

Pakistan's Constitutional Conundrum: Navigating the Lucid Implications of 26th Amendment

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Abstract

This article depicts a critical review of the lucid implications of 26th Constitutional Amendment on Pakistan's democratic milieu, predominantly the institutional autonomy of the judiciary and rule of law. The amendment's alteration of the Judicial Commission of Pakistan (JCP) and the process of judicial selection ensued apprehensions of undermining the paramount principles of judicial autonomy and the separation of powers, prevalent in Pakistan's constitutional framework. This analysis elucidates the amendment's profound consequences for Pakistan's democratic environment, global image, and human rights obligations, entailing the International Covenant on Civil and Political Rights (ICCPR). By explicating the intricate dynamics among the constitutional law, politics and governance, this article portrays a nuanced comprehension of the amendment's ramifications. Additionally, the article offers profound insights into the complexities of fortifying judicial independence, fostering democratic governance, and upholding the rule of law amidst Pakistan's complex political and legal landscape.

Keywords: 26th Constitutional Amendment, Judicial Independence, Democratic Governance, Rule of Law, Human Rights, Separation of Power, Judicial Autonomy, Political Influence

Introduction

When a nation's judiciary becomes a political battleground, democracy itself is at risk¹. Pakistan's 26th Constitutional Amendment has sparked intense

debate by restructuring the judicial appointment process, shifting power from the judiciary to a parliamentary committee dominated by politicians². Though proponents contend, it makes the system more democratic, critics caution that it erodes judicial independence, a pillar of democratic rule. Judicial independence is crucial in safeguarding basic rights, guaranteeing free elections, and ensuring institutional accountability on power. By allowing political authority over judicial appointments, the amendment threatens to make courts instruments of ruling coalitions, compromising civil liberties, economic transparency, and international confidence in Pakistan's rule of law³. The article analyses the long-term implications of this amendment on Pakistan's democratic stability, economic future, and international commitments under the ICCPR. Through the examination of constitutional dynamics and governance issues, it identifies how ensuring judicial independence is crucial to advancing democracy, safeguarding human rights, and ensuring the rule of law in Pakistan.

Research Methodology

This article adopts a qualitative doctrinal research approach, grounded in constitutional and international legal analysis. The study is primarily based on an examination of the text of the 26th Constitutional Amendment and its implications on Pakistan's legal framework, especially the independence of the judiciary. The methodology involves a critical review of primary sources including constitutional provisions (notably Articles 175A, 184, 199, 191A, and 48(4)), and secondary sources such as academic commentaries, legal opinions, judicial pronouncements, and public statements from legal scholars and bar associations. To explore the amendment's domestic and international implications, the article further incorporates a comparative interpretative analysis with international human rights instruments, specifically the International Covenant on Civil and Political Rights (ICCPR), to which Pakistan is a signatory. The research also evaluates the amendment through the lens of political theory and Islamic jurisprudence, using historical examples from Islamic governance (e.g., Khulfa-e-Rashideen) to contrast contemporary legal developments with traditional principles of justice and judicial independence. Moreover, socio-economic and geopolitical impacts were assessed using reports, policy briefs, market responses (e.g., KSE-100 index trends), and economic commentary to understand the broader implications on foreign investment, public trust, and Pakistan's international standing. This multi-disciplinary legal analysis aims to provide a holistic understanding of the amendment's potential consequences on democratic governance, rule of law, and constitutionalism in Pakistan.

Significance

This study holds significant relevance for Pakistan's evolving constitutional and democratic landscape. By critically examining the 26th Constitutional Amendment, the article contributes to ongoing debates about the separation of powers, judicial autonomy, and democratic integrity. It highlights the risks posed by increased political influence over judicial appointments and the curtailment of judicial powers, raising urgent concerns about the erosion of rule of law and the integrity of constitutional governance in Pakistan. Furthermore, the study is significant in assessing Pakistan's compliance with international human rights obligations, particularly under the International Covenant on Civil and Political Rights (ICCPR). By exposing the contradictions between domestic legal reforms and international legal standards, it brings attention to the potential diplomatic, economic, and reputational consequences of constitutional amendments that undermine judicial independence.

The article also provides a valuable interdisciplinary perspective by incorporating Islamic principles of governance and justice, thereby offering a culturally grounded critique of the amendment. This enhances its relevance to both legal scholars and policymakers in predominantly Muslim countries grappling with similar constitutional challenges. Lastly, the article serves as a resource for future legal reforms by proposing constructive recommendations for restoring judicial independence, promoting merit-based judicial appointments, and reinforcing constitutional checks and balances. It thus contributes to scholarly discourse, informs legal practitioners, and supports advocacy for democratic resilience and institutional integrity in Pakistan.

The 26th Amendment: A New Chapter in Pakistan's Judicial History

The 26th Amendment to Pakistan's Constitution fundamentally changes the appointment mechanism for the state's Chief Justice, resulting in a paradigm shift in the country's legal system. Under Article 175A, the Chief Justice will no longer be the seniormost judge of the Supreme Court; instead, one of the three seniormost judges will be nominated by a Special Parliamentary Committee (SPC) to the position, with the Prime Minister recommending the name of the nominee to the President for appointment. It so happens that this amendment actually bestows a preponderant role in the appointment process on the government because it will hold a majority on the parliamentary committee.

Moreover, the amendment also places significant restrictions on the judicial authority of Supreme Court and high courts. The suo motu jurisdiction of the Supreme Court has been repealed, and writ jurisdiction of high courts has

been limited (Articles 184 and 199). At the same time, a new Constitutional Bench will be constituted to solely decide matters of constitutionality, where the Presiding Judge will have sweeping powers (Article 191A).

Furthermore, the Judicial Commission of Pakistan will now include a "presiding judge" of the constitutional bench and conduct annual performance evaluations of high court judges (Article 175A). The Chief Election Commissioner may remain in office until their successor assumes the position, potentially permitting extended terms (Article 215), and courts or authorities are precluded from questioning the advice given to the President by the Cabinet or Prime Minister (Article 48).

International Implications

The 26th Constitutional Amendment also threatens Pakistan's global image, and potentially deters foreign investment due to worry over judicial autonomy and the rule of law. Foreign commentators perceive these changes as undermining the division of power, which is necessary in order to maintain investor confidence as well as deliver a stable commercial climate. The New York City Bar Association has stated that these amendments will affect the power balance between the executive, legislature, and judiciary, which does not align with international rule of law standards⁴.

International Human Rights

Pakistan's ratification of the International Covenant on Civil and Political Rights (ICCPR) in June 2010 obliges it to respect judicial independence, a right enshrined in Article 14(1)⁵. But the 26th Constitutional Amendment, by permitting a parliamentary committee controlled by political forces to shape judicial appointments, undermines this obligation directly. This politicization of the judiciary undermines its impartiality, in contravention of Pakistan's ICCPR obligations and threatening to convert courts into mechanisms for political agendas instead of the protectors of constitutional rights. The 26th amendment has ruthlessly clipped the wings of human rights' guardian angels, causing a devastating deterioration of judicial independence, the collapse of domestic confidence, and an open invitation to international examination, thus blurring Pakistan's international image and jeopardizing its position in international forums and trade arrangements that precariously rest on human rights compliance.

Institutional Impact

The 26th Constitutional Amendment transforms the inter-branch balance of power between Pakistan's executive, legislature, and judiciary by introducing unprecedented changes in judicial accountability and the division of powers. By altering the composition of the Judicial Commission of Pakistan (JCP), the amendment enhances political actors'—members of

Parliament's—control over judicial appointments at the expense of judges' control over the appointment process⁶.

This change compromises judicial autonomy, for including two members from the National Assembly, two from the Senate, and one Speaker nominee weakens judicial impartiality and makes appointments subject to political demands. In addition, it creates a Special Parliamentary Committee (SPC) to recommend the Chief Justice of Pakistan (CJP) from among the three most senior judges, superseding the normal seniority system. Four Supreme Court justices, i.e., Justice Mansoor Ali Shah, Justice Munib Akhtar, Justice Ayesha Malik, and Justice Athar Minallah, also expressed their apprehensions, addressing Chief Justice Yahya Afridi to suspend fresh judicial appointments pending determination of the constitutional validity of the amendment.

Socio-Economic Consequences

a. Access to Justice

The amendment may constrict the access to justice for marginalized groups by changing the structure of the judiciary and appointment procedures. Critics contend that enhanced political control over the appointments and the establishment of executive-dominated constitutional benches would undermine impartiality, hindering marginalized groups from availing themselves of legal redress⁷. The removal of the suo moto powers of the Supreme Court under Article 184(3) also weakens the enforcement of fundamental rights. Rather than revolutionizing the judiciary as argued by Waleed Sami⁸, the 26th Constitutional Amendment has compromised its autonomy, undermining the very foundation of judicial independence

The 26th Amendment has also limited the suo moto powers of the Supreme Court of Pakistan, rendering it less effective in determining cases of public interest without complaints. This is also different from Islamic principles, where judges have an obligation to act on their own to ensure justice and fairness, even in the absence of complaints. Through limiting suo moto activities, the Pakistan judiciary becomes less effective at checking executive power, contrary to Islamic ideals as well as international judicial practices.

b. Economic Stability

The economic stability effect of the amendment is mixed. By eroding the independence of the judiciary, it may discourage foreign investment as a result of uncertainty in the rule of law and stability of the judiciary. Strong and independent judiciaries are normally preferred by investors as a measure to secure impartial resolution of disputes as well as the security of property

rights. The amendment can also affect trade arrangements such as GSP+, which involve alignment with international human rights norms⁹.

There are others who may assume that the Government of Pakistan, through the Special Investment Facilitation Council (SIFC), has been able to draw a number of foreign delegates to the Pakistan Mineral Investment Forum, even after the passage of the 26th Constitutional Amendment. The event could have witnessed an even better turnout, if the 26th amendment had not been viewed as creating permeable regulations and executive-dominated judiciaries. The real reason for that turnout is the recent discovery of mineral reserves in Pakistan¹⁰. The politicization of the judiciary can bring about perceptions of instability, which could deter economic development and foreign investment in the future.

Despite these concerns, the Pakistan Stock Exchange (PSX) responded positively to the amendment, with the KSE-100 index rising significantly¹¹. In truth, the 26th amendment is highly risky for Pakistan's business environment. Domestic businesses that depend greatly on a stable legal environment may experience more uncertainty and lower confidence from investors in the long term. This would cause lower investment, slower development, and lower economic activity, eventually impacting the overall business environment of Pakistan. PSX may suffer from volatility if investors become risk-averse because of fear regarding judicial autonomy.

Analysis and Recommendations

The 26th Constitutional Amendment of Pakistan has, in fact, posed some key questions about Pakistan's system of governance. The state stands at a crossroads, poised to define its future: parliamentary supremacy or judicial independence. Pakistan can draw inference from the great traditions of *Khulfa-e-Rashideen*. Hazrat Ali (RA) showed his dedication to justice by agreeing with a court judgment against him in a controversy with a Jewish citizen because of insufficiency of evidence despite being the Caliph¹². He stressed that judges need to be independent of political influence to be able to deliver verdicts. These instances indicate a system of governance in which justice prevails over authority and self-interest.

The Islamic system of governance shines as a beacon of divine wisdom, surpassing modern democratic paradigms in its profound emphasis on justice, equity, and the well-being of all. It provides fairness by imposing stringent criteria for judges and holding rulers accountable to the same rules as the masses¹³. It gains trust by eliminating corruption by way of transparency and fairness. Pakistan can be a fairer and more equity-based society by embracing these principles. Islamic governance prioritizes justice over parliamentary supremacy, empowering an independent judiciary to enforce divine law and limit authority. This is not merely in line with Islamic

teachings but also constitutes a robust institutional apparatus of governance. If Pakistan adopts this model, it can further enhance public trust, and ensure that justice is served to all its citizens.

The 26th Constitutional Amendment warrants meticulous scrutiny, as its stipulations *prima facie* imperil the sacrosanct institution of judicial independence, undermining the Supreme Court's *suo motu* authority and potentially debilitating the very fabric of constitutional checks and balances. To rectify the detrimental effects of the 26th Constitutional Amendment, repeal or revision is imperative. Repeal would revive judicial autonomy and powers, whereas revision could reform the Chief Justice selection process, prioritizing transparency and meritocracy to safeguard the integrity of the judiciary. In selecting the Chief Justice, a harmonious blend of seniority and merit is essential. Seniority brings venerable experience, sagacity, and institutional stability, while merit-based selection ensures the most exceptional talent is elevated, fostering innovation and injecting fresh perspectives, thereby striking a perfect balance between tradition and excellence. Judges should be appointed taking into account the elements such as educational qualifications, work experience, neutrality, legal knowledge proficiency, reasoning ability, their dedication to judicial independence and rule of law.

Conclusion

In a nutshell, the 26th Constitutional Amendment triggers a paradigm shift in the constitutional structure of Pakistan, jeopardizing the sacrosanct principles of judicial autonomy and rule of law. This amendment's rebalancing of power relations between the judiciary and the executive, through the parliamentary committee's control over judicial appointments, violates the very principles of constitutional governance. To rectify this constitutional aberration, it is the duty of the stakeholders to agitate for the repeal or amendment pertaining to 26th Amendment, reinstating *suo motu* jurisdiction of the Supreme Court and ensuring the Chief Justice is elected through a transparent and meritocratic system. In upholding the dogma of judicial autonomy and rule of law, Pakistan may further strengthen its commitment to constitutional government and safeguard the fundamental rights of the citizens.

Endnotes

¹ R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

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⁴ New York City Bar Association, 'On the 26th Amendment to the Constitution of Pakistan' (NYC Bar, 31 January 2025) <https://www.nycbar.org/press-releases/on-the-26th-amendment-to-the-constitution-of-pakistan/>

⁵ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 14(1).

⁶ Tripathi N and Kumar A, 'The Story of the 26th Amendment: Executive Interference and the Judiciary's Struggle for Independence in Pakistan' ConstitutionNet (29 December 2024) <http://constitutionnet.org/news/voices/story-26th-amendment-judiciarys-struggle-independence-pakistan>.

⁷ Asif Mehmood, Civil society activists move Supreme Court against 26th Amendment | The Express Tribune (10 March 2025)

⁸ Sami W, 'Pakistan's 26th Constitutional Amendment: A Critical Step Toward Judicial Reform' Eurasia Review (29 September 2024).

⁹ Matthew Cline, The Link Between Trade & Human Rights, Minnesota Journal of International Law

¹⁰ News Desk, 'Gold deposits worth Rs800b found in Attock' The Express Tribune, 14 January 2025)

¹¹ Pakistan Stock Exchange Limited, KSE-100 Index Methodology (PSX)

¹² Hiba Magazine, Ali (rta) vs. a Jew (30 December 2020) <https://hibamagazine.com/ali-rta-vs-a-jew/>

¹³ Abul Hasan Ali-Mawardi, The Ordinances of Government, trans Asadullah Yate PhD (Ta-Ha Publishers Ltd) ch 7.

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