

## **The 26th Amendment to the Constitution of Pakistan: Implications for Judicial Independence**

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### **Abstract**

This paper discusses the 26th Amendment to the Constitution of Pakistan passed by the parliament on 21th October 2024 with unusual haste. It analyses its impacts on independence of judiciary in Pakistan. The advocates of the amendment claimed that the amendment was needed to address some socio-political and legal challenges. But it has raised questions about the balance of power principle which is the foundation of the constitution. This study analyses the text, motivation of the government, and its impacts on the judicial independence in Pakistan. The findings of the study reveal the impacts of the amendment on judicial impartiality, autonomy, and accountability.

### **Introduction**

The Constitution of Pakistan was promulgated in 1973. It provides the basic legal framework for governance of the country. It has number of clauses which protects fundamental rights of the people. Since its inception, several amendments have been incorporated to address political, social, and other's needs. Among these, the 26th Amendment has ignited significant debate, especially about its impacts on the independence of judiciary.

Judicial independence is a key to democratic governance and the rule of law. This paper is going to analyze how the 26th Amendment affects the judiciary in Pakistan. It assess whether the amendment increases or decreases judicial autonomy.

### **The 26th Amendment**

The 26th Amendment was enacted to address specific governance issues, particularly in the context of judicial oversight. However, its implications for judicial independence remain underexplored in existing literature. "The Senate passed the 26th Constitutional Amendment within hours following its introduction before it in the evening of Sunday 20 October. It was then introduced in the National Assembly, Parliament's Lower House, where it was passed early this morning, Monday 21 October. Shortly afterwards, it also received the assent of the President and was officially published in the Gazette (ICJ, 2024, p, 2)".

The 26<sup>th</sup> amendment has brought many changes to the constitution of 1973. Some important changes have been listed below.

#### **1. Appointment of Chief Justice of Pakistan**

The method of the appointment of Chief Justice has been amended. Previously, the chief justice was appointed on seniority basis. The most top judge had been appointed to the post that had most senior among the Supreme Court judges. Article 175A which is about the appointment of

the most top judge of the Supreme Court has amended and now he will be appointed on the recommendation of the judicial commission and special parliamentary committee. According to the supreme court of Pakistan, “the Judicial Commission of Pakistan consists of Chief Justice of Pakistan as Chairman, four senior most judges of the Supreme Court, one former Chief Justice or judge of the Supreme Court nominated by the Chairman in consultation with four member judges for a period of two years, the Attorney General of Pakistan, the Federal Law Minister and a senior advocate of Supreme Court of Pakistan nominated by the Pakistan Bar Council. Similarly, the Parliamentary Committee consists of eight members with equal membership from the treasury and opposition benches as well as of two Houses i.e. National Assembly and Senate. The nomination of the members from the Treasury Benches shall be made by the Leader of the House and from Opposition Benches by the Leader of the Opposition, provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only”. The committee will pick up the nominee for the top slot of the court from among three most senior judges of the Supreme Court and will send it to the prime minister of Pakistan who will forward the same to the president for the final approval.

Moreover, the term of office of chief justice of Pakistan has been limited to three years. The chief justice will be retired at the completion of three years without attaining the age of superannuation which is 65 years.

### **Curtailling the powers of Supreme Court and high court**

One of the most important change has been made through 26<sup>th</sup> amendment was the scraping the suo motu powers of the Supreme Court and high court by amending article 184. The superior judiciary now cannot take notice of any issue or matter which was the power of original jurisdiction of the high court and Supreme Court before amendment.

### **Introducing of constitutional benches in Supreme Court and high court**

A new article 191A has been inserted which is about the formation of constitutional benches in Supreme Court and high court. According to Article 191A clause 1, “There shall be Constitutional Bench of the Supreme Court, comprising such Judges of the Supreme Court and for such term, as may be nominated and determined by the Judicial Commission of Pakistan, from time to time, provided that the Constitutional Benches may comprise an equal number of Judges from each province” (Dawn, 2024, p, 2). The same Article of clause 2 says that the most senior judges nominated under clause 1 will be the presiding Judge of the court.

The constitutional bench will hear the cases where the constitutional interpretation is involved or any other matter which deals with the any Article of the constitution. Therefore it will deals with the all cases of original jurisdiction of the court under Article 184,186 and 199 etc. the rest of the Supreme Court will have no power to take up the above mentioned cases. Similar arrangements have been made for the formation of constitutional benches in high courts.

### **Performance evaluation of high court Judges**

The commission formed under clause 2 will conduct performance report of the high court judges annually. If the commission find the performance of any judge unsatisfactory then it may give notice to the concerned judge for improvement. If the said judge failed to improve his or her performances, then his or her case will be send to supreme judicial comission for further proceedings.

### **Elimination of Riba**

Article 38 has been amended for the elimination of Riba till January 1, 2028.

## **Provision of clean and healthy environment**

Article 9 has been amended to provide clean and healthy environment to every person of the country. The article says that healthy and clean environment is the right of every person.

## **Chief Justice's Tenure**

The amendment has fixed the tenure of the Chief Justice of Pakistan (CJP) to three years. According to the amendment, the term of office of the chief justice will be three years. He will be retired on serving three years without reaching to the age of superannuation. This change is significant as it is a departure from a long-standing tradition where seniority rule was taking in to consideration in judicial appointments. This rule was allowing longer tenures for the talented persons based on merit and experience.

## **Analysis of the 26<sup>th</sup> amendment**

The 26<sup>th</sup> amendment to the 1973 constitution is a landmark amendment to the constitution of Pakistan. It has radically changed the judicial structure of Pakistan. The amendment has drastically changed the powers of the Supreme Court and high courts. The amendment is also responsible for changing the balance between the executive and judiciary as the executive gain more powers to influence the judiciary. "The 26th Constitutional Amendment has introduced a series of radical changes to the structure and operation of Pakistan's judicial system that critics contend will politicize the higher courts and pave the way to undermine judicial independence (Tripathi & kumar, A, 2024,p,7). Similarly Amir Latif believes that, the Twenty Sixth Amendment may have been designed to address specific problems within the judiciary, but it has eroded judicial independence and democratic governance in Pakistan. As the appointment and removal process of judges has changed, the new vague criteria have increased the risk of interference in judicial operations from political branches, undermining the judiciary's authority as an independent branch focusing on protecting the Constitution and rule of law (2024, p4).

The impacts of 26<sup>th</sup> amendment on judiciary have been discussed below.

### **1. Composition of Judicial commission of Pakistan**

The 26<sup>th</sup> amendment has changed the composition of judicial commission in favor of the executive. Previously, the Judicial commission was dominated by the judges but now two member from national assembly, two members from senate one member non-muslim and one a woman will also be the members of the commission. The law minister, attorney general of Pakistan and a representative of the Bar council is already a member of the commission. "These changes in the JCP's composition allow for direct political influence over it, and reduce the JCP's judicial members to a minority. For the appointment of Supreme Court judges, for example, only five out of 13 JCP's members are required to be judges namely, the Chief Justice of Pakistan, the most senior judge of the constitutional benches, and the three most senior Supreme Court judges" (ICJ,2024, p, 6).

The government is now having an upper hand in appointing the judges of superior judiciary. It will definitely influence of the work of judiciary as in developing countries like Pakistan the institutions are not fully established the judges often criticized for their subjectivity in their judicial decision.

### **2. Administrative powers of the judicial commission of Pakistan**

The amendment has given exclusive powers to the judicial commission of Pakistan to nominate the constitutional benches in Supreme Court as well as in high courts. These benches have enormous powers over matter of interpretation of the constitution and all matters relating to the violation and enforcement of fundamental rights. Such powers allow the judicial commission to influence the court and get decision of their own choice. There is every chance that these decisions will be politically motivated and serious blow to the independence of judiciary.

### **3. Appointment of the chief justice of Pakistan**

Prior to the 26<sup>th</sup> amendment, the chief justice of the supreme court was to be elected on the basis of seniority automatically and the executive had no powers in his appointment the most senior judge had to occupy the top slot of the judiciary but now the executive and the parliament have the powers to influence the appointment of the top judge. "The 26th Constitutional Amendment has amended the Constitution to give a "Special Parliamentary Committee" (SPC) consisting of eight members of the National Assembly and four members of the Senate the power to nominate the CJP from among the three most senior Supreme Court judges" ICJ, 2024, p,8). Thus the 26<sup>th</sup> amendment has devised a procedure for the appointment of the chief justice which enables the executive to influence the appointing procedure and thus select a blue eyed top judge. The appointment of the first ever chief justice under the act says the full story. According to Neha Tripathi & Anubhav Kumar," just one day before the retirement of then-Chief Justice of Pakistan Qazi Faez Isa, the amendment derailed the "seniority principle" that would have elevated Justice Mansoor Ali Shah to Chief Justice. Instead, within 24 hours, the parliament passed the amendment with the requisite two-thirds majority (with some lawmakers alleging coercion), the newly constituted commission was convened and recommended Justice Yahya Afridi for the post, and the President appointed him as the Chief Justice, superseding the senior-most judge. Collectively, these actions scream of a compromised constitutional ethos in the country, an assault on the independence of the judiciary, and a blatant disregard for the separation of powers (2024)". According to Rameen Siddique, "The amendment places the appointment of judges back in the hands of the executive branch, a practice that history has shown to be fraught with potential for political interference. He warned that this return to executive control undermines the judiciary's ability to function as an impartial arbiter of justice (2024, p, 6)".

### **4. Removal of the judges**

The 26<sup>th</sup> amendment has given another opportunity to the executive and parliament to remove a judge from the service on the ground of inefficiency. The Judicial commission can give warning to a judge to improve his or her performances if the person, failed to improve his or her performances already advised, his or her case may be send to supreme judicial council for final removal. It is indeed a Damocles sword on the judge and will work in with feelings of uncertainty and insecurity. The executive will thus manipulate the work of judiciary and will threaten an upright judge on the ground of inefficiency. It is very interesting that the amendment does not describe or explain the word inefficiency thus leaving a room for the executive to use this clause to achieve its own objectives.

While constitutional amendments are a natural part of any democracy's evolution, the process by which they are enacted and the balance of power they maintain are critical. "The 26th Amendment, by altering the judicial appointment process and curbing the judiciary's independence, threatens to undermine the very foundation of Pakistan's constitutional framework. The trust and inclusivity essential for a truly democratic society are at risk, and this may have lasting implications for the rule of law and the protection of individual rights (shah, 2024,p, 4)".

### **5. Impacts on rule of law and Human Rights**

A rule of law is a cornerstone of democracy and nourishment for healthy society. An impartial and politicized judiciary cannot uphold the constitution and thus cannot protect the human rights in the country. The consequences of weak and compromise judiciary are erosion of democracy and strengthening of authoritarian rule in the country.

A weak judiciary is also detrimental to the notion of judicial review. A politicized and executive controlled democracy cannot challenge the laws of parliament which violate the constitution and against the human rights. This will ultimately leads to weakening of rule of law and democracy which will in turn shake the public trust in government. This will increase the sense of apathy in people which will be ultimately end in decline of the state.

## **6. Impacts on Separation of Powers principles**

The 26th Amendment also has profound implications for the principle of separation of powers. By increasing parliamentary representation in judicial commission it has increased the accountability of the judiciary *prima facie*. However, this shift required the judiciary to navigate new legislative enactments and administrative decisions that directly impacted the judiciary. The judiciary's role in interpreting the laws became critical, especially when disputes arose over the balance of power between federal and provincial governments. This dynamic raised concerns about potential conflicts between the judiciary and other branches of government, particularly in cases where judicial rulings were perceived as encroaching on legislative or executive domains.

### **Division in judiciary**

The amendment has virtually divided the court and its powers. There will be a constitutional bench which will hear cases in which some provisions of the constitution are involved. It is indeed a parallel court against the chief justice of the Supreme Court. Judicial commission which is an executive dominated organ will pick up the three judges. The most senior will be its presiding judge. Critics challenge the intent of the government on the ground that the latter is not comfortable with most senior judges of the current Supreme Court that is why this arrangement has been made to taking away the powers from these judges in order to secure the important decision in their favor. "With the insertion of Article 191A, the constitutional bench will exclusively handle constitutional matters, which are often the focus of television shows and newspapers. This amendment represents a clear step back from the initial effort to establish a completely separate apex court, leaving the Supreme Court in name only. Interestingly, judges for this bench will now be nominated by the Judicial Commission, not by the recently formed three-judge committee established under last month's ordinance. The most senior among them will serve as the Presiding Judge of the Constitutional Bench, and all significant powers, including *suo motu* and advisory powers, will be vested in this bench. Some argue that it may become a court within a court (khan , 2024, p, 4)" similarly, the human rights commission of Pakistan observes that, "the composition of the special parliamentary committee that will nominate the chief justice of Pakistan (comprising members of the Senate and National Assembly according to their parties' proportional representation) gives the government of the day a dangerous advantage, potentially subjugating the judiciary in contravention of Pakistan's obligations under Article 14 of the ICCPR (2024, p, 2).

Dividing the Supreme Court on constitutional and non-constitutional benches is to divide the powers of the judiciary. A general perception about this provision of the amendment is that the government wanted to dilute the powers of superior judiciary and wish to gain somewhat control over it. The current coalition government has a long history of tussles with the judiciary from time to time. So it is going to settle the issue.

### **Conclusion**

The 26th Amendment to the Constitution of Pakistan has profound impacts on judiciary, its independence, impartiality, and effectiveness. By manipulating the composition of the Judicial Commission of Pakistan and introducing a Special Parliamentary Committee for appointments of judicial top appointments, the amendment undermine the judiciary's autonomy and venerable it to political interferences.

The weakening of judicial independence has severe implication for the rule of law and human rights protection in Pakistan. A politically motivated judiciary may fail to check the executive and legislative organs of government from misusing the powers and compromising the principles and norms of democracy.

To ensure the integrity and effectiveness of the judiciary, it is necessary to revisit the 26th Amendment and restore the independence and autonomy of the judiciary. This can only be

happened by reversing the changes to the Judicial Commission of Pakistan and ensuring that judicial appointments are based on merit and impartiality.

Moreover, a powerful and independent judiciary is a key to uphold the Constitution. It protects the human rights, and ensuring the rule of law in Pakistan. It is important that all stakeholders including the government, parliament, and civil society work together to safeguard the integrity of the judiciary and make it certain that it remains a ray of hope for justice and democracy in Pakistan.

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