherein the five senior-most judges of the Supreme Court have the ‘*final word*’ on the appointment of judges to the SCI.³ Primarily due to concerns regarding transparency and opacity, the Parliament introduced the 99th Constitutional Amendment in 2015, providing for the establishment of the National Judicial Appointments Commission (“**NJAC**”). This was struck down by the SCI by a 4:1 majority.⁴ Notwithstanding the case’s merits, a key and rather unexplored question remains open: were there any other alternative remedies that could have been used by the court keeping in mind the principles of separation of powers? Curiously, the Supreme Court of Pakistan (“**SCP**”), which was placed in a very similar situation, chose to act rather differently. With identical constitutional provisions, the SCP chose to go down the route of institutional dialogue. This paper aims to explore alternative remedies that the SCI *could* have used in the NJAC Case, by looking at the example of dialogic judicial review and its application by the SCP.

² Damini Nath, *VP enters Collegium debate, recalls NJAC repeal: Never too late*, THE INDIAN EXPRESS, (Dec. 05, 2022), <https://indianexpress.com/article/india/v-p-enters-collegium-debate-recalls-njac-repeal-never-too-late-8303333/>.

³ Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgement in Comparative Perspective*, 49 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 569, 573 (2017). There remains some confusion as to who has the ‘final word’ on the appointment process because of the pocket veto exercised by the executive. For some instances, see Rushil Batra, *From Translucence to Opacity: Judicial Appointments after the Victoria Gowri Case*, I. CON. L. PHIL (Feb. 5th, 2023), <https://indconlawphil.wordpress.com/2023/02/14/from-translucence-to-opacity-judicial-appointments-after-the-victoria-gowri-case/>.

⁴ Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1.

This paper *first*, analyses the process of appointment of judges in India and discusses the reasoning of the SCI to declare the 99th Amendment Act unconstitutional. *Second*, it discusses the history of the appointment of judges in Pakistan and contrasts the approach adopted by the SCP with its Indian counterpart. *Third*, in light of the two case studies, it analyses the role of institutional dialogue and the need for responsive judicial review in cases relating to judicial appointments, particularly in India.⁵

THE REASONING ADOPTED IN THE NJAC CASE

Under Article 124 of the Constitution of India, the President is to appoint judges of the SCI in *consultation* with the Chief Justice of India (“CJI”).⁶ A series of judgements over the years concentrated the power of appointments with the judiciary and the word “*consultation*” was read to mean “*concurrence*”.⁷ This paved the way for the establishment of the “*Collegium system*”, consisting of three senior-most judges of the SCI, which was entrusted to decide on the appointment of judges to the SCI.⁸ The Collegium’s strength was later expanded to five judges in order of seniority,⁹ whose recommendations were said to be binding on the government.

To overcome the idea of giving an unelected group of judges the power to appoint other judges and taking inspiration from various other democracies in the world, a judicial commission model was brought in with the NJAC.¹⁰ The NJAC was to consist of six members, which included three senior-most judges of the SCI, the Union Law Minister, and two “*eminent persons*” who would be selected by a committee comprising the Prime Minister, the Leader of Opposition, and the CJI.¹¹ The rationale

⁵ This article restricts itself to the appointment of judges only to the Supreme Court due to paucity of space and time.

⁶ INDIA CONST., art. 124.

⁷ Supreme Court Advocates on Record Association and Others v. Union of India, (1993) 4 SCC 441; In Re: Appointment and Transfer of Judges, AIR 1999 SC 1.

⁸ *Id.* A similar process exists for appointment at the High Court level.

⁹ *Id.*

¹⁰ Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1 at 86.

¹¹ Abeyrante, *supra* note 3, at 600.

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behind including two representatives from civil society was to ensure accountability and transparency in the process.¹²

The 99th Amendment introducing the NJAC had a rather unique aspect that made it *qualitatively* different from other amendments to the Constitution – it got support from all parties across the spectrum, with not a single vote against it.¹³ Interestingly, this was not enough to get judicial deference and the SCI still proceeded to strike down the Constitutional Amendment *in toto*. During the course of the hearing, it was agreed by both sides that the independence of the judiciary is a part of the basic structure of the Constitution.¹⁴ The only question left open was whether the primacy of judges in the appointment process is a *sine qua non* to achieve the independence of the judiciary. If the answer was in the affirmative, then it had to be checked whether the NJAC preserved the primacy of the judiciary in the appointment process.

Notwithstanding the many contentions raised regarding the unconstitutionality of the 99th Amendment, there were broadly two major reasons for striking down the Amendment. These related to the *composition* and *functioning* of the NJAC.¹⁵ First, the presence of two “*lay persons*” from civil society who could veto an appointment even if the three members from the judicial branch collectively voted for it.¹⁶ Second, the reduced role of judges in the proposed amendment – from a Collegium of five senior-most judges which guaranteed primacy¹⁷ to the judiciary, to the NJAC which comprised three judges alongside the law minister and two eminent persons. In effect, the SCI held that the primacy of the judiciary in the

¹² Madhavi Divan, *Opening up Appointments: Civil Society Participation in the NJAC*, in *APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY AND INDEPENDENCE* 108 (Oxford University Press, 2018).

¹³ Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1 at 117 (Kehar J.).

¹⁴ *Id.* at 332 (Kehar J.).

¹⁵ Chintan Chandrachud, *Debating the NJAC: Framing a Remedy*, I. CON. L. PHIL. (Jul. 27, 2015), <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-framing-a-remedy-guest-post/>.

¹⁶ Supreme Court Advocates-on-record Association and Anr v. Union of India, (2016) 5 SCC 1 at 231.

¹⁷ *Id.* at 158.

appointment process was indeed an inviolable part of the basic structure to preserve the independence of the judiciary.¹⁸ Hence, the SCI declared the Constitutional Amendment as unconstitutional primarily because the composition of the NJAC and voting mechanisms violated the independence and primacy of the judiciary, and by extension, the basic structure.¹⁹ Never before had a Constitutional Amendment been struck down in its entirety by the SCI. This unique distinction falls only on the 99th Amendment. As we shall see in the next section, this approach is in stark contrast to Pakistan, a country that faced similar issues.

THE SEMINAL CASE OF THE 18TH AMENDMENT IN PAKISTAN

Article 177 of the Constitution of Pakistan provides for the appointment of judges to the SCP.²⁰ Similar to Article 124 of the Indian Constitution, it provides that judges of the SCP are to be appointed by the President in consultation with the Chief Justice of Pakistan (“CJP”).²¹ Even early jurisprudence on this article of the Constitution was similar to that of India, wherein confusion arose as to the ambit and scope of the word “consultation”.²²

In a series of cases, it was held that there was a nexus between judicial appointments and independence, and Article 177 was interpreted in a way that reduced the role of the executive and increased judicial primacy.²³ The judgement in *Al-Jehad Trust v. Federation of Pakistan* (“*Al-Jehad*”)²⁴ is strikingly similar to that of the *Second Judges Case*,²⁵ wherein the Court held that there is an inextricable link between judicial appointments and independence and

¹⁸ *Id.* at 354.

¹⁹ *Id.* at 238.

²⁰ PAKISTAN CONST., art. 177.

²¹ Sameer Khosa, *Judicial Appointments in Pakistan: The Seminal Case of the 18th Amendment*, in *APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE* 243 (Oxford University Press, 2018).

²² *Id.*

²³ HAMID KHAN, *CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN*, 573 (Oxford University Press, 4th ed., 2019).

²⁴ *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324.

²⁵ *Supreme Court Advocates on Record Association and Others v. Union of India*, (1993) 4 SCC 441.

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reduced the role of the executive in the appointment process. Post *Al-Jehad*, only the CJP could recommend names to the President of Pakistan for appointments to the SCP. The only leeway given to the President was that the judgement left open the possibility of the President not going forward with the appointment, but only after giving cogent reasons for the same. Therefore, primacy was accorded to the CJP, akin to the Indian case where primacy was accorded to the Collegium.

This position of primacy accorded to the CJP was sought to be changed by the introduction of the 18th Amendment. The 18th Amendment altered a total of 97 Articles of the Constitution of Pakistan.²⁶ It introduced Article 175A, which provided for a judicial commission for the appointment of judges to the SCP. In essence, the article envisaged a two-step process.²⁷ *First*, the Judicial Commission of Pakistan (“JCP”) was to make the initial selection of the candidates.²⁸ It would comprise a total of seven members, including the CJP, two senior-most judges of the SCP, a former Judge of the SCP nominated by the CJP, the Minister of Law and Justice, the Attorney General of Pakistan, and a senior advocate nominated by the Bar Council. Hence, out of seven, only three were to be sitting judges of the SCP. *Second*, the same had to be confirmed by an eight-member parliamentary committee which would have members from both the government and the opposition.²⁹

The process was such that for each vacancy, the JCP was to nominate names and forward it to the parliamentary committee. The committee would then have 14 days to confirm the nomination failing which the nomination would be deemed approved. The committee could reject a nomination only by a special three-fourth majority, in which case the JCP would have to provide a fresh nomination.

Soon enough, Article 175A was under challenge.³⁰ Interestingly, the challenge relied upon Indian jurisprudence and was on the grounds that

²⁶ KHAN, *supra* note 23.

²⁷ *Id.*

²⁸ Khosa, *supra* note 21.

²⁹ *Id.*

³⁰ Nadeem Ahmed, Advocate v. Federation of Pakistan, PLD 2010 SC 1165.

Article 175A violated the basic structure of the Constitution, which included the independence of the judiciary.³¹ The primary basis for this assertion was that the weight of judicial opinion had been drastically reduced, leaving room for the politicisation of the appointment process. As a result, a bench of seventeen judges was formed by the CJP to decide the case. Like in the Indian case, the key challenges to the 18th Amendment were regarding the composition and functioning of the commission.

Historically, the SCP has been rather shy about sitting over judgements challenging the constitutionality of amendments.³² This deference continued, wherein, after hearing the case on merits in full, the SCP refused to pass a final order. Instead, it passed a stern interim order, giving suggestions to Parliament on how to make the 18th Amendment constitutionally compliant. The court there went on to say:

*“We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for reconsideration. In adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate.”*³³ (emphasis mine)

It was thus made clear that if the Parliament did not make the required changes, the SCP had the power – and the inclination – to strike down the amendment as unconstitutional.³⁴ The SCP thus chose to send the matter back to Parliament. Arguably, something that weighed with it was that the Amendment being unanimously passed by the Parliament in a matter that was concerning its own appointment procedure.³⁵

In essence, the SCP suggested two changes to the 18th Amendment. First, increase the judicial participation in the JCP from two to four. Second, if the recommendation of the JCP was not accepted by the Parliamentary

³¹ KHAN, *supra* note 23, at 574.

³² Khosa, *supra* note 21, at 242.

³³ Nadeem Ahmed, Advocate v. Federation of Pakistan, PLD 2010 SC 1165 at8-10.

³⁴ Saroop Ijaz, *Judicial Appointments in Pakistan: Coming A Full Circle*, LUMS L. REV. JOUR. 86, 89 (2014).

³⁵ Khosa, *supra* note 21, at 246.

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Committee, it had to give cogent reasons for the same and refer the matter back to the JCP for its consideration – whose decision would then be binding on the Parliamentary Committee.

While the Parliament chose to incorporate both these Amendments in the form of the 19th Amendment, this essentially meant that judicial primacy was maintained by increasing the number of judges in the JCP. Hence, the SCP was satisfied with the 19th Amendment and the Parliament's compliance with its suggestions, and the matter was amicably resolved. However, such an approach leaves room for discussion in the Indian context.

THE ROAD NOT TAKEN BY THE SUPREME COURT OF INDIA

There are many similarities between India and Pakistan in the context of how jurisprudence on judicial appointments came about. *First*, while the textual basis of both used the word “*consultation*” and are almost identical provisions, both courts essentially read the same as concurrence, with minor differences as discussed above. *Second*, both the Parliaments tried to bring in the commission models, which were challenged before their respective Supreme Courts on the same ground. However, the way that both courts reacted presents a rather interesting dilemma of judicial restraint and deference, which further raises questions on separation of powers in India.³⁶

Was the SCI wrong in its approach in dealing with the NJAC? Specifically in the case of constitutional amendments, and more so if they have been passed almost unanimously, it is helpful to refer to what Rosalind Dixon calls “*responsive judicial review*”.³⁷ Dixon argues that courts should be mindful of their own institutional capacities and limits. She argues that when it comes to ideas that go beyond the “*democratic minimum core*” and are rather contestable, it would be wise to adopt a dialogic approach rather than a

³⁶ Aileen Kavanagh, *Judicial Restraint in The Pursuit of Justice*, 23, 24 (2010).

³⁷ ROSALIND DIXON, *RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE* (Oxford University Press, 2022).

“strong” form of judicial review.³⁸ Hence, in instances like the NJAC, the courts are not protecting the thinnest or the “*minimum core*” of democracy, which would mean independence of the judiciary in this case. Instead, they are deciding rather contested notions of democracy, like whether primacy is the *only* way to achieve the independence of the judiciary. Dixon uses the example of the NJAC judgement itself to put forth her case of the “*democratic minimum core*”. She argues that it is a widely accepted position that judicial independence is indeed a part of the “*democratic minimum core*”. However, the idea that judicial primacy is needed to ensure judicial independence is quite contested. In fact, the Collegium system is unheard of elsewhere and is rather unusual in global terms.³⁹ Most jurisdictions across the world are going towards the commission model, which includes members of the executive, at least in some measure, while recommending candidates.⁴⁰ Another striking feature, and perhaps the most important one, is the fact that judges have to go through a rigorous interview process in most such jurisdictions.⁴¹ For instance, in the United States, candidates are subjected to a televised interview not only on their judicial perspectives but also on their personal lives and views on controversial topics.⁴² Similar interviews are conducted in various countries, which allows for transparency and accountability in the process.⁴³

Thus, the Collegium system where *only* judges have the right to recommend names is presumptively unnecessary to maintain judicial independence which is part of the “*democratic minimum core*”⁴⁴. Hence, the least that the SCI

³⁸ *Id.* at 8.

³⁹ *Id.* at 86.

⁴⁰ Chintan Chandrachud, *Judicialisation of Judicial Appointments? A Response from the United Kingdom in APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE* 212 (Oxford University Press, 2018).

⁴¹ Prannv Dhawan, *Reform That You May Preserve: Rethinking the Judicial Appointments Conundrum*, 9 I. JOUR. CONST. L. 186, 193 (2020).

⁴² *Id.*

⁴³ For a detailed account of a comparative appointment process in other jurisdictions, see, *SECURING JUDICIAL INDEPENDENCE: THE ROLE OF COMMISSIONS IN SELECTING JUDGES IN THE COMMONWEALTH* (Hugh Corder & Jan Van Zyl Smit eds., SiberInk, 2017).

⁴⁴ *Id.* at 86.

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could – and should have – done was exercise restraint instead of striking down the entire Amendment as unconstitutional.

In the Indian context, such restraint can be exercised by a variety of means. When a legislation is challenged on the basis of unconstitutionality, it is fallacious to look at it as a binary – whether to strike down or not to strike down.⁴⁵ Rather, courts might as well read down legislation to bring them in conformity with constitutional requirements. The Court has several options, even if *prima facie* it sees the legislation as unconstitutional. In the present instance, there were at least two options that the court could have undertaken.

First, some scholars suggest that the court could have simply *read down* the provisions.⁴⁶ For instance, there was a lot of space for judicial craftsmanship in the question of the two “eminent persons”. There were broadly two arguments – malice-based and recklessness-based. In both, two unsuitable people might be picked up who can veto appointments suggested by judicial members. The simple response is that the Court could give a list of qualifications or disqualifications for such an appointment.⁴⁷ Another aspect that did not impress the court is the voting mechanism in the NJAC i.e., any two members have a veto over the unanimous opinion of the judicial branch. Some scholars argue that the SC could have read this down to mean that the two-person veto would apply *only* to judges.⁴⁸

The second alternative would be to follow the same model of institutional dialogue that Pakistan undertook i.e., refer the matter back to the Parliament. This is usually done when reading down becomes impossible or when the Court is rather wary of altering the Amendment so much as to change its character.⁴⁹ The idea of institutional dialogue, borrowed from

⁴⁵ Chandrachud, *supra* note 15.

⁴⁶ Rahul Bajaj, *Debating the NJAC: Framing a Remedy*, I. CON. L. PHIL. (Jul. 27, 2015), <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-framing-a-remedy-guest-post/>.

⁴⁷ Chandrachud, *supra* note 15.

⁴⁸ *Id.*

⁴⁹ Chintan Chandrachud, *Beyond Ghaidan and Back: the Supreme Court of India on Rights-Compliant Interpretation*, UK CONSTITUTIONAL LAW ASSOCIATION, (Nov. 30, 2013),

Canadian jurisprudence, means that Courts should recognize their own capacity constraints and the idea of separation of powers before adjudicating constitutional disputes.⁵⁰ This becomes important as judicial review presupposes a group of unelected judges overturning decisions made by elected members, who represent – at least in theory – the will of the people.⁵¹ This can take place through various methods, one of which was highlighted in *Nadeem Ahmed* which acts as an excellent example of dialogic judicial review, wherein after nudges from the Court, the executive takes into account its deficiencies in policy and makes suitable changes.⁵²

Another way for the SCI to follow the road of institutional dialogue could be to use the Suspended Declaration of Invalidity (“SDI”). With an SDI, the Court declares that certain provisions under the current legal regime are unconstitutional as they stand. However, instead of striking them down and thereby creating a possible vacuum, it gives Parliament an opportunity to cure the defect. Hence, the Court still gives directions for the realisation of the right, but suspends its operation for a given time period to allow Parliament to make the impugned provisions constitutionally compliant. Contrary to popular perception, the SCI has in fact used the SDI in numerous cases before.⁵³

<https://ukconstitutionallaw.org/2013/11/30/chintan-chandrachud-beyond-ghaidan-and-back-the-supreme-court-of-india-on-rights-compliant-interpretation/>.

⁵⁰ Luc Tremblay, *The Legitimacy of Judicial Review: The limits of Dialogue Between Courts and Legislatures*, (3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 617, 618 (2005).

⁵¹ *Id.* at 622.

⁵² Gautam Bhatia, *Coronavirus and the Constitution – XXXVII: Dialogic Review and the Supreme Court* (2), I. CON. L. PHIL., (Jun. 3, 2021), <https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/>.

⁵³ *Employee Provident Fund Organisation v. Sunil Kumar B.*, 2021 SCC OnLine SC 698; *Indira Sawhney v. Union of India* AIR 1993 SC 477 (Pandian J., ¶ 242); *Sampath Kumar v. Union of India* 1987 AIR SC 386. For an analysis of using the SDI in the Indian context, although in a different context, see Tarunabh Khaitan et al., *A Pathway for the Supreme Court in Ensuring Marriage Equality*, THE WIRE (Apr. 18, 2023), <https://thewire.in/law/a-pathway-for-the-supreme-court-in-ensuring-marriage-equality>.

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This argument of SDI becomes even more significant in light of the controversies surrounding the doctrine of revival.⁵⁴ As Professor Jain highlights, whether the doctrine of revival can be applied to unconstitutional constitutional amendments is still *res-integra*. When the Court struck down the 99th Amendment, it is unclear how the Collegium was revived, especially since it was a judicially created body having no mention in any statute. Thus, when the Court struck down the NAJC, it practically created a vacuum when it came to the appointment of judges. Hence, it is unclear as to where and how the Supreme Court derives the power to fill that void. It is in such circumstances of a possible vacuum that the SDI becomes even more important.

The idea of providing these alternatives is that once a Constitutional Amendment is passed almost unanimously, with not a single vote against it, it becomes incumbent on courts to participate in meaningful dialogue, and that can be achieved in numerous ways.

CONCLUSION

In this article, on a comparison of the process of judicial appointments in India and Pakistan, it became evident how two courts on alternate sides of a border reacted very differently to identical questions. The jurisprudence of both India and Pakistan is eerily similar, and both recently made attempts to bring in the judicial appointment commission model. Interestingly, both courts reacted rather differently, with one outright striking down the entire Constitutional Amendment, and the other engaging in institutional dialogue and prompting the Parliament to make the Amendment constitutionally compliant.

The thrust of this article is not to say that India should have replicated Pakistan's model, but is rather an attempt to deliberate on how the court *could* have reacted. The SCI struck down a constitutional amendment that passed unanimously, without a single vote against it. The NJAC attempted to correct a line of jurisprudence that wasn't textually tenable and in a case

⁵⁴ Sanjay Jain, *Debating the NJAC: The Philosophy of Revival*, I. CON. L. PHIL. (Jul. 27, 2015), <https://indconlawphil.wordpress.com/2015/07/27/debating-the-njac-the-philosophy-of-revival-guest-post/>.

that does not impact the “*democratic minimum core*”. Thus, in this case, the court should have gone through with a “*weak*” form of review showing some judicial deference, by either reading down some provisions or engaging in institutional dialogue. It was indeed a missed opportunity, one that could cost the country dearly.⁵⁵

⁵⁵ Indira Jaising, *National Judicial Appointments Commission: A Critique*, 49 EPW 16, 19 (Aug. 30, 2014).