

Judicialization of Politics vs Separation of Powers: The 26th Amendment Test in Pakistan

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Abstract

This paper examines the dynamic aspect of judicialisation of politics and doctrine of separation of powers in Pakistan with specific regard to the 26th constitutional amendment. The research questions is to see whether the amendment has brought about a balance between institutional power amongst the judiciary, the executive and the parliament. It explores three basic areas, namely appointment to the judges, restriction of the exercise of the suo motu powers and institutionalizing the regulation of procedure through the use of the Practice and Procedure framework. Such reforms are also compared with international standards, particularly the international standards within the UN Basic Principles on the Independence of the Judiciary. The study argues by the doctrinal and comparative study, the 26th Amendment is a significant step towards parliamentary supremacy that could restrain judicial enthusiasm and control the problem of judicial overreach. This paper ends by saying that this amendment can reduce judicialisation of politics, but raises new problems of checks and balances and institutional independence.

Keywords:- Judicialisation of Politics, Separation of Powers, 26th Constitutional Amendment, Judicial Independence, Judicial Activism

Introduction

The doctrine of separation of powers is one of the primary rules of contemporary constitutional government, aimed at deterring the accumulation of power through the division of state power between three separate organs: the legislature, the executive and the judiciary. This doctrine has its basis in the classical constitutional theory, especially the concept of Montesquieu, which attempts to assure that each of the branches acts within its designated domain but at the same time there is a check and balances system against the other. This division fosters accountability, protection of basic rights, and maintenance of democratic order in an ideal constitutional structure. The practical implementation of this doctrine has been uneven and debated in Pakistan, however, and has been frequently influenced by political unrest, constitutional crises and institutional imbalances. (Alter, 2020) Pakistan has had a history of democratic discontinuity in the form of military interventions, and poor parliamentary governance. The judiciary in such situations has often taken an activist and sometimes even an interventionist position in political and administrative affairs. This has been generally referred to as the judicialisation of politics, whereby courts and their powers have expanded beyond the traditional adjudication into other areas that

should be the preserve of elected institutions. Although the legitimacy of judicial intervention has been affirmed in certain cases as a need to enforce constitutional supremacy and safeguard the rights of citizens, it has also caused some major concerns on institutional overreach and undermining of democratic values. (Kavanagh, 2021).

The exercise of suo motu jurisdiction under Article 184(3) of the Constitution has been one of the main tools that have facilitated this augmented judicial role in Pakistan. This provision gives the Supreme Court the powers to assume cognizance of issues of national significance in the implementation of basic rights without having to be petitioned. This power has been applied over the years and has been utilized to solve problems like corruption, failure of governance, environmental issues and even human rights abuses. In certain instances, especially when there is judicial activism, the judiciary has used the suo motu powers to take action against the executive branch, review governmental policy-making and even shape the behavior of the administration. Though these interventions have played a part occasionally in bringing transparency and accountability, they have also led to blurring of judicial and political roles. Opponents say that the common and at times discriminatory exercise of suo motu powers harms procedural fairness, circumvents the due process of the law, and disturbs the constitutional balance of power. Moreover, it also casts doubt on the legitimacy of democracy because judges who are not elected take up positions that can override the powers of elected officials in policy making. The judicialisation of politics in Pakistan has thus been a highly debated topic with scholars and practitioners split on its need and consequence. (Ginsburg, 2020)

To address these fears, recent constitutional and legislative changes have attempted to re-balance the relationship amongst state institutions. These include the 26th Constitutional Amendment, which was also a notable effort in responding to the perceived abuses of judicial authority and the reestablishment of balance in the constitutional system. The amendment proposes some important reforms on three areas that are very crucial: the judicial appointment process, scope and exercise of the suo motu jurisdiction and the introduction of systematic procedural rules of judicial functions. To begin with, judicial appointments reforms focus on improving the levels of transparency and expanding institutional involvement, which may lead to a greater influence of the executive and parliament in the nomination process. Though this can enhance democratic accountability, there are fears about politicization of the court system and the possible dilution of merit-based appointments. Secondly, the limitation in the curtailment of suo motu powers is meant to curtail the discretionary power of the Supreme Court so as to minimize the incidences of unilateral judicial intervention in the affairs of governance. This is a reform that is aimed to bring back the discipline to the procedures and that the cases be heard in the proper legal procedures. Thirdly, the establishment of formalized practice and procedure mechanisms is an attempt to institutionalize the judicial processes, facilitate uniformity and predictability in their decision-making. (Tushnet, 2021) Although these goals were met, the consequences of the 26th Amendment are still debatable. On the one hand, it may be considered as a corrective action that will limit the judicial overreach and reinforce parliamentary sovereignty. Conversely, critics warn that going to the extreme with such restrictions on judicial powers can undermine the judiciary as a good check over executive and legislative abuses. This tension demonstrates the key dilemma of the reform, in terms of finding a proper balance between the independence of the judiciary and institutional responsibility. It is against this backdrop that the current paper attempts to critically review the issue of whether or not the 26th Constitutional Amendment has essentially changed the power hierarchy between the state institutions that are central to Pakistan. The study seeks to evaluate whether the amendment is an authentic restoration of the separation of powers or a move to increased politicisation of the judiciary by examining its effects on judicial appointments, suo motu jurisdiction and procedural governance. Through this, the paper equally contextualizes such

developments in the wider theoretical discussions and global norms regarding judicial autonomy and constitutional rule. (Hirschl, 2021).

Problem Statement

The constitutional balance of judiciary, executive and legislature in Pakistan has been a point of continued tension and debate. The judiciary especially the Supreme Court has over the years taken on a more activist role in the governance process by judicial activism and broad application of the suo motu powers under Article 184(3). Although these types of interventions have been rationalised as being necessary in the protection of fundamental rights and in ensuring accountability, there has been judicialisation of politics, which has brought about the issue of institutional overreach and dilution of the doctrine of separation of powers. In reaction, the 26 th Constitutional Amendment has brought about drastic changes that seek to limit judicial discretion, reform judicial appointments and codify the process by law. Nonetheless, these reforms have spawned a new breed of issues about how the judiciary might be politicized and how judicial independence may be compromised. The issue with this is whether the Amendment to the 26th has been effective in restoring institutional balance or has only swapped the power of the judiciary with the executive and the parliament. Moreover, no comprehensive scholarly discussion has been done to assess the reforms against international standards, especially the UN Basic Principles on the Independence of the Judiciary. The research aims to fill this gap by critically evaluating the constitutional, legal and institutional consequences of the amendment.

Objectives of the Study

The primary objective of this study is to examine the impact of the 26th Constitutional Amendment on the balance of power among state institutions in Pakistan. The specific objectives are:

- To analyze the concept of judicialisation of politics in the context of Pakistan
- To evaluate the doctrine of separation of powers and its practical application
- To examine the key features of the 26th Amendment, particularly judicial appointments, suo motu powers, and procedural reforms
- To assess whether the amendment strengthens or undermines judicial independence

Separation of Powers

Separation of powers in a democracy is not a technicality; rather it's a shield against tyranny. Partition of government authority into legislature, executive and judiciary meets the constitutional maxim that each part of government should not hold too much power. This mechanism ensures accountability, transparency and the rule of law. Institutionalized and laid out constitutionally, the success of separation of powers has to do less with the writing on the walls, but more with political will, institutional maturity, and legal culture of checks and balances. It is ironic that while separation of powers has been championed in theory in Pakistan, it is not one of its enduring institutional principles. Pakistan started with a colonial inheritance that was not institutionally self-governing. A civilian-military bureaucracy has dominated the first few years and institutional ease of command imposed over elected governmental structure. While symbolically important the Objectives Resolution of 1949 offered very little in terms of institutionalization of separation of powers. Rather it introduced an ideological vacuity which later would be cited as an authority to exercise tyrannical power of the executive. That the constitution of 1956 was an attempt to carpet the principle of separation of powers through its constitutionalization turned out to be short-lived and only foreshadowing of the immaturity of democratic institution in the country. It was later the 1962 Constitution, imposed under military rule, which aggravated the situation further through increasing power of the president at the expense of parliament and judiciary. An egalitarian constitutional division of powers under the 1973 Constitution has been repeatedly suspended or

bypassed under various guises of stability and national security. This has been a function of the judiciary's own volatility of behaviour swinging between a passive compliance and a determined defense of constitutionality, such laws and principles as the doctrine of necessity that empowered the military and contradicted the judiciary's power-checking role during cases like *Begum Nusrat Bhutto v Chief of Army Staff* and *Zafar Ali Shah v General Pervez Musharraf* have greatly contributed to this erosion of the principle of separation of powers.

It was the lawyers movement after 2007 which led to reinstatement of Chief Justice Iftikhar Muhammad Chaudhry, and since then judiciary has been trying to gain its autonomy with determination and force. Nonetheless, separation of powers still has to overcome institutional fragility. The executive still wields excessive policy authority and infringes on legislative and judicial powers. Parliament is weakened by fragmentation and lack of efficacy. The Judiciary, though an increasingly proactive power in Pakistan, still lacks enforcement and suffers from political instrumentalisation and inconsistency. A key principle of constitutionalism in modern times is the doctrine of separation of powers, which is best known by its formulation by Montesquieu. It supports the separation of state power into three arms- legislature, executive and judiciary to avert the accumulation of power and the protection of individual freedom. The branches have specific functions: the legislative branch passes laws, the executive enforces them and the judiciary interprets and enforces them. Notably, the doctrine is supplemented by a check and balance system, where each arm of government can restrict the other, thus holding them accountable and deterring abuse. Theoretically, institutional independence, efficiency and democratic legitimacy are encouraged by the separation of powers. The judiciary, more so, is supposed to be an unbiased judge, not conditioned to political influence and is to enforce the constitution and enforce basic rights. But the practical implementation of this doctrine differs in the political systems, and is usually dependent on historical, social, and institutional factors. (Barber, 2021). The process of separating powers has been tried severally in Pakistan because of political instabilities, constitutional failures and authoritarian regimes. This has often led to blurring of the boundaries between institutions with one branch of the institution often taking over the territory of another. The judiciary has justified the executive actions by such doctrines like necessity and has at other times asserted its authority by judicial review and activism. This fluidity brings to the fore the difficulty of ensuring a steady constitutional balance in an evolving democratic environment. In this context, it is possible to observe that the 26th Constitutional Amendment is an effort to rebalance institutional relationships, by redefining the boundaries of judicial authority. The amendment is aimed at strengthening the legislature and executive by adding restrictions on the suo motu powers and changing the processes of judicial appointments, thus returning the power balance to the traditional equilibrium. But this begs some very important concerns as to whether such reforms will reinforce the doctrine of separation of powers or will jeopardize judicial independence by enhancing the political power. (Carolan, 2022).

Judicialisation of Politics

The idea of judicialisation of politics offers a complementary and opposing view. It means the procedure through which the courts extend their functions beyond adjudication to the sphere which is traditionally attributed to political decision-making. This has been very common in developed and developing democracies and is usually as a reaction to institutional inefficiency, governance failure or a growing complexity of the policy issues of the people. Judicialisation can take many forms such as widening of judicial review, increasing the use of courts in solving political conflicts and exercising of judicial powers to provide solutions to matters of national interest. This has been especially true in Pakistan with the judiciary exercise of suo motu jurisdiction under Article 184(3), which permits it to directly interfere in issues such as corruption and governance, environmental protection and human rights. (Dyzenhaus, 2020).

On the one hand, judicialisation is seen as a good move which increases responsibility, which acts as a check on excesses by the executive and the legislative. The judiciary may become a crucial tool of the rule of law and the rights of citizens in cases where the political institutions are weak or ineffective. Critics, however, claim that too much judicialisation will result in overreach and a loss of democratic procedures and confusion of legal and political functions. The courts might not possess the expertise, resources and democratic mandate needed to make policy and this may create inefficiencies and institutional conflict. The judicialisation of politics has been both applauded and repudiated in Pakistan. Although, it has led to increased awareness and accountability among the people, it has equally expressed concern on inconsistency, selective intervention and the concentration of power in the hands of the judiciary. These debates have been heightened by the fact that there are no clear procedural guidelines on how the *suo motu* powers should be exercised. (Finn, 2021).

Federation of Pakistan v. Maulvi Tamizuddin Khan (PLD 1955 FC 240)

This landmark case arose after Governor-General Ghulam Muhammad dissolved Pakistan's first Constituent Assembly in 1954. Maulvi Tamizuddin Khan challenged the action, and the Sindh Chief Court declared the dissolution illegal. On appeal, the Federal Court (4–1 majority, led by Chief Justice Muhammad Munir) overturned that decision. It ruled that the Sindh Chief Court had no jurisdiction because the relevant law (Section 223-A) lacked the Governor-General's assent. The Court also held that the Constituent Assembly's laws required such assent, as Pakistan was still a dominion.

State v. Dosso (PLD 1958 SC 533)

This case arose after the 1958 martial law imposed by President Iskander Mirza. The Supreme Court, led by Chief Justice Muhammad Munir, upheld the new regime by applying Hans Kelsen's theory of legal positivism. The Court ruled that a successful revolution creates a new legal order, making the previous Constitution (1956) invalid. It declared the martial law and the Laws (Continuance in Force) Order 1958 as the new legal foundation (*grundnorm*), thereby validating the regime.

Asma Jilani v. Government of Punjab (PLD 1972 SC 139)

This landmark case challenged detentions under General Yahya Khan's martial law regime. The Supreme Court (led by Chief Justice Hamoodur Rahman) declared Yahya Khan a "usurper" and held his rule illegal and unconstitutional. The Court overruled *State v. Dosso*, rejecting the idea that a successful revolution creates a valid legal order. It emphasized that constitutional supremacy prevails over military force and that legality cannot arise from mere effectiveness. The judgment restored the authority of the Constitution and judiciary, limited the doctrine of necessity (only to avoid chaos), and firmly rejected the validation of military rule in Pakistan's constitutional law.

Begum Nusrat Bhutto v. Chief of Army Staff (PLD 1977 SC 657)

This case challenged General Zia-ul-Haq's 1977 military coup and the detention of political leaders, including Zulfikar Ali Bhutto. The Supreme Court (led by Chief Justice Anwarul Haq) dismissed the petition and upheld martial law. The Court applied the doctrine of necessity, holding that the military takeover was justified to restore order. It stated that the 1973 Constitution was only suspended (not abolished) and that the regime was temporary. The judgment legitimized Zia's rule, revived the doctrine of necessity, and weakened the earlier stance in *Asma Jilani*, thereby reinforcing judicial support for military interventions in Pakistan.

Zafar Ali Shah v. General Pervez Musharraf (PLD 2000 SC 869)

This case challenged General Pervez Musharraf's 1999 military coup. The Supreme Court (12-member bench led by Chief Justice Irshad Hasan Khan) validated the takeover using the doctrine of state necessity. The Court allowed Musharraf to govern as Chief Executive and even make limited constitutional amendments, but restricted him from altering the Constitution's basic features (like democracy, federalism, and judicial independence). It also required that elections be held within three years to restore civilian rule. The judgment again legitimized military intervention in Pakistan, continuing the trend of using the doctrine of necessity, while attempting to impose limits and a timeline for a return to democracy.

Tension of Analysis and its Application to the Research.

The conflict between the separation of powers and judicialisation of politics is at the centre of the research. On the one hand, the increase in judicial authority can be legitimized as the result of the need to respond to poor governance and institutional failure. Conversely, this expansion can go against the constitutional restraint and democratic legitimacy. This tension can be studied through the 26th Constitutional Amendment that presents a case study that is critical. The amendment seems to lean towards strengthening the separation of powers by reducing judicial discretion and putting procedural restraints. Meanwhile, it creates issues with the restriction of the judiciary to become a proper check to other branches. This paper uses the following theoretical frameworks to examine the claim that the amendment is a corrective action that seeks to restore constitutional balance or a change that would undermine judicial independence. In this perspective, the study will aim at making contributions towards the wider arguments regarding the proper role of judiciary in democratic governance, especially in new constitutions such as Pakistan. (Ginsburg, 2020).

26th amendment Major characteristics.

The 26th Amendment to the Constitution is a major change in the constitutional and institutional structure of Pakistan especially in restructure the role and purpose of the judiciary. It presents a bundle of reforms that comes into direct contact with the centuries-old arguments about judicial independence, accountability, and separation of powers. The amendment targets mainly three areas that are of critical concern namely judicial appointments, fine-tuning of suo motu powers and institutionalization of procedural rules by reform of practice and procedure. All these features have significant implications to the balance of power among the state institutions. (Levinson, & Pildes, 2021).

Judges Appointments

The reorganization of the judicial appointment process is one of the key aspects of the 26th Amendment. Historically, the Pakistani judicial system has been characterized by judicial appointments, with the judicial system, especially the internal recommendations and seniority mechanism prevailing. Although these systems are aimed at maintaining judicial independence, they have been criticized to be not transparent and accountable. The amendment aims at bringing a more embracing model where there is a possibility of increasing the role of the executive and parliament in the appointing process. This change is an attempt to democratize judicial appointments by integrating more institutional influence, and thus lessening the power concentration of the judicial branch of government. More involvement of elected officials can boost citizen trust in the process and make appointments a more diverse set of voices. Nonetheless, there is also a great concern about this reform. The more the politicking involved in the appointment of judges, the more the principle of appointing judges on the basis of merit is compromised and the judiciary can become politicized. When partisan interests enter into the

appointments, then the autonomy and objectivity of judges may be at stake. This gives a fragile balancing act between accountability and maintaining autonomy. Although the reform can help to increase the democratic control and transparency, it is also accompanied by the threat of political intervention in the judicial proceedings, which can undermine the credibility of the judicial system and its impartiality. (Möllers, 2020)

Limitations of Suo Motu Powers.

The other major point of the 26th Amendment is the restriction of the Supreme Court in suo moto jurisdiction. Article 184(3) has historically granted the Court very wide discretionary powers to notice things of national significance without a formal petition. The judiciary has been able to interfere in the governance, administrative rulings and policy making with this power being a characteristic of judicial activism in Pakistan. The amendment aims to check and limit such power by incorporating more explicit guidelines and procedure limitations. The reform will help to minimize arbitrary or discriminatory interventions by restricting the conditions under which suo moto action may be taken and the cases should be taken by the proven legal routes. This amendment will correct the historic criticism that the unrestrained application of suo moto powers places the rights of due process in jeopardy and vests too much power in a small group of judges. It also reaffirms the doctrine that courts are mainly adjudicative bodies as opposed to active policy-makers. Nevertheless, the limitation of suo moto jurisdiction can also have some unforeseen effects. Where the mechanisms of the judiciary to act on its own are crucial in the protection of the fundamental rights, especially in circumstances where access to justice is restricted and institutional structures are weak. Limiting this authority can diminish the ability of the Court to give prompt responses to immediate societal problems, especially those that involve minority groups. The reform is a direct reaction to the issue of judicial overreach and it enhances procedural discipline, but it also can curtail the capacity of the judiciary to serve as an efficient protector of constitutional rights in emergencies. (Rose-Ackerman, 2021).

Reforms of practice and procedure.

The 26th constitutional amendment also stresses institutionalization of judicial processes by introducing practice and procedure reforms which are structured. The Supreme Court has been very discretionary in the way it initiates, hears, and decides cases. Although this flexibility enables it to be flexible, it has brought about its own criticism as being inconsistent, lack of transparency and may use the power in an abusive manner. The amendment attempts to deal with these issues by institutionalizing procedural rules and setting out more definite guidelines of the operation of the Court. This involves case assignment, bench-setting, and judicial process regulation. The reform will help to improve predictability, fairness, and minimize the role of individual discretion by codifying these processes. This procedural standardization is in line with the more general concepts of the rule of law, whereby legal procedures must be open, predictable and public. It also complies with the international best practices that pay attention to the institutional integrity and accountability in the judiciary. However, the higher procedural regulation can also limit judicial discretion. The courts frequently require the flexibility to change procedures to suit complicated or first-time cases, and strictly followed rules can impede efficient legal decision-making. It is also possible that procedural frameworks might be manipulated by outside forces thus indirectly interfering with judicial independence. Such reforms enhance transparency, consistency, and institutional responsibility, but can also restrict the flexibility and adaptability of the judiciary in its operations and response to a variety of legal issues. (Waldron, 2022).

Analysis: Has the Balance Shifted?

The 26th Constitutional Amendment is a significant milestone in the constitutional development of Pakistan and the poignant question is whether it has indeed redistributed the balance between judiciary, legislature and executive or has merely changed the institutional dominance to a new direction. This part critically analyses how the amendment has changed the constitutional balance by looking at three important dimensions, the shift of judicial supremacy to parliamentary domination, the effect on judicial independence and how the amendment has decreased judicialisation of politics.

Judicial Supremacy to Parliamentary Control.

A visible impact of the 26th Amendment is the apparent change of institutional power of the judiciary to the parliament and to some degree to the executive. The judiciary especially the Supreme Court had become a strong institutional player in Pakistan in the years before the amendment. The Court used its vast interpretations of the articles of the constitution, and its frequent application of suo motu jurisdiction under Article 184(3) to exert a great influence on political and administrative affairs. This is commonly described as a time of judicial supremacy when the judiciary was not only interpreting the law, but was also influencing the results of governance. The amendment aims at adjusting this imbalance by adding structural and procedural checks on judicial power. It curbs the discretionary application of suo motu authority and the formalization of the judicial procedures, which means that individual judges or benches are less likely to act on their own. Also, shifts in judicial nominations which possibly concern parliamentary involvement is an indication of a shift to more democratic accountability. This change insinuates a conscious effort towards parliamentary renewal, reaffirming the notion that elected officials ought to be key in governance and policy making. Nevertheless, this change poses some serious questions. Parliamentary domination can also lead to the failure of the system of check and balances because of the diminished ability of the judiciary to check the other branches.

In essence:

- Past: The Judiciary had broad, virtually unrestrained powers.

Now: The institutional mechanisms should be used to restrict unilateral judicial action and increase the role of the parliament. Therefore, although the amendment seems to remedy the problem of judicial overreach, it also has the potential to bring about a different form of imbalance unless sufficient checks and balances are upheld.

Effect on Judicial Independence.

The independence of the judiciary is a pillar to constitutional democracy where the courts are able to work devoid of external influences and make a judgment without any form of prejudice. The 26th Amendment has brought about certain reforms which have immense implications on this principle and have both positive or even negative consequences. On the one hand, the amendment enhances accountability as it creates checks on judicial discretion. Managing suo motu powers and the development of procedural frameworks minimize the chances of arbitrary decision-making and increase the level of transparency of the institution. These policies can help build the confidence of the people in the judiciary since its activities are controlled by the same set of predictable rules. Conversely, the more active role of the executive and parliament in judicial appointments is a reason to be concerned with the political interference. This may undermine the impartiality and independence of the judges in case they are chosen or advanced on political grounds instead of merit. This is especially in cases which are politically sensitive and the judiciary is supposed to serve as an impartial judge.

Furthermore, restriction of the discretionary powers of the judiciary can undermine its capacity to act as a proper check to the government activities. A limited judiciary might find it difficult to

defend basic rights and enforce constitutional norms in situations of a strong executive power and a poor system of political accountability.

Key concerns include:

- Possible politicization of judicial courts.
- Less ability of courts to check executive or legislative excess.

Including: risk of institutional dependency on political actors.

Consequently, although the amendment will improve accountability, it will create new weaknesses that may compromise the future independence and credibility of the judiciary.

Lessening Judicialisation of Politics.

One of the key purposes of the 26th Amendment is to deal with the so-called judicialisation of politics that has been a hallmark of the Pakistani constitutive landscape. The amendment is aimed at restraining judges in their involvement in politics and policy making by making sure that they exercise their suo motu powers sparingly and that they adhere to procedural discipline. This change is important in a number of aspects. To begin with, it will lessen the direct interference of the judiciary in political conflicts hence strengthening the idea that political conflicts are to be solved in a democratic manner and not by the courts. Second, it promotes political institutions especially parliament to have more responsibility in governing issues and policy making. The amendment will revert to the traditional role of judiciary that of an adjudicative institution as opposed to a policy-making institution by limiting judicial activism. This is consistent with the classical understandings of the separation of powers, in which the courts are not supposed to make or change the policy, but to interpret and apply the law.

Nevertheless, the judicialisation decline also has some threats. The judicial lack of control over judicial issues can enable the government to continue to have failures in governance or abuse human rights in a political environment where institutional weaknesses are prevalent. This reform is thus effective to a certain extent based on the ability and the desire of the political institutions to execute their constitutional duties. The 26th Amendment is without any doubt a change of power in the Pakistani constitution. Although it is effective in solving the issues of judicial overreach and minimising judicialisation of politics, it also brings forth important concerns of judicial independence and maintenance of effective checks and balances. The amendment, instead of creating a fixed balance, begins a new era in the negotiation of institutional power that will eventually lie in its practical application and the dynamic nature of the Pakistani political system.

International Standards and Comparative Perspective

Without placing constitutional reforms in international law norms and comparative constitutional practice, the assessment of constitutional reforms cannot be complete. The reforms in the case of the 26th Constitutional Amendment of Pakistan need to be evaluated in terms of their compliance with internationally accepted standards of judicial independence and a comparison with well-established democracies like the United Kingdom and the United States.

UN Principles on the Independence of the Judiciary.

The United Nations has developed a detailed model on how to ensure that the judicial system is free of any undue influence by the United Nations Basic Principles on the Independence of the Judiciary (1985). These are broadly acknowledged as a standard to assess judicial reforms in various jurisdictions.

The main aspects that are highlighted in these principles are:

Autonomy of the judiciary: The judiciary should not be subject to any interference by the executive, legislature, or any other external body. Judges are supposed to be able to make decisions

independently without any preference or favouring any side as long as the facts and the law are taken into account. Clear and non-partisan appointments: Judicial appointing should be done based on objective factors like competence, integrity and experience in order to be fair and to reduce the political factor in the process. Stability of tenure and fair operation: The judges should have a sense of security in their posts and be able to discharge their mandate without fear of being dismissed or being attacked. This is crucial in ensuring impartiality and public trust on the system of justice. All these principles are intended to uphold the rule of law by making the judiciary an independent and credible institution as part of the larger constitutional system.

The compatibility with the 26th Amendment

In comparison with these international standards, the 26th Constitutional Amendment is a mixed picture, both in terms of agreement and disagreement.

Positive Alignment:

The procedural reforms advocated in the amendment especially the use of structured practice and procedure procedures is in line with the UN principles of transparency and consistency. The reforms make judicial processes more formal, thereby minimizing arbitrariness and increasing institutional responsibility. This helps in having a more predictable and rule-based judicial system which is one of the major elements of judicial independence.

Areas of Concern:

Although these are positive developments, there are serious concerns that there is increased involvement of political actors in the appointment of judges. The inclusion of the executive and parliament though it might improve democratic scrutiny might not augur well with the principle of non-dependence on outside forces. When political factors come into play in appointments, it may affect the selection based on merit and may negatively affect the judicial impartiality. Moreover, limitations on judicial discretion- especially concerning suo motu powers- can inhibit the judiciary to take independent action in safeguarding fundamental rights. Although these restrictions are necessary to curb the issue of overreach, they should be well balanced so that the judiciary is still given the power to act as a sufficient check to other branches.

Comparative Insights (UK/ USA)

The Study argues by the doctrinal and comparative study. That study known democracies will give additional enlightenment on the ramifications of reforms in Pakistan.

United Kingdom:

The UK is governed on the basis of parliamentary sovereignty, the legislature is the ultimate power. The judiciary is restrained and tends not to intervene with politics. Nonetheless, courts independence is highly guarded by a well-developed set of conventions, clear procedures of appointing people to the court, and institutional protection.

United States:

The US model, on the other hand is characterized by a robust system of judicial review where the courts can invalidate legislation. The judicial appointments are politicized (President and Senate) and yet the procedure is institutionalized, open, and balanced with institutional checks. Judicial independence is also enhanced by lifetime tenure.

The 26th Amendment in Pakistan seems to be making steps towards a more akin to a parliamentary control model just like in the United Kingdom. But, as opposed to the UK, there are no well-established institutional protections and norms in place in Pakistan to guard judicial autonomy.

Meanwhile, it is not a complete copy of the well-structured and balanced appointment system of the United States. Consequently, even though the reforms are expected to deal with judicial overreach, they also have the risk of creating more vulnerabilities on the issue of politicization. The move towards a more active political role in the absence of strong protection measures can destroy the independence that international standards are meant to defend.

Conclusion

The 26th Constitutional Amendment is an important step in the history of the constitutional development of Pakistan, which indicates a conscious attempt to readjust the balance of power between the institutions of the state. By correcting the long-standing problem of judicialisation of politics, the amendment aims at curbing the wide scope of role played by the judiciary and to reestablish the powers of parliament and the executive in their respective fields. By so doing, it is an indication of a more general trend towards enhancing democratic governance and institutional responsibility. Nonetheless, this recalibration cannot go without complexities and trade-offs. Although the restriction of suo motu powers and the implementation of procedural reforms can make the system more transparent and decrease the cases of judicial overreach, it also brings up some valid questions about maintaining the independence of the judiciary. Heightened political interference in the appointment and decision making within the judiciary could put the judiciary at the mercy of outside forces and compromise its position as a nonpartisan and a check to the government. Finally, the effectiveness of the 26th Amendment will be judged by how well the law is put into practice, and by how honest the institutions are. A differentiated strategy, which preserves judicial autonomy, yet holds them accountable will be necessary to constitutional stability, securing fundamental rights, and enhancing the rule of law in Pakistan.

Recommendations

- Based on the discussion of the 26th Constitutional Amendment and its effects on the balance of power in Pakistan, the following recommendations can be made with a view to ensuring that reforms can deliver the desired effects without undermining the independence of the judiciary:
- The criteria in appointing the judges should be transparent, objective and publicly available, with emphasis on competence, integrity and work experience. The mechanisms like judicial commissions or parliamentary committees need to work in a transparent way, well documented and justified decisions. This will assist in avoiding the interference of political interference and build trust on the judiciary by the people.
- Independent oversight bodies should be created or enhanced to ensure accountability without compromising autonomy. These bodies are expected to check judicial behavior, appointment, and fair procedure and not to be under executive or legislative influence. These mechanisms may serve as a check to judicial activism and political interference.
- Although excessive judicial activism is a problem, the judiciary should still have the necessary power to check the legislative and executive actions. Judicial review must continue to be a fundamental constitutional role especially where the fundamental rights are at stake and cases of constitutional infractions. There must be a balanced policy that allows the courts to be a good check without interfering with the areas of policy making.
- All constitutional and legal changes are to be appraised against international standards especially those of the United Nations under the UN Basic Principles on the Independence of the Judiciary. Adherence to these standards will improve credibility of the legal system in Pakistan and strengthen its adherence to the rule of law.

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