

ADVANCE SOCIAL SCIENCE ARCHIVE JOURNALAvailable Online: <https://assajournal.com>

Vol. 04 No. 02. October-December 2025. Page# 3414-3420

Print ISSN: [3006-2497](#) Online ISSN: [3006-2500](#)Platform & Workflow by: [Open Journal Systems](#)**The Trojan Horse of Judicial Reform: An Analysis of Pakistan Controversial 26th Constitutional Amendment****Muhammad Abdullah**

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abdullahkhan99050@gmail.com**Abstract**

This paper is an incisive examination of continuous alterations in the 1973 Pakistan's Constitution, suggesting that the changes have always been a tool of political expediency rather than manifestations of public interest. The historical trajectory of constitutional change is portrayed as a sequence of treacherous modifications, as the amendments are used to restructure the power system within the state institutions, which is usually against the judiciary independence. The new and very controversial 26th Amendment as not a well-intentioned reform, but a manipulative and cunning political action that is intended to put the judicial system in a state of juridical paralysis. The main mechanisms that the amendment introduces politicization of the Judicial Commission of Pakistan (JCP), the abandonment of the principle of seniority in judicial appointments and the establishment of malleable Constitutional Benches are dismantled to show a systematic process of effacing judicial independence. In a comparison and theoretical approach, the article shows how these changes amount to a basic abnegation of the pillars on constitutionalism, federalism and separation of powers. The final finding is that such a change of paradigm in the judiciary, to a potentially subservient arm of government, is a paradigm shift that negates the very social contract on which Pakistan was founded and puts in danger the pursuit of a stable, democratic polity.

Keywords: 26th Amendment, Independence of Judiciary, Separation of Power, Constitutional Benches, Judicial Appointments, Executive Influence.

1. Brief background on constitutional amendments in Pakistan

The constitutional history of Pakistan, since the adoption of the 1973 Constitution, is a narrative of its political instability, often reflected in its numerous amendments. These amendments have frequently been used to alter the balance of power among state institutions, particularly between the executive and the judiciary. The current 1973 Constitution is a parliamentary document, but its journey has been marked by repeated alterations. Military regimes have been a major source of amendments, often to legitimise their rule and expand presidential powers. The 8th amendment by General Zia entrenched these powers, including the controversial ability to dissolve parliament. A significant democratic reversal came with the 18th amendment, which restored the parliamentary spirit. It abolished the President's dissolution power, enhanced provincial autonomy, and

strengthened fundamental rights. Furthermore, the 21th amendment establishing military courts. The 25th amendment merged the Federal Administrative Tribal Areas (FATA) with Khyber Pakhtunkhwa (KPK) province. Now, the 26th Amendment to paralyse the judiciary. Each amendment therefore represents a moment of renegotiation of the social contract and the balance of power among state institutions. The trajectory of these changes demonstrates a continuous struggle to define the nature of the Pakistani federation and the independence of its pillars. The amendments collectively narrate the story of Pakistan's quest for a stable, democratic, and federal polity.

2. Overview of the 26th Amendment

The 26th Amendment to the Constitution of Pakistan, passed on October 21, 2024, after a long debating session of Parliament, is arguable judicial reform package since the Eighteenth Amendment. Its central focus was restructuring the mechanism for appointing judges to the superior judiciary, a long-standing flashpoint between the judicial and executive branches. One of the key Article amended is Article 175-A by restructuring the judicial appointment mechanism for the superior judiciary, altering the composition of the Judicial Commission of Pakistan (JCP). Furthermore, the amendment limits the power of Supreme Court by amending Article 184(3). Another critical change was the introduction of a 'performance evaluation mechanism' for judges under Article 209. Another major innovation is the introduction of Article 191-A, which established 'Constitutional Courts' at both federal and provincial levels.

3. Previous constitutional amendments in Pakistan

There is a famous maxim "**Salus populi est suprema lex**", this principle states that 'welfare of the people is the supreme law', meaning that public interest and well-being of the community should override individual interests when laws are created and applied. However in Pakistan, the amendments are only made to save the skins of either the powerful or their favourites, without debating with representatives of peoples and without seeking opinions of peoples, who are the actual stakeholders of the state. The amendments to the Pakistani constitution have continually been interpreted through the values of political authority as opposed to legal development without personal political preference. Eighteenth Amendment, is widely discussed as a correctional post-democratic transition measure as a paradigm shift towards the federal parliamentary sovereignty that indirectly enhanced the strength of the judiciary by restoring the constitutional balance. In short, the 1973 constitution is often amended either to serve the powerful or their favourites or curtailing independence of institutions.

4. Comparative analysis with other countries constitutional amendments affecting independence of institutions

A comparative constitutional law approach will be important to examine the Pakistan 26th Amendment, with reference especially to the comparison of other common laws countries reforms. It is most relevant to compare it with India experience with the National Judicial Appointments Commission (NJAC) Act, 2014. In the case of Supreme Court Advocates-on- Record Association vs. Union of India 2015, the Indian Supreme Court 4:1 majority, struck Indian NJAC—that consisted of members of the executive and the opposition— because it abrogated the basic structure of the constitution by jeopardizing the independence of the judiciary. This path-breaking decision supports the fact that collaborative appointments may be a Trojan horse of executive

intrusion. The United Kingdom Constitutional Reform Act 2005, in its turn, provides an alternative model. The independent Judicial Appointment Commission in the UK that worked successfully in eliminating the position of the Lord Chancellor, by dissociating judicial competencies with the office of the Lord Chancellor to guarantee judiciary freedom. The South African system entails a hybrid Judicial Service Commission (JSC) that seems to be politically and judicially representative; and has been complimented as transparent and heavily criticized as being overtly politicized in carrying out public interviews on candidates. These comparative cases derived a critical framework for Pakistan, indicating that as much as the use of inclusive appointment bodies is a global trend, the success rate of the body depends on its design, composition, and the political culture within which it is operating.

5. Theoretical Lens: Constitutionalism, federalism, separation of powers

The three theoretical pillars that are interconnected will be used to offer a solid lens to the analysis of the 26th Amendment. First, there is the principle of constitutionalism that holds that the power of the government should be restricted and should be exercised in relation to a higher law of the constitution. Indeed, it is the redesign of the judicial appointments procedure under the amendment, which challenges the very boundaries of how the constitutional change can be used to either bolster or compromise these boundaries on power. Second, the theory of federalism offers a critical paradigm particularly with the fact that Pakistan is a multi-national federation. Federalism is a contractual sharing of power between the central and regional units, which are meant to safeguard diversity and avert tyranny. Lastly, there is the doctrine of the separation of power which is supreme. Following the classical theory of '**Montesquieu**' as well as concept of '**Trichotomy of Power**', scholars base their arguments on the premise that the autonomy of the judiciary is an essential condition that every branch can serve as a checklist to the other. By introducing the figures of parliament and executive into the judicial appointment process, the 26th Amendment establishes a new hybrid paradigm, which does not fit the conventional ideas of the absolute segregation.

6. Few major changes introduced by the 26th Amendment?

1. Composition of Judicial Commission Of Pakistan(JCP)

The first major change introduced through 26th amendment is restructuring the Judicial Commission of Pakistan (JCP), which unduly subjects it to the executive and parliamentary control. Before the amendment was passed, the JCP comprised majority of judges. After the amendment, the composition of JCP under article 175-A is totally changed and includes two members of National Assembly and two members of Senate (nominated by leaders of the House), one women or one non-Muslim member (nominated by speaker of NA) the, Law Minister, the Attorney General, and an Advocate of SC with not less than fifteen years of practice in the SC. From judiciary's side, Chief Justice of Pakistan, three most senior judges of SC, and most senior judge of Constitutional Bench are now members of JCP. Consequently, out of 13 members of JCP, in which 8 members are non-judicial members are in majority. These changes allow direct political influence.

2. End of Seniority Principle

Prior to this amendment, the most senior judge of the Supreme Court was entitled to be the Chief Justice of the SC. However, after the 26th amendment, Special Parliamentary Committee, under article 175-A(3) have to

choose next Chief Justice among the three most senior SC judges. They will forward the name of the nominee to the Prime Minister, who will then forward the same to the President for appointment. This change marks the end of seniority principle, and no criteria have been provided for nominating the CJP among the three.

3. Formation of Constitutional Benches

The third major blow is formation of a 'two-tier justice system' in shape of Constitutional Benches (CBs) under Article 191-A within the Supreme Court and under article 202-A within the High Courts. These benches have jurisdiction to proceed specially with matters involving interpretation of constitution and enforcement of fundamental rights. Furthermore, there is no specified tenure for these benches; and JCP can determine the tenure from time to time, meaning their composition can be changed at any time. Hence, decision regarding formation and tenure of CBs, at the will of JCP (where the majority consists of non-judicial members), directly impacts independence of the benches. Now, with formation of these parallel courts within the apex courts, it becomes difficult to determine the proper jurisdiction in cases that whether the instant case falls within the jurisdiction of ordinary courts of the Supreme Court or its Constitutional Benches. Justice Mansoor Ali Shah, during hearing of a matter, highlighted this concern by stating, 'The question of jurisdiction will arise every day after formation of Constitutional Benches'.

4. Limiting *Suo Moto* Power

The fourth amendment is made under Article 184(3) and Article 199 of the Constitution, and after that amendment, the **Suo Moto** power/jurisdiction is now transferred to Constitutional Benches of the apex courts. Apart from that, Constitutional Benches will give relief to the extent of relief prayed in application and not beyond the content of application. Before this amendment, the Supreme Court had power to take *Suo Moto* action even in absence of any petition before the court. In **Darshan Masih vs The State** case, the concept of *Suo Moto* was first discussed, where it was held that under the Constitution, court could take up the matter even in absence of any formal petition. The purpose of *Suo Moto* is to be the voice of voiceless, ensuring they could be heard even when they were unable to plead. The basic purpose behind limiting the power of *Suo Moto* jurisdiction, argued by the ruling coalition during tabling the amendment, was that, in the past, this power was used by the Apex Court indiscriminately and even also to topple governments.

5. Transfer of Cases from High Courts to Supreme Court

The amendment further amends article 186-A of the Constitution, which deals with the power of the Supreme Court transfer of cases from one high court to another or to itself. Now, the SC can transfer any case from any high court to itself. The general rule of law is that every suit shall be instituted at lowest grade competent to try it, meaning that a parties can contest their cases step by step from lower courts to higher. So, if the Supreme Court transfer any case from high court, and decides the matter in favour of one and against the other, what remedy will be left for the aggrieved party from that decision?. Meaning thereby, that Supreme Court can bypass any high court by transferring cases to itself. This particular amendment, undermines the autonomy of provinces and provincial high courts as well as it is against the right of appeal of aggrieved parties.

6. Removal on ground of “inefficiency”

Before this amendment, the grounds for removal of judges by the Supreme Judicial Council were ‘**incapacity and misconduct**’. The word ‘**inefficiency**’ has been added through this amendment, without a definition that what exactly the criteria and threshold will be. The new accountability measures could be misused to intimidate judges who issue rulings against the powerful or the government; such a judge could be simply be removed on the ground of ‘**inefficiency**’, effectively placing the judiciary entirely under control.

7. Impacts of 26th Amendment on independence of judiciary

As we have already discussed above, this controversial amendment curtails the independence of judiciary. So far, the new Constitutional Bench of SC issued controversial rulings, such as permitting military trials of civilians, which is against the fundamental rights enshrined in the Constitution and also against the principle, “**nemo judex in propria causa**” which means that ‘no one should be judge in his own cause’. Another much debated case is of reserved seats, where the Supreme Court denied the (Pakistan Tehreek-e-Insaf) its reserved seats. Another short ruling issued was justifying transfer of Lahore High Court judges to Islamabad High Court by the President. The takeover of Islamabad High Court by transferring judges was depriving the serving judges of Islamabad High Court of their due seniority. This controversial transfer and subsequent conduct of transferred judges, especially conduct of **Justice Dogar**, who restrained legitimate judges of ISB High Court from proceeding with cases fixed for hearing before the court, caused judges to confront each other. For the first time in the history, the judges were forced to seek justice for themselves by filing petition before the Supreme Court, which was justified by the Supreme Court. So, until now, the new Constitutional Benches are used as ‘**shop for favourable rulings**’, as we have seen in the latest rulings, especially against Pakistan Tehreek-e-Insaf (PTI). Furthermore, the non-implementation of SC and other different apex courts orders and judgments shows that the judiciary is being undermined and paralyzed.

8. Summary of Key Arguments

1. Politicisation of Judicial Appointments

The restructuring of Judicial Commission of Pakistan (JCP) gives a majority to non-judicial members of commission, allowing for direct political influence over the appointment of judges.

2. End of Seniority Principle

The amendment abolishes the rule that the most senior Supreme Court Judge automatically becomes Chief Justice. Instead, a political committee chooses from among the top three, with no defined criteria, opening the process to political manipulation.

3. Limitation of Suo Moto Jurisdiction

The power to take action on its own motion (Suo Moto) is transferred to new CBs and restricted. This is criticised as stripping the court of its ability to be a “voice of voiceless” and a check on executive overreach.

4. Creation of “Two-Tier Justice System”

The establishing of Constitutional Benches (CBs) within the Supreme Court and High Courts is seen as creating parallel courts. Their composition and tenure are controlled by the politicised JCP, raising concerns that they could be used as “shops for favourable rulings”.

5. Undermining Provincial Autonomy and Right to Appeal

The amendment enhanced the Supreme Court power to transfer any case from a High Court to itself bypasses provincial courts, undermines provincial autonomy, and denies aggrieved parties rights to appeal through the common judicial hierarchy.

6. Ground for removal

Adding the word 'inefficiency' as a ground for removal, without defining it, creates a tool that could be misused to intimidate or remove judges who issue rulings against the government or powerful.

7. Separation of power

The amendment blurs the lines between judiciary and other branches (executive and legislature), dismantling the system of checks and balances.

Conclusion

In this article, how the Constitution of 1973 has been often amended repeatedly, not for welfare of the true stakeholders of the state it's people, but to serve a few powerful individuals. The 26th amendment can be viewed as one of the most significant and extremely controversial changes in the constitutional history of Pakistan, which is often seen not as the real change but as an attempt to put the judicial system on its knees. The amendment has scientifically exposed the judiciary to executive and parliamentary control by radically restructuring the Judicial Commission of Pakistan to give a political majority, the abolition of the principle of seniority in appointment of the Chief Justice and establishment of manipulable Constitutional Benches. It is also amplified by restricting the *Suo Motu* jurisdiction of the court, decreasing the autonomy of the provinces in terms of the authority to transfer cases, and fuzzy reasons of displacement such as inefficiency that can be used to coerce judges. The initial signs such as the upsetting decisions in military trials and internal judicial wrangles indicate that such structural reforms have succeeded in making these benches a shopping mall where good rulings are made, compromising the public interest. Finally, the amendment is a gross violation of the very constitutional principles of separation of powers, constitutionalism, and federalism and this is a severe step backwards in terms of the democratic ethos of the 18th Amendment.

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