**[Paterfamilias?](https://www.dawn.com/news/1703522/paterfamilias)**

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THE [recording](https://www.dawn.com/news/1702281) of the Judicial Commission of Pakistan’s recent [meeting](https://www.dawn.com/news/1701995) has once again brought the role of the chief justice of Pakistan in the judicial appointments system in the spotlight.

The most controversial of the CJP’s powers is that he alone can recommend names of candidates who are then considered by the JCP for nomination to a parliamentary committee (PC) for appointment to the Supreme Court (SC).

How was the CJP able to retain these powers despite clear legislative intent in the 18th Amendment to make the process of judicial appointments — including initiation — more transparent, accountable and inclusive?

The answer lies in a powerful, uniquely placed post-restoration judiciary, which with the aid of sections of the media, the legal community, and some political parties, was able to undo the most significant changes in the new system. This was done through arm-twisting of parliament, threats of institutional clash and sweeping assertions about safeguarding the independence of the judiciary.

Before the 18th Amendment, the president in consultation with the CJP appointed judges to the SC. Through a series of judgements, the SC made the CJP’s recommendations virtually binding on the president.

For the 2008 election, both PML-N and PPP promised judicial reform in their manifesto, including overhauling the judicial appointments process. This was done through Article 175-A in the 18th Amendment. Instead of the CJP, a judicial commission comprised of a diverse set of members (including judges, the attorney general of Pakistan, the law minister and a Bar representative) was to initiate the process of nomination, which was to be followed by confirmation by a PC. The CJP was only a member of the commission — they enjoyed no other powers.

The CJP’s dominant role in judicial appointments must be rethought.

In multiple orders and judgements that followed, not only did the SC make the role of the PC redundant, it also greatly enhanced the CJP’s role in the commission’s proceedings.

The first such [order](https://www.dawn.com/news/849078/sc-order-on-18th-amendment-calls-for-review-of-article-on-judges-appointment-ball-back-in-parliament-s-court) was passed in October 2010 in response to challenges to the 18th Amendment. Among other arguments, the petitioners contended that the CJP is paterfamilias ie the head of judiciary, and it was against judicial independence for his role to be limited to only one vote in the JCP.

During the hearings, the attorney general clarified the government’s position, submitting that the names of the recommendees would be initiated in the Judicial Commission by the CJP in consultation with the other judges in the commission, but the executive too, if need be, could suggest names.

A full court of 17 judges heard the petitions. In its interim order, the SC unanimously held that Article 175-A shall be given effect in a manner that: the JCP “shall be convened by the CJP in his capacity as its chairman”; names of candidates for appointment to the SC “shall be initiated” by the CJP; and the CJP “shall regulate its meetings and affairs as he may deem proper”.

The SC gave no reasoning to support its interpretation of Article 175-A to read powers of initiation as well as control of the JCP’s proceedings to vest in the CJP.

Shortly after the interim order, the JCP unanimously framed its rules of procedure. Unsurprisingly, the rules gave the CJP the power to “regulate the proceedings of the commission” and also to “initiate nominations” for vacancies in the SC. A few weeks later, parliament passed the 19th Amendment, which implemented other recommendations in the SC’s interim order such as increasing the number of judges in the JCP to a majority.

**Editorial:** [*Supreme discontent*](https://www.dawn.com/news/1702291)

The CJP’s role in the appointments process was further cemented in 2012, when a presidential reference, among other questions, asked the SC to clarify “whether the Constitution prohibits individual members of JCP to initiate names for appointment of judges to the Supreme Court…”

In its opinion, the SC said Article 175-A was silent on the JCP’s procedure and empowered the commission to regulate its proceedings. In light of JCP rules, no member of the commission, except the CJP (or the chief justice of the Federal Shariat Court or of a high court) could initiate the nomination for appointment against a vacancy.

The court elaborated this was the correct decision as the CJP was the best person to evaluate a person’s calibre to be nominated as a judge; initiating the nomination is “an act of mere procedure”; and allowing every JCP member to recommend names is impractical as there would be too many candidates to consider. The SC, however, did not suggest the Constitution ‘prohibited’ other methods of initiating nominations.

The most striking flaw in the SC opinion is that it considers initiation an “act of mere procedure.” The truth could not be more different. Control over initiation has resulted in the CJP acting as a gatekeeper to the Supreme Court, with the power to block the appointment of deserving judges by refusing to recommend their names.

At times, it seems the reason for refusing to consider certain names is not lack of merit, but ideological or personal differences. And as the façade of unanimity in the SC is withering, it also shows how this power is deepening the divisions and appearance of ‘camps’ in the court.

Notably, other jurisdictions that have bodies similar to the JCP to appoint judges do not give the chief justice control over initiation. The UK and South Africa, for example, invite nominations, where interested candidates apply to be considered for appointment to the supreme court.

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As Justice Khosa observed in his dissent in the 18th/21st Amendment judgement, “we shall be naïve if we deny that if we had some very honourable and respected paterfamilias in the past then there were also others who were not held by the people in that esteem”. He warned against the system depending too much on the “integrity, independence and good choice of just one man”.

This warning also seems applicable to the CJP’s control over initiation. To quote Justice Khosa again: “It surely is painful to let go a power which one has exercised and enjoyed for a long time but it is good to be graceful in parting with power when time for the same comes.”

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