Constitutional Amendment and Dismemberment :

Locating Judiciary as actors of Constitutional Dismemberment

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ABSTRACT

This thesis aims to broaden the concept of *Constitutional Dismemberment,* a term that has been given by Prof. Richard Albert in the context of constitutional amendments. The thesis has explored a gap in the development of this concept – whether courts can be located as primary actors of constitutional dismemberment, instead of being passive, secondary participants in the process, playing their role as guardians of constitution. It goes on to devise a litmus-test, one which, if tested positive, proves conclusively that the institution concerned has been guilty of constitutional dismemberment. The frame of reference used for this enquiry is judicial appointments to the supreme constitutional court, as a separation of power and checks and balances issue and two countries with similar shared experiences have been chosen as subjects of this enquiry: India and Pakistan. India uses a collegium-based model of judicial appointments, where judges appoint other judges, and Pakistan has a judicial commission cum parliamentary committee based model, brought in relatively recently by the eighteenth and the nineteenth constitutional amendment act. The thesis also aims to explore whether the judicial response to both these models can have something instructive for the institutions of either countries. The thesis concludes with the finding that the Indian Supreme Court is guilty of constitutional dismemberment, but the judicial response in Pakistan, seemingly better at first, need not necessarily present an experience to be emulated. As a corollary to this finding, the thesis also concludes that the concept of constitutional dismemberment, insofar as it excludes the judicial branch from being active perpetrators of it, is deficient and needs to be made more robust.

INTRODUCTION

Background

Constitutional dismemberment is a concept propounded by Professor Richard Albert. In his scheme of things, simple constitutional amendments are divided into two types – corrective and elaborative constitutional amendment (both further the purpose and meaning of the Constitution in line with the existing theme and structure). But amendments that cause constitutional dismemberment do much more than simply amending the constitution – it reorients the constitution to a new paradigm. To identify such instances of constitutional dismemberment, a three-pronged litmus test has been devised –

- There must be an amendment to the Constitution, which is not in the nature of rectification or exposition on the scope of existing provisions. It should introduce a new rule altogether.
- The amendment should be transformative in nature. It should alter the core features of the Constitution i.e., it should strike and change the structure or rights or the very identity of the Constitution
- The amendment must not constitute a break in the scheme of constitution ie., there must be continuity and it should be done without giving a new constitution itself. The aim of such an amendment can further or defeat the ends of liberal constitutionalism, such that its broader effect is immaterial.

Having chosen judicial appointments as the frame of reference to investigate into claims of judiciary being actors of constitutional dismemberment, the two comparators - India and Pakistan have been chosen as subjects of enquiry.

1. Justification for choice of comparators

India and Pakistan have been chosen as comparators because both countries have a parliamentary form of governance and as such have seen similar developments in the field of constitutional law vis-à-vis judicial appointments. India follows a collegium system of appointment whereas Pakistan now follows a judicial commission cum parliamentary committee model of appointments. Indian Supreme Court's response to the second and third judges' case with respect to Article 124 of the constitution will be the analysed and Pakistan Supreme Court's response to the eighteenth and the nineteenth constitutional amendment acts

(Article 175 A of the amendment) shall be within the scope of enquiry. Pakistan makes for a perfect comparator in this scenario because it presents a good point of contradistinction, given India's own failed experience with National Judicial Appointments Commission, and continuation with the collegium system of appointments. Thus, the common framework of judicial appointments works for both the countries.

2. Proposed question to be answered by the thesis

Constitutional dismemberment as a concept encapsulates the attempts made by a specific branch of governance i.e., the legislature that embodies the will of the popular majority (constituent power) and the judiciary acting as a check against those attempts. The thesis aims to answer -

Is it possible to locate the judiciary in the framework of Richard Albert and charge it with perpetuating constitutional dismemberment, by virtue of exceeding its authority and virtually amending the text of the constitution?

One of the most prominent ways by which many courts across the world have caused constitutional dismemberment, is by retaining the power of judicial appointments with themselves and thereby impacting the constitutional structure, which is indeed one of the three ways in which constitutional dismemberment is purported to take place as per Prof. Albert. A dismemberment of constitutional structure involves disturbing the allocation of power, as envisaged by the constitution. This particular variety of dismemberment sits at the heart of separation of powers and systems of checks and balances embodied by the Constitution. Appointment of judiciary by the judiciary, if done against the fundamental structure and spirit of the constitution, especially when introduced by the judiciary via a *judge made law* (judge made *constitutional amendment*, in this case), is enough to rouse suspicion that the judiciary is in fact guilty of dismembering the constitution.

For the purpose of this enquiry, the thesis will delve into a comparative analysis between two countries – India and Pakistan and shall also aim to assess whether a dialogical response given as part of judicial review, is necessarily a better approach.

3. Methodology and theoretical framework

Vicki C. Jackson outlines five different approaches for attempting a comparative study of constitutional law namely - classificatory, historical, universalist, functionalist and self

reflective.[1] Since the thesis deals with analysis of an institution i.e., judiciary in the form in which it operates in different two different countries and at the same time attempts to critically analyse its functioning, the approach adopted for research would be a functionalist one. Jackson further elaborates on Conceptual Functionalism - a form of analysis that hypothesise about the cause and effect of peculiar behavior shown by the institution. The thesis will have an element of institutional perspective in the form of correlations or causal associations between the functioning of the institution and the end result of constitutional dismemberment.

Among the five basic principles of case selection in the field of comparative constitutional studies, as given by Hirschl[2], - *most similar cases principle* has been chosen to select the two comparators. The most similar cases principle hinges on a dependent variable and an independent variable. The fixed independent variable in the thesis would be the shared institutional concern for maintaining judicial independence through regulating judicial appointments, and the dependent variable is the method in which either of the countries chose to tackle it, and in the process, incurred the charge of causing constitutional dismemberment.

The research employs qualitative doctrinal analysis of case laws, commentaries, constitutional provisions and secondary literature and primarily has an overlap of — historical, normative and functionalist approaches to methodology.

Limitation of scope of the thesis

The thesis makes a rather pointed enquiry into the nature of judicial response while handling issues of judicial appointments. For abundant clarity, it is important to highlight the discussions and debates that were excluded as part of the thesis, but nevertheless present fertile sites of academic enquiry -

- The thesis is limited to assessing the role of judiciary in making amendments to the constitution or responding to amendments made by the Parliament. Actions of the Parliament itself, while relevant, are beyond the scope of this thesis. The limitation has been pointed out, wherever applicable.
- For purpose of clarity, provisions dealing with the Supreme Court only have been used, however analogous rules and provisions also apply to the High Courts of the two countries.

[1]Jackson, V. C. (2012). Comparative Constitutional Law: Methodologies. In M. Rosenfeld, & A. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law (pp. 54-74).
[2]Ran Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies', in Comparative Matters: The Renaissance of Comparative Constitutional Law (OUP 2014) 253.

- India's response to the National Judicial Appointments Commission Bill, or the ninety-ninth constitutional amendment act[3] is covered only briefly and greater focus has been on the second and the third judges' case, which constitute the law as on date. The Bill reflects an amendment made by the Parliament, while the thesis deals with amendments made to the Constitution by the judiciary.
- The thesis may be accused of cherry picking the cases and comparators in a manner to fit the hypothesis. However, if even one cases can be conclusively proven, there is reason to argue that the concept of constitutional dismemberment, as it exists on date, requires greater depth and further revision to include judiciary as actors of dismemberment.
- The tone and tenor of the thesis is argumentative, more than descriptive. The thesis does come from a place of value judgement informed by its initial hypothesis, however a separate chapter has been accorded to include the arguments from the other side.

Structure of thesis

Chapter I begins by a detailed introduction of the concept of constitutional dismemberment and informs about the role of judiciary that has been envisaged in the Albertinian framework. Chapter II elaborates upon the relevance of picking judicial appointments as the frame of reference and brings out the link between judicial appointment and judicial independence as an issue of separation of power. Chapter III introduces the two comparators – India and Pakistan and briefly traces the legal and constitutional history of the relevant provisions. Chapter IV defines the three-pronged litmus test of constitutional dismemberment and clearly specifies the judicial action which is under the scope of enquiry. Chapters V, VI AND VII give the finding after testing the two comparitors on first, second and third prong of the test, respectively. Chapter VIII highlights the main arguments that can be presented by the other side. Chapter IX gives the Conclusion.

[3]Supreme Court Advocates-on-record Association & Anr. vs. Union of India, (2016) 5 SCC 1.

Chapter I

CONSTITUTIONAL AMENDMENT AND DISMEMBERMENT

Constitutional Dismemberment – Definition and Concept

Constitutional dismemberment is a concept, doctrine, phenomenon – many identities rolled in one – propounded by Professor Richard Albert.[4] This concept has been fleshed out in the larger framework of constitutional changes brought in by the legislature and it is based on the assessment of the very nature of constitutional amendments being introduced by the legislature.

At the very outset, constitutional amendments are divided into two types – corrective and elaborative constitutional amendment (both of which further the purpose and meaning of the Constitution **in line with the existing theme and structure of the constitution**). Simple constitutional amendments have been distinguished from constitutional dismemberment in the following terms –

'an amendment is an authoritative change to higher law that corrects, elaborates, reforms, or restores the meaning of the constitution consistent with its existing framework and fundamental presuppositions.[5] *'*

Constitutional dismemberment however are those amendments made to the constitution which neither rectify nor elaborate upon the existing constitutional framework. Rather, its motive is to deliberately disassemble an elemental part of the constitution[6] – which could look like obliteration of fundamental rights or any other basic building blocks. An amendment aimed at dismembering the constitution usually assaults one of the three seminal features that make the constitution – rights, structure or identity. For example, BREXIT, that causes fundamental changes to the status of EU laws in the UK or proposed change to Article 9 of the Constitution, which contains Japan's commitment to Pacifism, would constitute as constitutional dismemberment in the opinion of Prof. Albert because they bring about

[4]Albert Richard, 'Constitutional Amendment and Dismemberment', (2018) 43 Yale Journal of International Law 1, 38-49.

[5]Richard Albert, 'Keynote Address : Constitutional Amendment in Constitutional democracies : Transformation, Eternity, Illusion', (2020) 30 Indiana International and Comparative Law Review 3, 359.

[6]Richard Albert, Benvindo, Ramirez, Villalonga, 'Constitutional Dismemberment in Latin America' (2023), 99, 97-133 http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932022000200097 accessed on 21st March 2024.

fundamental changes to governance structures and popular cultural values held by the nation.[7] In the context of Chile[8], the constitutional amendment of 2005, that significantly altered the structure of interbranch relations as contained in the original constitution and changed the composition of Constitutional tribunal was also seen as structural dismemberment of the Constitution, even though the amendments were aimed at reducing the military's influence in the political process.[9]

Professor Albert insists that Constitutional dismemberment is distinguished clearly from usual amendments made to the Constitution insofar as the consequence of a dismemberment exercise is unmaking of the Constitution without a clear and formal break in the legal continuity of the Constitution itself i.e., the new scheme proposed as the result of the dismemberment exercise departs so greatly from the previous scheme (or part thereof) of the unamended constitution that it almost qualifies to be an exercise of re-drafting of the constitution (or its part thereof), one that should only be attempted by the constituted power, as representative of the constituent power by a process which is similar to the process of ratification of the original constitution.

Constitutional Dismemberment thus mandatorily involve the following components – a change in Constitution brought about within the existing framework of constitutional amendments, which is incompatible with the original framework and purpose of the Constitution.

Role of Judiciary in the framework of Constitutional dismemberment

As per Professor Albert, judiciary has been located as a **catalyst** in the larger scheme of constitutional dismemberment. By definition, a catalyst is a chemical that does not actively take part in the chemical reaction but either retards or accelerates the rate of reaction. That is informative of the role that is envisaged for the judiciary – to be the catalyst which will either facilitate or hinder the attempt at constitutional dismemberment.

[7] *Supra 5*, 355.
[8] Supra 3, pg. 117.
[9] Dante Figueroa, 'Constitutional Review in Chile Revisited: A Revolution in the Making' (2013) Duquesne Law Review , Vol.51, 403-411 accessed at https://www.corteidh.or.cr/tablas/r31162.pdf

Prof. Albert sees judiciary as the final front against the assaults made by the legislature in the form of constitutional amendments. In that vein, he has discussed six pillars of judicial nullification power (of constitutional amendments), across the world[10]

1. Procedural Irregularity – when the judiciary nullifies an amendment passed by the legislature in a procedurally irregular manner.
2. Subject-rule mismatch - when differential threshold has been prescribed by the constitution for amending its various parts, and the legislature has not complied with the threshold while passing a constitutional amendment.
3. Temporal limitations – when the judiciary nullifies an amendment for not complying with a time restriction, prescribed in the Constitution.
4. Codified unamendability – when the judiciary nullifies an amendment which is in violation of a textual rule as contained in the constitution, prohibiting the very amendment.
5. Interpretive unamendability – this offers a discretionary avenue to the courts to nullify such amendments which violate an unwritten norm, which according to the judiciary, is central to the governance and polity. By virtue of discretion afforded to the courts in this category, they often declare some parts of the Constitution as the basic-structure, embodying some overarching values, even though the Constitution itself makes no reference to any such sacrosanct provision. In Prof. Albert's own words, this is a very controversial form of the power of judicial nullification[11], especially in view of a court exercising its discretionary power *selectively* and for *self-serving purposes*, thereby risking its own legitimacy.[12]
6. Supranational constitutional restrictions – whereby the judiciary can nullify an amendment for being against international rules and norms, and the same have been accorded a supra-national status by the constitution.

While discussing *interpretive unamendability*, Prof. Albert takes the example of the Indian Supreme Court, that has exercised this discretionary power of interpretive unamendability and given a *basic structure doctrine*. Taking the example of *Minerva Mills Ltd. v. Union of*

[10]Richard Albert, *The power of judicial nullification in Asia and the world, The Law and Politics of Unconstitutional Constitutional Amendments in Asia*, (2023, Routledge) 232.
[11]*Ibid, 239.*
[12]A.G. Noorani, 'The judges'case', in *Constitutional questions and citizens' rights* (Oxford University Press, 2006) 95-97.

India[13], the Court used its self-propounded basic structure doctrine to nullify a constitutional amendment that had stated "*no amendment of this Constitution … shall be called in question in any court on any ground*"[14]. The amendment further stated that there will be 'no limitation on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of this Constitution under this article.'[15] Without discussing how promulgation of basic structure doctrine might itself be a constitutional amendment introduced by the judiciary, the frame of reference makes the subsequent amendment passed by the legislature as suspicious, while seeing the judicial nullification power as a shield for democracy.[16]

It is noteworthy that 'interpretive unamendability' is usually seen acting out in the context of constitutional silences i.e., rules, principles, procedures and norms upon which the Constitution is silent. In other words, there is nothing to suggest on the contrary to a rule that has been read into the Constitution, by the judiciary. Prof. Albert states that even where the text of the Constitution has left gaps, constitutional culture can inform the norm or rule that can be supplied to fill in the space that had been left blank by the constitution.[17] *It is in the text's inevitable gaps and abeyances that culture and convention find their place.*[18]It is well acknowledged that important normative consequences flow as a result of constitutional silence, which are often sites of political compromise. This context may prove important while assessing the complete scope of judicial intervention in cases where the judiciary has supplanted or implanted the text into the Constitution.

According to Prof. Albert, whether judiciary is viewed as wielding an anti-democratic sword, while nullifying amendments that have been passed by the elected constituted power i.e., legislature, or it is viewed as a shield against assault on the democracy, both are rooted in competing views of democracy itself. However, under the radar of such unconstitutional constitutional amendments, the judiciary is never seen as a PRIMARY AND DIRECT ACTOR of introducing constitutional amendments, but only as a PASSIVE PARTICIPANT IN THE PROCESS, which has been tasked with the most important responsibility to protect the Constitution from attempts at dismemberment. In fact, constitutional dismemberment has been seen as a judicial doctrine to aide the judiciary in evaluating transformative

[13]1980 AIR 1789.
[14]42nd Constitutional Amendment Act, 1976.
[15]*Ibid.*
[16]*Supra* 10, 241
[17]Richard Albert and David Kenny, 'The challenges of constitutional silence: Doctrine, theory, and applications' (2018), Vol. 16 International Journal of Constitutional Law, 3, 880, 883.
[18]*Ibid.*

constitutional changes brought about by the legislature. In implementing the test of constitutional dismemberment for constitutional amendments proposed by the legislature, the judiciary has been advised to investigate into popular support for these amendments from the constituent power in general (either by a referendum or in any other manner), especially in jurisdictions where the Constitution does not envisage a separate and more onerous mechanism for amendments that alter the basic structure of the Constitution or in jurisdictions where it is relatively easy to amend all parts of the Constitution.

The Kenyan Supreme Court's response in the case of Building Bridges Initiative has been illustrative of the role that the judiciary needs to perform : to block those amendments which are in effect, provisions of constitutional dismemberment.[19]The Supreme Court of Kenya had to decide constitutionality the Building Bridges Initiative Constitutional Amendment Bill, which was an all encompassing amendment bill pertaining to nearly seventy four amendments of the constitution of Kenya.[20] The bill itself was the result of a *handshake* between the rival political leaders -Mr. Raila Odinga and Mr. Kenyatta and the same was termed *as 'the fruit of a poisoned tree, and therefore wholly unsalvageable as a constitutional matter.'*[21] The Kenyan Constitution bench described the bill as "a presidential initiative in the guise of a popular initiative",[22] and called it out for defeating the constituent power's i.e., people of Kenya, prerogative of giving a Constitution to itself. The Supreme Court of Kenya called the BBI Bill as an attempt of Constitutional dismemberment in the garb of amendment and therefore, it could not have been passed by making use of simple constitutional amendment procedures.[23]Thus, in the lager scheme of constitutional dismemberment, judiciary has been viewed as the final bastion to protect against dismemberment attempts by the executive.

IDEAL JUDICIAL RESPONSE ON BEING FACED WITH ATTEMPT AT CONSTITUTIONAL DISMEMBERMENT

[19]Richard Albert, 'Constitutional Dismemberment in Constitutional Design', DPCE online, 2037-6677,1592-1594 https://www.dpceonline.it/index.php/dpceonline/article/download/1659/1660/ accessed on 6th June, 2024.
[20]For detailed description of the provisions, see https://kajiadoassembly.go.ke/wp-content/uploads/2021/02/Summary-of-the-BBI-Constitutional-Bill-and-Legislative-Bills-2021.pdf accessed on 6th June, 2024.
[21]Makau Mutua, 'Kenya and the BBI Five', (Verfassungsblog, 11th June 2012) https://verfassungsblog.de/kenya-and-the-bbi-five/ accessed on 6th June 2024.
[22]Joseph Wangui, 'President Uhuru Kenyatta acted in excess of his powers on BBI, court rules', (The Nation, 14th May, 2021) https://nation.africa/kenya/news/president-uhuru-kenyatta-acted-in-excess-of-his-powers-on-bbi-court-rules-3399520 accessed on 6th June 2024.

[23]*Supra 19*, 1593.

As per Prof. Albert, after ascertaining that a Constitutional Amendment is in fact an attempt to dismember the Constitution, the judiciary is supposed to have an advisory opinion on the nature of such an amendment and whether or not the legislature has properly discharged the burden of proving popular support for its amendments. Such an advisory opinion will have a binding value depending upon the strength of the unanimity of the opinion itself i.e., a completely unanimous consensus among all the judges on the bench will hold a greater binding value than a majority. The strength of such an advisory opinion will decrease with greater split/divide among the judges on the bench. However, how to mobilise this mechanism and ensure that the advisory opinion is taken with the same level of seriousness by the amending power i.e., the legislature as with which it was delivered by the judges, is left unaddressed by the Prof. Albert.[24]

It is to be remembered at all times that the vantage point of approaching constitutional dismemberment – does not change. It is always seen from the perspective of the constituted power i.e., the legislature and they remain the sole actors of constitutional dismemberment.

While Prof. Albert does talk about the problem of '*juristocracy'*, by which judges sit in judicial review over constitutional amendments and have a final say in allowing some amendments over the others, he stops short of addressing instances where judiciary itself has been responsible for bringing in virtual amendments to the Constitution, by practically re-writing the text of the Constitution itself, and by doing so – no longer being a bystander or gatekeeper of constitutional dismemberment rather an active perpetrator of the same.[25]

In fact, taking the example of Honduras, the judiciary has been blamed for dismembering the Constitution – but only insofar as it failed to follow a judicial precedent, failed to account for a constitutional prescription that disallowed the constitutional dismemberment and failed to block an attempt at the same by the legislature.[26]

The test for constitutional dismemberment

In order to investigate whether any branch of governance is indulging in constitutional dismemberment, as the concept stands defined by Prof. Albert, it is necessary to look into the list of essential ingredients that constitute constitutional dismemberment and then check the same against the suspended action -

[24]*Supra* 4.
[25]*Supra* 4.66-71.
[26]*Supra* 4, 67.

- There must be an amendment to the Constitution.
- The amendment must not be in the nature of rectification or exposition on the scope of existing provisions.
- It should alter the core features of the Constitution i.e., it should strike and change the structure or rights or the very identity of the Constitution, i.e., '*transformative alterations that simultaneously unmake the Constitution and reorient it towards a new direction'*
- The aim need not necessarily be to further or defeat the ends of liberal constitutionalism.
- There must be continuity i.e., it should be done without giving a new constitution itself.
- Since all amendments are not dismemberments, only the truly transformative ones qualify as dismemberment of the Constitution – Prof. Albert gives three ways to judge whether an amendment is in fact transformative: whether the change goes against the normative vision of what should be protected by the Constitution or goes against the understanding of the other actors and stakeholders or is completely opposite to the original version/drafting.

Chapter 2

JUDICIAL APPOINTMENTS AS FRAME OF REFERENCE : AN ISSUE OF SEPARATION OF POWER AND CHECKS AND BALANCES

Since the frame of reference chosen to locate judiciary as actors of constitutional dismemberment is that of judicial appointment, it becomes necessary to establish the causal link between judicial appointments and separation of powers, as a constitutional guarantee. As per the Albertinian conceptualization, for an amendment to qualify as constitutional dismemberment, it should attack the structure, rights or the very identity of the Constitution. Judicial appointments would qualify in the 'structure' category, if a coherent link can be established between appointment of judges as a problem that sits at the heart of structural separation of power between the executive and the judiciary.

Constitutions serve many purposes, one of which is to be the instrumentality through which the powers of the government can be restricted.[27]Historically speaking, the concept of Separation of powers can be traced back to James Madison, who was of the view that accumulation of power in any one branch of governance, legislature, executive or judiciary, is the very definition of tyranny.[28] Later, Montesquieu linked the tyranny of one branch that discharges the power of other two branches, with defeating the ends of liberty of the citizens, because an all-powerful legislator or executive or judiciary is more likely to act arbitrarily.[29]Whether it is a strict separation of power stemming from the US model or a loser separation of power stemming from the Westminster model or a hybrid one that incorporates a Westminster structure of parliamentary governance while marrying it with an empowered judiciary that checks the legislature and the executive for exceeding their briefs, through strong judicial review, there is no one perfect method to ensure separation of powers.[30]

Thus, Constitutions across the world have tried to devise a mechanism to give effect to the herculean task of maintaining the dynamic equilibrium between allocating power to different branches of governance and at the same time, not allow this power to go unbridled, resulting into self-aggrandizement by one branch. This delicate balancing act has led to the twin

[27]A. Hamilton, J. Madison and J. Jay, *The Federalist Papers* (Mentor, 1961) 301.
[28]*Ibid.*
[29]A. M. Cohler, B. C. Miller and H. S. Stone, *Montesquieu, The Spirit of the Laws [1748]* (Cambridge University Press, 1992) 157.
[30]Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (OUP, 2016)

doctrines of separation of powers and checks and balances, which envisages a system of accountability of one branch to the other two.[31]

Judiciary has been seen as the guardian of the constitution, one that has been tasked with the responsibility of thwarting attempts of its violation. In the context of separation of power and checks and balances, judicial review over executive and legislative actions has been seen as the way in which the judiciary discharges its responsibility. Often viewed as a branch that is *least dangerous* because of being insulated from pandering to popular will of the people, thereby being in the most suitable position to check the branches who depend upon popular vote for their sustenance[32], designing a strong judicial system is a task that stares at seemingly ir-reconciliable ends - checking the constituted power all the while lacking the justification due to not being an elected body.[33]However, this is the very reason that makes it competent to do so.

System of checks and balances runs both ways, ie., the least dangerous branch of governance cannot be allowed to operate without check on its own authority, lest it becomes the most dangerous one. Of all the ways that ensure checks upon the judiciary, appointment of the judges is one of the most intractable problem that has plagued the constitution makers to strike the right balance between ensuring judicial independence and allowing for checks upon the unelected branch of governance. Such a constitutional commitment to judicial independence is generally ensured by opting for one of the four models of appointment[34] - (a) single-body appointment mechanisms[35], which allows the executive to appoint the judges; (b) professional appointment mechanism[36], which allows other judges to appoint new judges in a self-perpetuating manner ; (c) cooperative appointment mechanisms[37], in which two different

[31]Andras Sajo and Renata Uitz, *The Constitution of freedom and introduction to legal constitutionalism*, (OUP, 2017) 128
[32]*Supra 27*, 465.
[33]Jeremy Waldron 'Core of the case against Judicial Review', (2006) 115 Yale Law Journal 1346.
[34]Elliot Bulmer, *Judicial Appointments International IDEA Constitution-Building Primer 4* (IDEA 2017)
[35]Example UK, through an independent selection commission https://www.supremecourt.uk/about/appointments-of-justices.html accessed on 7th June 2024.
[36]Example India, which can qualify for both professional and cooperative models as appointments are seen to be self-perpetuating, but require the concurrence of President.
[37]Ex., Brazil – Article 101, both president and senate are involved.

bodies cooperate and nominate the judges; and (d) representative appointment mechanisms[38], which allows more than two bodies to nominate a fixed quote of judges.[39]

It is important to note that judicial appointment is one of the many ways to elicit accountability from the judiciary, others being removal of judges, budget allocation to the judiciary, source of salary of the judges, altering the jurisdiction[40] and thus, complete spectrum of constitutional guarantees on each of those markers must be taken together. However, *the selection of judges is a central factor in most theories of judicial independence*[41]because it is the only factor that strongly raises a strong presumption against impartiality of judiciary, a value which is expected to inform every practice of this particular branch of governance. The pre-occupation with establishing an independent judiciary has resulted into various methods of appointment as discussed above and at the same time, has resulted into global proliferation of judicial councils[42] as means to attain the elusive aim of balancing between judicial accountability and independence. Either ways, judicial appointments can be safely concluded to be a structural separation of power problem.

[38]Example - Mongolia, where one-third of the Constitutional Court is appointed by the president, parliament, and the judiciary, each https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf at 10, accessed on 8th June 2024.
[39]Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003)
[40]*Supra 31*, pg. 157
[41]Nuno Garoupa, Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) The American Journal of Comparative Law, Volume 57, Issue 1.103, https://doi.org/10.5131/ajcl.2008.0004 , accessed on 5th June 2024.
[42]*Ibid*, 105.

Chapter 3

INTRODUCTION : JUDICIAL APPOINTMENTS IN INDIA AND PAKISTAN

In order to find out whether judiciary can work as an agent of constitutional dismemberment, two jurisdictions have been selected for analysis from the lens of appointments of judges – India and Pakistan. Both countries, being parliamentary democracies having analogous constitutional provisions that are in consideration, provide a good point of comparison between their strikingly different treatment of a common issue : appointment of judges to the constitutional courts.

India

The Indian Supreme Court is the highest court of the land established under Part V of the Indian Constitution by Article 124.[43] The Supreme Court of India is a powerful body entrusted with the task of deciding a wide array of disputes[44] along with the power of Judicial Review embodied in Article 13 that declares laws in derogation of fundamental rights to be void.[45] Besides, it enjoys original jurisdiction over disputes involving the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States, if and insofar as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.[46]Apart from this, it has advisory, appellate, suo motu and extra-ordinary jurisdiction, wherever applicable.[47] Thus, the Supreme Court of India is a powerful organ that enforces fundamental rights of the people and as such, enjoys considerable credibility among the people.[48]

[43]Art.124 (1), Constitution of India : *'There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than thirty-three other Judges.'*
[44]Ajay Bhargava and Trishala Trivedi, 'The Supreme Court of India and its Diverse Jurisdictions' (18th July 2023, 2023 SCC OnLine Blog Exp 59), https://www.scconline.com/blog/post/2023/07/18/the-supreme-court-of-india-and-its-diverse-jurisdictions/ accessed on 1st June 2024.
[45]Article 13(2), Constitution of India : '*The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.'*
[46]Article 131 and 32, Constitution of India.
[47]Articles 132-137, 143 Constitution of India.

[48]Banerjee, S., 'Judging the Judges', (2002) Economic and Political Weekly, 37(50), 4983, 4984, http://www.jstor.org/stable/4412951 accessed on 2nd June 2024.

The procedure for appointment of judges to the Supreme Court has been provided in Article 124 of the Constitution of India, however, the constitution is silent upon the rules of appointment of the Chief Justice of the Supreme Court. India had been following a strict seniority-based rule for appointment of chief justices to the High courts and Supreme courts i.e., the judge who is most senior in service among the cohort of judges was supposed to be elevated to the rank of chief justice and will be serving in that capacity until retirement without any fixed tenure, following which the next senior-most judge will take the place of the outgoing chief justice. However, two derogations from this rule had taken place between 1973 and 1977 – when retired Justice A.N. Ray and retired Justice Beg were made to supersede their more senior counterparts, for taking an anti-establishment stance over deciding the exact scope of power of judicial review[49]. In backdrop of other historical developments through the decades of 1970s to 1990s,[50] the tussle between the executive and the judiciary had become even more pronounced and one of the manifestations of this power struggle between the two organs of governance came in the form of the three-judges' case, which adjudicated upon the rules for appointment of judges to the Supreme Court and High Court.

The first judges' case[51] posed the following question for adjudication –

Whether the constitutional requirement under Article 124(2) for the President of India to '**consult'** the Chief Justice of Supreme Court before appointing judges to the Supreme Court imply that the president is bound by the opinion of the Chief Justice, or, in other words, whether 'consultation' in fact means 'concurrence' for the purpose of Article 124(2) of the Constitution of India?[52]

This question was answered in **the negative and consultation was not held to be concurrence** and the President was allowed to differ from the opinion of the Chief Justice and adopt a contrary view. Thus, the Union government and not the Chief Justice, would have the final say in the matter.

[49]Chandrachud Abhinav, *'The Judges Cases : The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India' (*OUP 2014) 71-78.
[50]Henderson, M, 'Setting India's Democratic House in Order: Constitutional Amendments' (1979). Asian Survey, 19(10), 946, 951 – 954 https://doi.org/10.2307/2643847,accessed on 3rd June 2024.
[51]SP Gupta v. Union of India, AIR 1982 SC 149.
[52]*Ibid.*

However, in the second judges' case[53], which was decided about 12 years after the first judges case, the court was asked to review its decision in the first judges' case and it held that –

For appointments to the Supreme Court, the Chief Justice of India would have to consult (a) the two most senior judges on the Supreme Court and (b) the most senior judge on the Supreme Court whose opinion was 'likely to be significant in adjudging the suitability of the candidate', either because the judge hailed from the same high court as the candidate, or 'otherwise'[54]

A similar procedure was given for high court judges as well. In a nutshell, the court held consultation to be concurrence and accorded primacy to the opinion of the Chief Justice.

The third judges' case[55] came in the form of a presidential reference – to explain the rule laid down by the Supreme Court in the second judges' case. In this reference, the Supreme court of India gave the name to the body of judges whose recommendation would be binding upon the President – *the collegium system* : *'As analysed in the majority judgement in the second Judges case, as also the precedent set by the then Chief Justice of India, as set out earlier, and having regard to the objective aforestated, we think it desirable that the collegium should consist of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court'*[56] Additionally, the senior most judge at the Supreme Court hailing from the High Court from which an appointment is to be made, should also be consulted, however such a judge will not form a part of the collegium.[57]

Pakistan

Pakistan has a parliamentary form of governance and Part VII of its constitution deals with establishment of the judiciary. As per Article 175 and 176 of its Constitution, *'the Supreme Court shall consist of a Chief Justice to be known as the Chief Justice of Pakistan and so many other Judges as may be determined by Majlis-e-Shoora (Parliament) or, until so determined, as may be fixed by the President.'* The appointment scheme of the judges to be appointed to the Supreme Court however has undergone considerable changes over the years.

[53]Advocates on Record Association v. Union of India, (1993) 4 SCC 441.
[54] Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268.

[55]In re Special Reference, AIR 1999 SC 1.
[56]In re Presidential Reference, A.IR. 1999 S.C. 1 at 16.
[57]M.P. Singh, 'Securing the Independence of Judiciary – The Indian Experience', (2000) Indiana International & Comparative Law Review 10:2, 245, 275.

Before the passage of the 18th Constitutional Amendment Act of 2010[58], the rule for appointment of judges had striking resemblance to the Indian constitutional provision -

'1)The Chief Justice of Pakistan shall be appointed by the President, and each of the other Judges shall be appointed by the President after consultation with the Chief Justice.'[59]

The *Chief Justice of the Supreme Court recommended a panel to the President and from that panel, a suitable candidate was appointed.*[60]The discretion of the executive was further curtailed by the judiciary in 1996[61] and the role of the President was made ineffectual by making the opinion of the Chief Justice not only binding upon the President, but also the reasons for rejecting the recommendations were made justiciable.

It was during the first wave of 'public interest litigation' and 'judicial activism',[62] when the Supreme Court of Pakistan adopted an activist stance while adjudicating cases falling under the jurisdiction of Article 184(3)[63]. The decade of 1990s saw considerable expansion of the scope of PILs by allowing their suo motu initiation and at the same time, devised the method of "rolling review" i.e., an executive action is supervised by the court periodically by giving out 'interim orders' with each successive hearing, all the while keeping the matter open and under consideration, as opposed to issuing one final declaratory or decisive judgment, as is the practice in the Indian Supreme Court.[64]

During this time, the court also concerned itself with issues of judicial independence and proper division of judiciary from the executive, as was envisaged in the 1973 Constitution[65] of Pakistan.[66] In this backdrop, the controversy relating to judicial appointments in Pakistan led to the passage of the 18th amendment act, which had introduced significant changes to appointment process, thereby making it a good point of comparison vis-à-vis India.

Controversy leading to the passage of the 18th Amendment Act

Al-Jehad Trust v. Federation of Pakistan [67]

[58]The 18th Constitutional Amendment Act, provisions at https://www.pakistani.org/pakistan/constitution/amendments/18amendment.html accessed on 4th June 2024.
[59]Refer Note no. 421 at https://www.pakistani.org/pakistan/constitution/part7.ch2.html#421 accessed on 4th June 2024.
[60]Ijaz, Saroop, 'Judicial Appointments in Pakistan: Coming Full Circle' (2014) LUMS Law Journal 1, 86, 87.
[61]Al Jehad Trust v. Federation of Pakistan, PLD 1996 (SC) 324.
[62]Moeen H Cheema, 'Two steps forward one step back: The non-linear expansion of judicial power in Pakistan', (2018) 2 International Journal of Constitutional Law 16, 503, 516.
[63]Article 184(3), Constitution of Pakistan, allowed the Supreme Court to at once take up any matter pertaining to "public importance w.r.t. the enforcement the Fundamental Rights.
[64]*Supra 51.*
[65]Art.175(3), Constitution of Pakistan, 1973 : Stipulation of a five year deadline for separation of power between judiciary and executive.
[66]Yasser Kureshi, *Seeking Supremacy*, (Cambridge University Press, 2022) 299-303.
[67]Al-Jehad Trust v. Federation of Pakistan, PLD 1996 SC 324

Al Jehad Trust, filed a Public Interest Litigation petition in the year 1996 challenging the appointment process of judges in Pakistan. The procedure for judicial appointments was embodied in the *erstwhile* Article 177[68] and 193[69] of the Pakistani Constitution :

> *177. Appointment of Supreme Court Judges.*
>
> *(1) The Chief Justice of Pakistan shall be appointed by the President, and each of the other Judges shall be appointed by the* ***President after consultation with the Chief*** *Justice.*
>
> *193. Appointment of High Court Judges.*
>
> *(1) A Judge of a High Court shall be appointed by the* ***President after consultation-***
>
> *(a) with the Chief Justice of Pakistan;*
>
> *(b) with the Governor concerned; and*
>
> *except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.*

It was argued by the petitioners that such a procedure lacked transparency and was susceptible to political interference, thereby compromising the independence of the judiciary. Relying upon the principle of judicial independence in Islam and Indian precedents, the Supreme Court held that the consultation required for appointments to the superior judiciary had to be *effective, meaningful, purposive, and consensus oriented*.[70] Driven by the motive to reduce executive interference in the functioning of judiciary, he court clarified its stance and made the Chief Justice's opinion final in matters of appointments. The President was no longer allowed to derogate from the opinion of the Chief Justice, unless cogent reasons were furnished and at the same time, was made bound by the advice of the Prime Minister.

Changes to judicial appointment brought by the 18th Amendment and 19th Amendment to the Constitution

The 18th Constitutional Amendment Act had revamped the process of judicial appointments and undone many of the changes brought by former President Musharraf. As per the 18th

[68]*Supra 59.*
[69]Refer Note no. 439 at https://pakistani.org/pakistan/constitution/part7.ch3.html#439
[70]Sadaf Aziz, *The Constitution of Pakistan – A contextual analysis*, (Hart Publishing, 2018) 145-149.

Amendment, Article 175-A[71]had established a 7 membered judicial commission[72] for appointing judges. Names of the prospective candidates had to be forwarded by the commission to a parliamentary committee[73] for consideration, which was the forwarded to the President.

The 18th Amendment Act was considered a watershed moment in the constitutional history of Pakistan but the reversal of procedure of judicial appointments, from being led by the Chief Justice, to the newly designed Judicial Commission and Parliamentary Committee, roused insecurity and suspicion and led to several arguments[74] with respect to threat to the independence of judiciary. However, the Supreme Court of Pakistan, while taking note of the basic structure doctrine of India, along with the three judges' cases established the primacy of judicial appointments in ensuring independence of judiciary, but instead of reiterating its stance in Al-Jehad, it opted for a *dialogic approach*[75] and flagged its concerns regarding –

- Reduced role of the Chief Justice
- Equal role of the representatives of the Executive in the Judicial Commission;
- Virtual veto powers in judicial appointments granted to Parliamentary Committee.[76]

Despite being led by a proactive Chief Justice, the Supreme Court referred the matter with its suggestions to the Parliament, without disposing it off i.e., kept the matter open under judicial consideration making it apparent that further action could be taken by the judiciary depending upon the response from the Parliament and incorporation of its suggestions.[77] In this backdrop, the 19th Amendment Act was passed by the Parliament of Pakistan, incorporating

[71]Art. 175A, Constitution of Pakistan, as amended by § 67 Eighteenth Constitutinal Amendment Act, 2010.
[72]Nadeem Ahmad v. Federation of Pakistan, (2010) PLD (SC) 1165, https://www.supremecourt.gov.pk/downloads_judgements/Const.P.12of2010.pdf accessible on 10th June 2024, 6 -
The 7-membered Judicial Commission which was under consideration by the court comprised of –
Chief Justice of Pakistan,
Two senior most judges of the Supreme Court,
A retired Judge of the Supreme Court,
Federal Minister for Law and Justice,
Attorney General for Pakistan,
A senior Advocate of the Supreme Court to be nominated by the Pakistan Bar Council in case of appointment to the Supreme Court; *Supra 58.*
[73]The Parliamentary Committee comprised of eight members, four from the National Assembly and four from the Senate, *Supra 58.*
[74]*Supra 72.*
[75] Moeen H. Cheema, 'The "Chaudhry Court": Deconstructing the "Judicialization of Politics" in Pakistan', (2016) 25 Washington International Law Journal 3, 447, 458
[76] *Ibid.*
[77]Madhulika Kanaujia and Rimi Jain, 'Dawn of a New Democracy in Pakistan: Legal and Political Implications of Nadeem Ahmed v. Federation of Pakistan' (2009) 2 NUJS L. Rev. 713.

the changes recommended by the Supreme Court. Resultantly, in order to increase the weight of judicial opinion, the composition of the commission was expanded to include four (instead of two) senior-most judges of the Supreme Court. Additionally, in case the Parliamentary Committee fails to confirm one of the nominees sent by the commission, the reasons for not doing so would have to be recorded and both the decision along with the reasons will be sent to the Commission. However, there was nothing to suggest that such reasons would be justiciable. As per the combined effect of 18th and 19th Constitutional Amendment, Pakistan now has a judicial commission that will appoint its judges, instead of a self-entrenching model by which judges appoint other judges. Such a Commission will have representation from the executive, judiciary and other experts.[78]

TESTING THE COMPARITORS ON THE LITMUS TEST OF CONSTITUTIONAL DISMEMBERMENT

In the Albertinian framework, to check whether the two comparAtors test positive for constitutional dismemberment, a three -pronged litmus test[79] has been devised -

- There must be an amendment to the Constitution which does not rectify or elaborate on the scope of existing provisions.
- The Amendment must be transformative.
  Indications of transformative alterations –
  Changes in the structure or the rights or the identity of the Constitution.
  Unmake the Constitution and reorient it towards a new direction.
  The change should go against the normative vision of what should be protected by the Constitution or go against the understanding of the other actors and stakeholders or is completely opposite to the original version/drafting.
- There must be continuity i.e., it should be done without giving a new constitution itself and the aim need not necessarily be to further or defeat the ends of liberal constitutionalism.

To safely conclude beyond all reasonable doubt that the judicial action under consideration qualifies as constitutional dismemberment, all three prongs of the litmus test must yield a positive result.

[78]Sameer Khosa, 'Judicial Appointments in Pakistan: The Seminal Case of the 18th Amendment', in Arghya Sengupta, and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (OUP 2018) 242–254
[79]Chapter 1, this thesis.

Defining the judicial action which is within the scope of enquiry

Before the nature of judicial action can be discussed, the same must be clearly defined. In case of India, the combined effect of the second and third judges' case[80] is being considered – which had finally resulted into the collegium system of five senior-most judges deciding upon issues of appointing judges to the Supreme Court. In case of Pakistan the court's response in *Nadeem Ahmad v. Federation of Pakistan*[81], of *passing an interim order by which the matter of appointment of judges was referred to the Parliament for re-examination with proposals stated in Paragraph 10 read with Paragraph 13 of the Order*.[82]The court thereafter kept the matter pending and referred it to the Parliament to consider its recommendations. Thus, the response to Nadeem ahmad and subsequent proceedings shall be analysed.

[80]*Supra 53, 54.*
[81]*Supra 72.*
[82]*Supra 72, 7*

Chapter 4 : THE LITMUS TEST : PRONG 1

An Amendment that does not rectify or elaborate on the scope of constitutional provisions

'O, it is excellent

To have a giant's strength, but it is tyrannous

To use it like a giant.'[83]

Indian legal system has its origin in the common law system, which is often recognised by prevalence of judge-made laws ie., judges elaborating upon the scope of law that will apply between private parties. It is often called as 'constrained law making' where judges are expected to perform "the disinterested application of known law".[84] However, the Indian example presents a case of judge made constitutional amendment. Even so, it is informative to go through the caveat, of when a judge should refrain from pronouncing a law, as understood by the common law system : where there is a need for detailed legislative code to address a crisis of rule of law, such that the research required to supply a new rule is beyond the scope of judicial expertise. At the very max, judge is required to apply existing principles to a new, open question of law.[85] This is in addition to other stipulations about only filling in the gaps in law and instead of developing laws which are incongruous to the Parliamentary will.[86] The common law understanding itself has evolved from the times when the thought of judges making laws was considered an 'indecent' idea to considering the notion of 'judges must only declare laws' as an outdated notion[87], to adopting a middle path outlook that judges can make laws but without overstepping into the Parliamentary prerogatives of framing the policy".[88] Even though in Indian context, there is a clear departure from the traditional common law understanding that the judiciary must defer to the will of the Parliament, supplanting amendments to the Constitution is still controversial. Since India presents a special case, it will be most enlightening to acquaint oneself with the opinion of H.M. Seervai, who has authored a seminal commentary on the Indian Constitution. In words of

[83]Lord Cooke of Thorndon, 'Where Angels fear to tread', in B.N. Kirpal et.all eds., *Supreme but not infallible*, (Oxford University Press, 2000) 98

[84]Patrick Devlin, *The Judge* (Oxford University Press 1979) 4.

[85]Tom Bingham, 'The Judge as Lawmaker: An English Perspective' in Paul Rushworth (ed.*), The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thornton* (1997).

[86]Lord Hodge, 'The scope of judicial law-making in the common law tradition' (28th October 2019 Max Planck Institute of Comparative and International Private Law Hamburg, Germany) https://www.supremecourt.uk/docs/speech-191028.pdf accessed on 30th May 2024, 36.

[87]Lord Reid, 'The Judge as Lawmaker' (1972) 12 Journal of the Society of Public Teachers of Law 22.

[88]Richard Benwell and Oonagh Gay, 'The Separation of Powers Standard Note', https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf accessed on 3rd June 2024.

Seervai, the conclusions of the second judges' case was 'absurd, untenable and it involved individually and collectively rewriting the parts of the Constitution which is obviously beyond the power of any court'.[89] Not only the ordinary meaning of the word 'consultation' was disregarded, but consultation erroneously was conflated with concurrence in blatant disregard of celebrated rules of statutory interpretation of ascribing ordinary meaning to the constitutional provisions was also disregarded.[90]To make the charge amply clear, a pre-existing decision of the Supreme Court in a case that involved transfer of High Court judges, throws light upon the ordinary meaning that must be ascribed to the word 'consultation' –

"What is consultation, dictionary-wise and popular parlance-wise? It implies taking counsel, seeking advice. An element of deliberation together is also read into the concept. "To consult" is to apply to for guidance, direction or authentic information, to ask the advice of as to consult a lawyer; to discuss something together; to deliberate."[91]

Insofar as the second judges' case fails to ascribe the literal meaning to the words used in Article 124(2), it indulges in re-writing the Constitution. In fact, it is stated that the third judges' case reads more like a policy promulgation, rather than a reasoned judgement.[92]A similar view has been re-iterated by the Law Commission of India in its report, in the following words :

"The Supreme Court has read into the Constitution a power to appoint judges that was not conferred upon it by the text or the context. The underlying purpose of securing judicial independence was salutary but the method of acquiring for the Court the exclusive power to appoint judges by the process of judicial interpretation is open to question.. "[93]

It is to be noted that the word Amendment conventionally is used in the context of Parliament introducing changes in the text of the Constitution. In the Indian context, judicial interpretations or as in this case, re-written provisions of the Constitution do not automatically find their way into the text of the Constitution, unless explicitly done so by the Parliament via a Constitution Amendment Act. It is for this reason, the text of the article 124 does not mention collegium, however this little technicality cannot be a good ground to

[89]H. M. Seervai, *Constitutional Law of India: A Critical Commentary* (Bombay : Tripathi, 1993) 2953.
[90]Nakul Dewan, 'Revisiting the Appointment of judges : Will the executive initiate a change', (2005) 47 Journal of the Indian Law Institute 2, 199, 200.
[91]Union Of India vs Sankal Chand Himatlal Sheth, 1977 AIR 2328.
[92]*Supra 83*, 103.
[93]Law Commission Report 214, 'Proposal for Reconsideration of Judges cases I, II and III' (2008) https://indiankanoon.org/doc/173571889/ accessed on 4th June 2024.

maintain that there has been no constitutional 'amendment' in the strict sense of the word, by the Indian judiciary. In fact, since the Albertinian model views constitutional dismemberment from the perspective of the Parliament only, it makes no accommodation for judicial actions that are as good as constitutional amendments.

Furthermore, in the Albertinian framework, the second burden of the first litmus test, must also be discharged ie., the amendment neither rectifies nor elaborates. It should do something more drastic than that. Insofar as the second judges' case inserts fifteen norms,[94]it tantamounts to appropriating of the power of a constituent assembly. Such an extensive amendment has in fact been held to be beyond the ken of Parliament itself.[95]

Pakistan is likely to fail the litmus test of constitutional dismemberment on the first count itself, since there has been no amendment from the Pakistan Supreme Court in the first place. Rather, the text which was under its consideration i.e, the eighteenth constitutional amendment itself was a detailed document that contained about 100 articles in the nature of deletion, addition, modification of the text, which have by and large been lauded as they were aimed towards 'cleansing the constitution' of the provisions which were introduced by the military rulers like Zia-ul-Haq and Musharraf.[96] The portion of this text which was the subject matter of dispute[97] before the court was an important section as it completely overhauled the process of judicial appointments in Pakistan and introduced considerable interference of the Parliament. However, the nature of this amendment in toto or even the impugned article, was much more than simple rectification or elaboration. The response from India, which predates Pakistan's constitutional amendment by about two decades, is enlightening in framing the correct questions.

The scathing response[98] given by doyens of Indian constitutional law scholars to the constitutional amendments brought in by the Indian Supreme Court in the judges' case, merits an important consideration for Pakistan –

Is it possible for Pakistan's legislature to amend and reformulate the fundamental governance structures (including but not limited to judicial appointments) without invoking the constituent power and convening a constituent assembly a-fresh, since bringing in a new

[94]In the context of appointment of High Court judges.
[95]*Supra 89,* 2964.
[96]Hamid Khan, 'The Last Defender of Constitutional Reason? Pakistan's embattled Supreme Court', in , Grote & Roder ed., *Constitutionalism in Islamic Countries* (Oxford University Press, 2012) 302.
[97]Art. 175 A, 18th Constitutional Amendment Act of Pakistan.
[98]*Supra 89.*

method of judicial appointments by the courts in India was viewed as lacking in democratic mandate of the constituent power?

Pertinent as that question may be, the enquiry is beyond the scope of this thesis. The judiciary in Pakistan had issued an interim order and referred the amendment to the Parliament for reconsideration. The most striking aspect of such a response was its starting point and philosophy – to not view Parliamentary sovereignty and judicial independence as competing values[99] rather complementary ones which are indispensable for the people. The trust on the collective wisdom of the people's representatives and viewing goals of both the organs of governance as common and aligned with the constitutional mandate has resulted into the nineteenth constitutional amendment act.

However, the view on the other side is that *to hold the petition maintainable was a very strong statement in itself,*[100] if one considers the fact that historically, the Court does not sit in adjudication of constitutional amendments passed by the Parliament. Referring the case back to the Parliament without passing a definitive order, with assertive recommendations, was display of 'minimum level of restraint'.[101] Thus, it was not entirely upto the parliament to reject the advice of the courts in toto.

It is pertinent to note that the nineteenth amendment act did incorporate the recommendations of the judiciary. It increased the strength of the judges on the commission in order to allow more weightage to judicial opinion and also required the parliamentary committee to record reasons for rejecting the names forwarded by the Commission, but on one crucial aspect, it was silent. What would happen if the commission were to reject the reasons so recorded by the Parliamentary Committee? In *Munir Hussan Bhatti v. Federation of Pakistan*[102]the court kept the form of the nineteenth amendment but altered it in substance by holding that [103]in such a scenario, the committee would not have any discretion to reject the candidates as that would encroach upon judicial independence.[104] The Supreme Court went even delineated the grounds on which the parliamentary committee is expected to vet the list of prospective appointees and held that the Committee did not possess the required expertise to assess the

[99]*Supra 60.*
[100]*Supra 60,* 88.
[101]Mohammad Waseem, 'Judging democracy in Pakistan : Conflict between the executive and judiciary', (2012) 20 Contemporary South Asia 1, 19, 5-28.
[102](2011) PLD (SC) 407
[103]Po Jen Yap, Rehan Abeyratne, 'Judicial self-dealing and unconstitutional constitutional amendments in South Asia', (2021) 19 *International Journal of Constitutional Law* 1, 127,145.
[104]Supra 102.

professional competence, judicial expertise and legal insight of the candidates and thus, the reasons for rejection of the candidates shall also be justiciable. [105]Furthermore, in *District Bar Association v. Federation of Pakistan*[106], the court held that eighteenth constitutional amendment act was saved because of the changes brought in by the nineteenth amendment act and that for independence of judiciary it must follow that the power of appointment of judges must reside with the judicial branch,[107]which is eerily reminiscent of the holding in the second judges' case. Assessing the Supreme Court's response in the aforementioned three cases together, which outlay the scope of eighteenth and nineteenth amendments, the court has referred an amendment for reconsideration, interpreted the meaning of a *'constitutional silence'*[108]on the issue of primacy of commission over committee, and declared that the judicial branch has the most important role to play in the matter of judicial appointments, as opposed to the Indian Supreme Court's response – of constituting a collegium system unfounded in the Constitution itself. Thus, for the purpose of this prong of the litmus test, it is sufficient to record a negative finding - that the Supreme Court of Pakistan did not cause a defacto amendment to its constitutional provisions. However, similarity of outcomes in both these countries through different procedures, qua the issue of judicial appointments, begets the question: what makes one procedure immune from the charge of constitutional dismemberment vis-à-vis another. The other prongs of the litmus test shall explore the very question.

[105]Rao Imran Habib, 'Re-Thinking Models of Judicial Appointments in the Superior Courts of Pakistan: A Quest for a Better Model' (2021) 3 Review of Politics and Public Policy in Emerging Economies 1, 51, 62-63.
[106](2015) PLD (SC) 401.
[107]Supra, 91 at 146.
[108]*Supra 106.*

Chapter 5 : THE LITMUS TEST : PRONG 2

The Amendment must be transformative

'And an albatross is no ordinary bird. It has the largest wingspan, can live for five decades, and returns to roost in the same spot year after year during its impressively long career. The oldest known albatross in the wild is called Wisdom.'[109]

Prof. Sajo uses the literary metaphor for judges who are taken in by their own wisdom of acting like the savior of the courts. The metaphor works aptly to set the tone for this chapter. The second judges case was a dramatic event in the international history of jurisprudence.[110] The first prong of the litmus test has already established that there was a *de facto* constitutional amendment that was passed by the Supreme Court of India. For the purpose of the second prong of the litmus test, it is required to establish that this amendment had a transformative potential, which itself has been recognized by a non-exhaustive list of indicators like changes in the structure of the Constitution, reorienting it to a new direction against the normative vision of the original version/drafting.

Some scholars have termed judicial activism shown in the three judges' case as '*judicial expansionism*' because of the self-serving amendment brought in by the court. The veritable question posed by one of the leading scholars of Indian constitutional law, in the context of the judges' case, lends credence to the view that the court's response to the judges' case falls in the category of structural amendment made to the Constitution of India –

"Under the guise of interpretation of the Constitution, can the Supreme Court change the basic structure of the Constitution? The basic structure consists of division of powers and functions between the Parliament, the Executive and the judiciary. The court claimed a power to itself that the basic structure of the Constitution did not envisage"[111]

It is important to note that the second judges' case presents a radical departure from the normative vision of what must be protected by the Constitution, as is evident from the constituent assembly debates[112]. The CAD, which is most instructive in garnering the original purport or spirit behind the constitutional provisions make it amply clear that Art. 124 had not

[109]*Supra 31,* 362-365.
[110]B. N. Srikrishna, 'Judicial Independence', in Mehta, Khosla, Chaudhary eds., *The Oxford Handbook of the Indian Constitution,* (Oxford University Press, 2016) 388.
[111]S. P.Sathe, *Judicial Activism in India* (Oxford University Press, 2002) 126-127
[112]Hereinafter referred to as 'CAD'

been drafted in a manner that can suggest the primacy of judiciary, to the exclusion of the legislature. In the CAD, it was stated as a 'dangerous proposition' to understand the article as allowing a practical veto to either of the two branches of governance.[113] The normative vision of what should be protected by the Constitution is gleaned with the help of settled principles of interpretation. The second judges' case seems to fall foul of this test as well. Being called as a fatally flawed judgement[114], the bench in the second judges' has been rightfully charged with wanton usage of speeches delivered in the CAD and selectively picking statements to establish primacy of the Chief Justice's opinion.[115]The court had been accused of wrongfully and selectively picking the CAD to show that it has always been a part of the Indian Constitutional history to accord primacy to the opinion of the Chief Justice in the matter of judicial appointments, and therefore, insofar as the second judges' case attempted to do that, it was not introducing anything which was not already a part of the constitutional history and convention. However, a holistic reading of CAD did not yield such conclusions. Even from the perspective of constitutional history, consultation was not held to be concurrence, under the Government of India Act, 1935,[116]as was argued by the bench in the second judges' case and the Chief justice was not given an all-important stature. Additionally, a note of caution was struck for using the CAD to understand the 'original intent'. Given that the Constitution is supposed to be flexible and adapt in accordance with the 'living constitution' doctrine, in order to accommodate the changing times, more importance was laid on interpreting the meaning of the words, instead of speeches in the CAD, to understand their purport.[117] To quote Mr. Albert expounding upon the meaning of an amendment being transformative –

"Such amendments *dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old….Political actors must modify their behavior in accordance with new popular expectations."*[118]

Thus, the collegium system was neither envisaged by the constituent assembly, as part of the original version of the Constitution, nor can such a change be passed off as a minor alteration to a single provision in the constitution. The view of Indian scholars is clear – bringing such an amendment that almost entirely negates the participation of the executive, goes against the

[113]CAD Vol. 8, 258, https://www.constitutionofindia.net/constituent-assembly-debate/volume-8/ accessed on 6th June 2024.
[114]*Supra 89,* 2928.
[115]*Supra 89* 2946.
[116]*Supra 89* 2957.
[117]*Supra 89* 2940.
[118]*Supra 5,* 353.

original constitution and exercise of the constituent power. It is nothing short of altering the basic structure of the constitution, something that the Supreme Court had itself held to be inviolable.[119]

Thus, the Indian Supreme Court response to judicial appointments tests positive for the second prong as well.

In case of Pakistan, it may be superfluous to enquire into the second prong of the test, following a negative result in the first instance. However, for the purpose of comparative analysis of the two countries, it is useful to delve into the enquiry of what is the effect of the judicial response following the eighteenth amendment.

The Supreme Court of Pakistan, without passing an amendment to the constitution on its own, seems to be operating within the framework of the two amendments, but whether its adjudication of issues emanating from these amendments and subsequent proceedings constitute a break from the normal or just an interpretation /elaboration of the existing provisions, will determine the transformative effect of the judiciary on the process of judicial appointments.

The Supreme Court of Pakistan has wrested the primacy in the power of appointments with its own self through multiple manoeuvres. Even after settling the scope of eighteenth and nineteenth amendment, the Supreme Court of Pakistan took the opportunity to reassert its authority in a Presidential Reference, which was prompted by the Chief justice allowing supersession of a senior candidate for the post of Chief Justice of Islamabad High Court, and appointing the next senior-most member.[120]Even though there was negligible difference in the seniority of the two candidates, it still constituted a departure from the rule of seniority and legitimate expectations of a prospective appointee.[121]The presidential reference had raised three important legal points, one of which is particularly relevant –

What remedy does the President have if asked to make judicial appointments that, in his opinion, are against the Constitution?[122]

[119]Keshavananda Bharati v. Union of India, (1973) 4 SCC 225;
[120]*Supra 60,* 86-96.
[121]Sultan Mehmood, 'Judicial Independence and development : Evidence from Pakistan', (2020) HAL Open Science, https://shs.hal.science/halshs-03054106/file/WP%202020%20-%20Nr%2041.pdf accessed on 15th May 2024.
[122]Reference No. 01 of 2012 PLD 2013 SC 279.

The simple answer to the second question was, none; especially since the President does not have any important role to play in the appointments process, which is largely driven by the Judicial commission and the Parliamentary committee. The role of the President was stated to be 'ministerial' only. The court also refused to give an opinion whether violation of the seniority norm in judicial appointment, was constitutional.

If a pattern is attempted to be weaved by considering the judicial response, it has to be one of constant judicial pushback to bring the Parliament back to the point of pre-eighteenth constitutional amendment, where the Chief Justice of the Supreme Court enjoyed considerable primacy in judicial appointments. In theory, the Chief Justice was supposed to be one of the members of the judicial commission but now, only the Chief Justice can propose names of candidates for appointments, for the other members of the commission to accept or reject.[123] The status of the Chief Justice is not equal to the other judges in the commission. The progress made by the Parliament in having a say in judicial apppointments, has been largely 'undone'[124] by the court. The court usually speaks in one voice on issues of judicial appointments, to present a united front as a response to the previous experience of surviving under the Musharraf regime. From this angle, the two amendments introduced by the Parliament did not change much. The country has come a full circle and the project of devolution of power to institutions from individuals, has been a failure. The second prong of the litmus test requires the amendment (or in the case of Pakistan, the judicial responses in the three cases – *referring* the eighteenth amendment to the parliament, *interpreting* the nineteenth amendment to declare judicial primacy in the process of appointments and *declaring* no presidential discretion in matters of judicial appointments) to be transformative and constitute a radical departure from the status quo, such that there is a reorientation to a new paradigm. Pakistan's example, at max, brings to fore the power tussle between the two branches of governance, with the judiciary once again being in domination, similar to the Indian context but the courts in Pakistan were not the drafting bodies of the selection apparatus. It may be argued that in their case, they were interpreting a provision that was silent upon the nature of Parliamentary interference, instead of drafting a whole new provision. The power of the judicial commission has been termed as 'unfettered' and one that

[123]Judicial Commission of Pakistan Rules 2010 (the 'JCPR'), https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/judicial_commission/Rules,2010.pdf accessed on 12th June 2024.
[124]Suhail Shahzad, 'Theory and Practice of Judicial Appointments in Pakistan' (2009) 39 JL & Soc'y 25, 35.

causes an imbalance in the institutional prerogative,[125]but it is also seen as coming back after making a full circle, to the state that existed before their judges' case and as such, from the vantage point of the judiciary, there has not been a massive transformation. However, it is safe to hypothesize whether the Pakistan Parliament itself can be susceptible to the charge of constitutional dismemberment.

[125]Muhammad Hamza Ali Qadir Khan, 'Critical Analysis of the procedure of appointment of Judges in the Superior Courts of Pakistan',(2021) 1 Pakistan Journal of Criminal Justice, 1, 40,49-50.

Chapter 6 : THE LITMUS TEST - PRONG 3

The Amendment must be continuous

The third prong of the litmus test is rather straight-forward. The amendment which is suspected of constitutional dismemberment should be brought in without giving a new constitution itself ie., it should form a continuous part of the original constitution. Furthermore, the aim of such an amendment does not make a difference ie., a country cannot get away with the charge of constitutional dismemberment by introducing amendments which further the ends of liberal constitutionalism, should the other components of the litmus test yield positive result.

In case of both India and Pakistan, the constitutional amendment does not come as a break in the existing scheme or in the form of a new constitution. India's Article 124 still reads like it was initially drafted. Pakistan's eighteenth amendment act was passed as an amendment, but it was very expansive in its scope ie., major changes were introduced to the Federal Legislative List, concurrent legislative list was abolished, greater role to the provinces in governance was accorded, provinces were recognized as rightful beneficiaries of the natural resources, education was made a fundamental right, health and agriculture, which were initially a part of residual list, were also addressed by this amendment, reduction in the power of the President for return to a proper Parliamentary form of governance were some of the changes which were brought in addition to changes in the process of appointment of judges.[126]An amendment of that scope, which touches upon rights, structure, federalism provisions, is almost like passing a mini-constitution, albeit with the aim of strengthening the democracy and liberal constitutionalism. It doesn't originate in the judicial branch of governance, but gives rise to suspicion about the Parliament causing constitutional dismemberment.

For India, the self perceived end of introducing the collegium system was preserving judicial independence i.e, in furtherance of ends of maintaining separation of power as integral part of the constitution's basic structure. It is argued that *to save democracy and the rule of law, there must be judicial primacy and a consequent lack of democratic pedigree in the matter of*

[126]Muhammad Ahsan Rana, 'Decentralization Experience in Pakistan: The 18th Constitutional Amendment', (2020) 17 Asian Journal of Management Cases, 1, 61, 68-79.

selection of judges[127] and that judicial independence must not only be done, but also seen to be done as a question of optics and perception.[128]Whether the collegium system furthers or defeats the end of liberal constitutionalism can be, a matter of debate, however the result would not impact the finding of the litmus test under this prong. Insofar as the collegium system forms continuity with the original constitution without following a break, India does test positive on this count as well.

[127] Gopal Subramanium, 'The NJAC Case and Judicial Independence' in Arghya Sengupta and Ritwika Sharma eds., *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press , 2018) 193.
[128]*Id.*, 174.

Chapter 7 : THE COUNTER ARGUMENTS

It is important to note some arguments which may disturb the finding of the first two prongs of the test for India. The bench constituted in the second judges' case mentions the word 'convention' about one hundred and thirty seven times. It notes that written word of constitutional law and the unwritten conventions and practices constitute two sets of principles, where the conventions can *be a way of bringing about constitutional development without formal changes in the law.*[129] In the court's opinion, it was merely reading a constitutional convention *that the opinion of the Judiciary expressed through the Chief Justice of India is primal and binding,*[130] into the text of Article 124. In their own opinion, they were not legislating or amending, but merely filling the gap through the use of conventions in the constitution. That, when seen in light of judicial independence being part of the basic structure and the judicial primacy in the matter of appointments as the only way to preserve that feature of the basic structure, forms the larger framework in which judiciary is operating in the second judges' case. However, there was a third manoeuvre by which the court transposed itself from the realm of constitutional convention to the realm of constitutional law – by holding that there was no distinction between the "constitutional law" and an established "constitutional convention" and that they were both equally binding. Now, if it can be proved conclusively that a convention exists and is currently in operation, there remains no difference between a convention and a law and both acquire equal force.

There has been considerable doubt cast upon the correctness of such a conflation[131] and standard rule is that conventions do not have the force of law, nor can they be 'enforced' or 'created' by courts, as was attempted in the judges' case to source the primacy of not just the judiciary, but the Chief Justice in matters of judicial appointments. In such situations, it is expected of judges to follow the doctrine of judicial restraint even if they can get away with legislating and finding answers to difficult questions from within the authoritative legal materials. Baxi bats for judges to behave less like legislators and more like adjudicating

[129] *Supra 53,* 436.
[130] *Id.* 455
[131] S. Schmid, Oliver/Fusaro, 'How Constitutions Change. A Comparative Study' (2012). ICL Journal 2, 365, see footnote 71.

officers when faced with such hard cases, even if they are convinced that they would do a better job at it.[132]

The second counter argument stems from comparison between the two countries. Since the dialogical exchange between the Supreme Court of Pakistan and the Parliament in bringing forth the nineteenth amendment act to the Constitution of Pakistan has been considered prescriptive in insulating the judiciary from the charge of constitutional dismemberment, it is of utmost importance to point out, what can be called, a semblance of dialogue that can be culled out or extrapolated from the response of the executive between the second and third judges' case, in the Indian scenario. As mentioned earlier, the third judges' case was a reference under Art. 143 of the Indian Constitution, under which the President can refer a matter for the opinion of the Supreme Court, however the advice so rendered by the court is non-binding. The then Attorney General of India, Mr. Soli J. Sorabjee, while clarifying the stance of government made it amply clear that the Union of India does not seek a reconsideration of the law laid down in the second judges' case, only an elaboration of the rule and that it will consider the advice of the Supreme Court as final and binding. These statements legitimize any 'usurpation' of authority by the judiciary,[133]and can be considered as an implicit form of judicial dialogue. India is said to follow a strong form of judicial review, one which has judicial primacy[134], stemming from the consequentiality of its pronouncements.[135]It has been argued that strong form of judicial review may not be necessarily wanting of a dialogue between the two branches of government, as the legislature often endorses the judicial pronouncement by enacting a law or challenges it again before the judiciary.[136]By that logic, it is open to argumentation that referring a judicial pronouncement for elaboration, and not rectification, is in fact a form of acquiesance.

[132]Upendra Baxi, 'On how not to judge the judges : Notes towards evaluation of judicial role' (1983) 25 Journal of the Indian Law Institute, 2, 211,225
[133]*Supra 83,* 102.
[134]Douglas Tomlinson, 'Dialogue of the Deaf: A Comparative Legislative Analysis of Weak-Form Judicial Review', (2022) 46 Seton Hall Journal of Legislation and Public Policy:. 1,11-13
[135]Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?', (2018) 29 Duke Journal of Comparative & International Law 1, 39–40.
[136]*Supra 134,* 71.

CONCLUSION

Constitutional Dismemberment v. The cloak of judicial restraint and institutional dialogue

India has tested positive on all three prongs of the litmus test of constitutional dismemberment, primarily because of committing the '*original sin'* of bringing in a de-facto amendment to Article 124, and not bringing in an amendment is the very reason for why Pakistan's Supreme Court can escape the charge of constitutional dismemberment. This shows that Constitutional Dismemberment in the Albertinian model needs to be made more robust and expanded to view judiciary, just like any other branch of governance, as actors of dismemberment.

However, notwithstanding the charge of constitutional dismemberment, does the comparative analysis show whether there is anything that can be emulative for the Indian Supreme Court, from the experience of Pakistan?

Pakistan's eighteenth constitutional amendment and the Supreme Court's response to the challenge of its constitutionality, had largely been lauded for forging an institutional dialogue.[137]Infact, when viewed in the scheme of Richard Albert's preferred judicial response[138] on being faced with attempts at constitutional dismemberment by the legislature, Pakistan's response largely fits the bill. The Supreme Court of Pakistan, albeit without declaring that they were facing an attempt of constitutional dismemberment from the Parliament in the form of the eighteenth amendment, gave an advise/recommendation and referred the matter back to the Parliament for rectification, without giving an order nullifying the amendment itself. This is how Richard Albert views the role of judiciary – as the final bulwark of constitutional protection.

The overall state of affairs however betray a different story. We can look at it across two heads – the inter-branch devolution of power ie., judiciary v. legislature and the intra-branch devolution of power i.e., within the Supreme Court. It is widely accepted that the Pakistan Supreme Court, under the cloak of institutional dialogue and consultative process, has ended up strengthening its own position and power in the matters of judicial appointments. The modalities by which it has been done, have been made clear by the thesis. On the contrary, the Indian Supreme Court may be accused of causing constitutional dismemberment, but the third judges case largely rectified the drawback of the second judges' case i.e., primacy

[137]*Supra 48,* 254.
[138]Refer to Chapter I of this thesis.

accorded to the Chief Justice in the collegium or a veto power exercised by the Chief Justice. The third judges' case has made the collegium work on the basis of majority of opinion among the judges, there being no higher value accorded to the vote of Chief Justice. A 3:2 split among the collegium members, with the Chief Justice being in minority, can very well thwart any attempt at one-upmanship, by the Chief Justice. In Pakistan, the process started at an encouraging note but quickly became an exercise in redundancy, as the court took the country back to the pre-eighteenth amendment situation, where no candidate can be appointed without winning the Chief Justice's favour.[139]Thus, there was a mere cloak of institutional power sharing and checks and balances. On counts of both inter and intra branch devolution of power, Pakistan does not present any improved response of judicial self-restraint. India atleast on the latter metric, seems to be doing marginally better. Having said that, the true test of intra-branch judicial autonomy can be done only by reading the minutes of the collegium/commission meetings –the pandora's box which is zealously guarded by the courts of both countries.

It would be remiss to not mention India's latest attempt at introducing a National Judicial Appointments Commission[140] to replace the collegium system for appointing the judges. The six-membered commission, having three judicial members, was declared unconstitutional by the Supreme Court of India, because it did not have more judicial members and that the same was held to be a threat to judicial independence. It has been argued that judicial primacy is not the sole route to an independent judiciary and that there is nothing in the constitution that suggests that judicial primacy in the matter of judicial appointments is part of the basic structure.[141]Given that both Pakistan and India had been presented with an opportunity of adopting a judicial commission model for appointment of judges, it is suggested[142] that India stands to learn from Pakistan's response to the eighteenth amendment and instead of rejecting the NJAC amendment, it should have opted for a suspended declaration of invalidity, since

[139]Reference No. 01 of 2012 PLD 2013 SC 279.

[140]The NJAC comprised of The Chief Justice of India as the ex-officio Chairperson, two other senior Judges of the Supreme Court next to the Chief Justice of India and the Union Minister in charge of Law and Justice being ex-officio members, along with two eminent persons to be nominated by a committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha, for more details access - https://www.scconline.com/blog/post/2015/07/02/developments-associated-with-the-njac/ accessed on 12th June 2024.

[141]Gautam Bhatia, 'The Sole route to an independent judiciary?', in Arghya Sengupta, and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (OUP 2018) 144-145.

[142]Rushil Batra, 'Judicial Appointments in India and Pakistan: The Need for Responsive Judicial Review and Institutional Dialogue' (2023) 8 CALJ 103, 110-115.

this amendment was no ordinary one. A more responsive judicial review[143]was expected from the Indian Supreme Court because an amendment to the model of judicial appointments constituted a *democratic minimum core.* Be that as it may, Pakistan does not present the model of dialogical jurisprudence that should have been followed by India. Rather, Pakistan is a good example to demonstrate that the self-perpetuating tendencies of an institution can remain intact, if the commitment to having robust institutional checks and balances is weak.

[143]Rosalind Dixon, *Responsive Judicial Review : Democracy and Dysfunction in the modern age* (Oxford University Press, 2022) 86.

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