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Analysing the 26th Amendment and What Chaos It Is Bound to Bring

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by

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I. Introduction

Since its birth in 1973, the current constitution of Pakistan has gone through 23 amendments¹, facing several challenges and providing necessary changes in system. Change isn't always bad as history stands witness. In words of *Oliver Wendell Holmes Jr.*

Law is a social construct that evolves over time.

– *Thurgood Marshall further retreated the same as;*

“Law is a tool for social change.”

18th amendment was a positive landmark step towards this Independence of judiciary and pertaining to least involvement of executive in judicial affairs. It is considered to be a practical approach towards a federation. It truly gathered all political parties on one front against the dictatorial regimes, moving from a dictatorship to a democracy. Now the 26th amendment² is complete 180 degrees of that, moving from a shattered democracy to a one-party system. If this is what the current government plans to do for their tenure, then a collective suicide awaits us.

II. Proposed Amendments

Three drafts were circulated online regarding the 26th amendment:

- a) by PML(N) (that advised formation of a new federal constitutional court in Islamabad.)
- b) by PPP (that suggested formation of new constitutional courts on provincial level also)
- c) by JUFİ (it was a rather face-saving attempt, a mix of both previously circulated drafts and with a new demand of expulsion of riba by 2028)

¹ The Constitution of Pakistan. Retrieved from <https://www.pakistani.org/pakistan/constitution/>

² https://na.gov.pk/uploads/documents/1557903893_479.pdf

III. Enacted Amendment

The Senate passed the 26th Constitutional Amendment within hours following its introduction in the evening of Sunday 20 October. Next morning on Monday, 21 October it was passed by national assembly as well. Shortly afterwards, it also received the assent of the President and was officially published in the Gazette. All this was done within matter of just a few hours. The Government enacted this amendment under the ironic name of *Judicial reforms*. Approximately 27 amendments are made in existing constitution of Pakistan and mostly cater to judicial changes. These judicial changes are nothing but an attempt to make the judicial institute subservient to the executive.

IV. Key Changes via the 26th Amendment

The amendment basically carries following main:

- Parliamentary committee [175a]
- Formation of judicial commission of Pakistan
- High court powers [186A]
- Constitutional bench [191(a)]

They are briefly explained as follows:

a. Parliamentary Committee [175a]

Before this amendment the judicial committee of Supreme court use to give a name for selection of Chief justice by a *seniority criterion* and then that name was sent to the President for his assent. Now there's a parliamentary committee which is assigned that task. The chief justice is appointed by a special parliamentary committee which consists of:

12 members	from parliament	8 from National Assembly	4 from senate.
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The committee gives its decision on the basis of a 2/3 majority. This implies that the political party with majority representation in parliament would hold most power and appoint the senior most judge of the state. The name selected from 3 senior most judges would be then forwarded for the assent of President *who works on advice of PM*. The most interesting point is that no action by the committee is invalid under any circumstance.

b. Formation of Judicial Commission Of Pakistan (JCP)

The judicial commission has been reduced to a 13-member committee, out of which only 4 are judges. The committee will appoint the judges of apex court, the high courts and federal shariat courts. It is also assigned with the task of performance evaluation. The chair person of this committee is CJ of Pakistan.

(i)	Chief Justice of Pakistan;	Chairperson
(ii)	Presiding Judge;	Member
(iii)	three most senior Judges of the Supreme Court,	Members
(iv)	Federal Minister for Law and Justice;	Member
(v)	Attorney-General for Pakistan;	Member
(vi)	an advocate nominated by the Pakistan Bar Council for a term of two years;	Member
(vii)	two members from the Senate and two members from the National Assembly	Members
(viii)	a woman or non-Muslim, to be nominated by the Speaker of the National Assembly for a term of two years.	Member

c. High Court Powers [186A]

Under the new amendment in article 186A, Supreme court can transfer cases from one high court to another and also from a high court to itself, without the consent of said judge and specifically on the whim of the ruling executive to control the judiciary. Further if there's any vacancy in any high court of a province ANYONE from the judicial committee (JCP) can suggest a name and appoint them on basis of majority vote. A new Article 202A is inserted for the formation of constitutional benches in the high courts. Further under changes in article 199, new clause 1A is added that takes away suo motu powers from high courts.

d. Constitutional Bench [191(A)]

Under a new article 191A, constitutional benches are to be formed instead of a Federal constitutional court. These benches consisting of not less than five judges would deal with cases of constitutional nature. The amendment also ends the suo moto power and further requisites under original jurisdiction of Supreme Court [184(3)].

- Further, this new inclusion is in *in conflict with* The Practice and Procedure Act 2023, section 416, which is already enacted and makes a 5-member committee which deals with interpretation of constitution.
- Another interesting point to note is that all these benches have been created for JUST 178 cases of constitutional nature, pending in supreme court.

V. Impacts Bound by These Changes:

a. Lobbying and Friction Between Judges

The process outlined clearly demonstrates the overpowering role of executive in judicial affairs. The whole appointment process of judges from superior hierarchy to junior is designed in a way that it would fuel more lobbying in the judiciary. Having politically affiliated judges on highest level of Judiciary will transfer a sense of helplessness and bitterness in lower level judges. Lawyers will also be reluctant to plead in front of a judge representing ruling party. The unaddressed pressure and tension could result in friction and tiers of judicial system standing against each other. The new amendment not only effects the common man approaching court for the practical enforcement of justice but also hinders the smooth functioning of the state.

- **Compromising On Fair Trial; Article 10a**

A junior judge who's more vulnerable to be influenced by the political elites would try to get on the good side of the ruling government to get promotions and cover the ladder to reach higher hierarchy more quickly and easily. This would effect his decision. The moment he takes oath he would contradict himself, mapping his decisions around his future promotion, putting the present justice to be done among the parties in front of him on the back gear. This not only compromises the impartiality of the judges but also significantly impacts the right to fair trial under 10A.

The right to seek a fair trail as enshrined in constitution under article 10A has been so vastly interpreted by the courts. For a trial to be fair under the Article 10A of the constitution, it shall contain certain elements, as stated in the Government Of Balochistan Vs. Azizullah Memon³

“It therefore follows that in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved. Therefore, justice can only be done if there is an independent judiciary which should be separate from executive and not at its mercy or dependent on it.”

The rule of fair trail has been highlighted by Pakistan courts as early as last century and has been retreated in recent cases. Back in the dictatorial regime of Zia the Bhutto case⁴ was a significant marker in highlighting the difference between an impartial court and a biased court and in a recent case⁵the Supreme Court declared that Bhutto

³ PLD 1993 SC 341

⁴ State v Zulfiqar Ali Bhutto PLD 1978 Lahore 523.

⁵https://www.supremecourt.gov.pk/downloads_judgements/reference_1_2011_06mar2024.pdf

didn't receive a fair trial. Moving forward to as recent as it could be, the case of Imran Khan also draws parallel to the Bhutto case.

If we go over the legal proceedings against Imran, Shah Mehmood Qureshi, and other political workers of PTI, we find a glaring indifference for the basic principles of justice, due process and the procedural safeguards in their trials. The denial of access of their trials to the public or media and the prohibition of cross-examination of prosecution witnesses⁶ are direct violations of the right to a fair trial and the presumption of innocent until proven guilty as enshrined in the Constitution of Pakistan as well as the international law.

The question to ponder is, if, under previous law our judiciary is still repeating the 44-year-old patterns, then how come the new 26th amendments would guarantee fair trial, with such vast involvement of ruling party, under so called highlighter of “*judicial reforms*”?

Judiciary is already an easy target for elites to exploit. The history is evident of examples where politicians and establishment tried to exploit the judiciary for their own agenda. With the deteriorating condition of politics and economy in the country, such a step is going to be proved as fatal blow to judicial independence.

On grass root level it could affect in several ways. The political sentiments in general public as of recent rise high. A government who came into power with manipulation of form 45 would decide the highest judicial hierarchy. These changes would lead to more political polarization. With parliament already burdened with economical, social and public policy issues, adding a supposed judicial role would ultimately be devastating for country.

b. Almost Absolute Power to Executive:

Under Article 239 of constitution of Pakistan, Parliament has the power to amend the constitution with a two-third majority, however, time and again courts have interpreted that parliament is subject to judicial review and any decision that's contrary to basic features would be unconstitutional. The Supreme Court of Pakistan, back in 2015⁷, ruled that even a constitutional amendment can be struck down (i.e., declared unconstitutional and of no legal effect) if it violates the “salient features” of the Constitution. What are these salient features? This includes the “Basic Feature Theory”.

⁶ Tribune. (2024, March 14). A case of fair trials Zulfikar Ali Bhutto and Imran Khan. *The Express Tribune*. Retrieved from <https://tribune.com.pk>

⁷ District Bar Association (Rawalpindi) v Federation of Pakistan PLD 2015 SC 401

• **Violation of Doctrine of Basic Structure in Pakistan**

India has played a chief role in the establishment of doctrine of basic structure theory. Pakistan also originally borrowed it from India⁸. The judiciary however, has been reluctant to accept it. The theory first appeared in Mahmood Khan Achakzai Case⁹, where the apex court held that Parliament has the power to amend the Constitution but it cannot alter its basic features that are parliamentary democracy, federalism and Islamic provisions. Later on in cases like Asma Jilani¹⁰, the Supreme Court held that Pakistan has its own Legal Doctrine which has been enshrined in the Objectives Resolution 1949 that now forms a substantive part¹¹ of the constitution. To form the basis of judicial review the nine guiding principles in objective resolution are enough, as highlighted by J. Jawad S. Khawaja¹²

These features form the “Basic Features Theory” which were also recognized in Wukula Mahazl Case¹³. The concept of basic structure includes,

- separation of powers between the legislature, executive and the judiciary,
- republican and democratic form of government,
- secular character of the Constitution,
- supremacy of the Constitution, unity of the country,
- federal character of the Constitution,
- essential features of the individual freedoms secured to the citizens and mandate to build a welfare state and democratic character of the polity.¹⁴

Ironic to note here that Basic doctrine theory isn't the only thing borrowed. The 26th amendment is a replica¹⁵ of *JUDICIAL APPOINTMENT BILL OF 2013* of India where Indian executive tried to bring to changes in order to control judiciary. However, that bill was struck down in 2016 case, *Supreme court Record Advocates on Record Association v. Union of India (2015)*¹⁶ with a 4:1 majority on basis of basic feature theory.

The whole goal of judiciary is to remain apolitical. With the major political party having last say in amending the constitution, the essence of these features could never be upheld. Blurring the powers between the three tiers of government amounts to the collapse of the system.

⁸ https://pu.edu.pk/images/journal/indianStudies/PDF/5_v6_2_20.pdf

⁹ Mahmood Khan Achakzai Vs. Federation of Pakistan P L D 1997 SC 426

¹⁰ Asma Jelani v. Government of the Punjab, PLD 1972 SC 139

¹¹ inserted through President's Order No.14 of 1985

¹² District Bar Association, Rawalpindi VERSUS Federation of Pakistan and others (in Const.P.12/10)

¹³ Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263

¹⁴ JUSTICE (r) FAZAL KARIM (2006), “Judicial Review of Public Actions” Universal Law Publishing Co. Pvt. Ltd. 2006, p.66

¹⁵ Extracted from: <https://youtu.be/J5hpY9wB9iU?si=RW-CV7FrvrWaFu-P>

¹⁶ (2016) 5 SCC 1

c. Moving Away from Original Goal; Federalism

In order to advance the cause of federalism these basic requisites are essential. To empower the parliament to an extent where it goes beyond the constitution, is destructive. The 26th amendment is a direct as well as indirect attempt in doing so. Directly blurring the line of separation of power by making parliament the custodian to apply highest judicial panel and indirectly forming an environment where any amendment would be passed by those bias judges and bared from judicial review, even if it violates the basic doctrine feature.

Rule of constitution demands that the constitutional principles that govern the people are aligned with basic salient features. In an already deteriorating society where one political party is being side-lined with contrast to other political parties who are working day and night to destroy the democracy, where inter-provincial tensions are on a rise and justice is just in theory for the poor, the amendments are a fuel for further political polarization.

d. False Hypothesis of Reform and Paradox of Contradiction

As a rule, in world history, crisis situations are unique opportunities for socially dominant forces to unfold a wide range of interventionist policies that form a new way of governing which in turn tends to transform our living standards¹⁷. Though there's not any apparent crisis of judiciary in Pakistan the government is trying to create a situation of urgency regarding the judiciary, forcing the idea that judiciary needs reforms otherwise the current system wont work. When reality is the system was working just fine. The only thing we needed was the executive to leave judiciary alone however this amendment has done the complete opposite.

For months the government has been using some of the highly intellectuals, policy makers and law makers to shape this amendment. So called Pseudo intellectual people have been using a false hypothesis in name of "*judicial reforms*". Government is contradicting itself here; how it is going guarantee reforms in judiciary when it itself is going against the very constitution that empowers it? It is focusing on stabilizing their current tenure rather than the state and history bears witness that it has never forgiven such people.

VI. Where Do We Need Reforms?

For a saving face the government has included *a new article as 9A*; right to a clean environment and has decided to end riba by Jan 1,2028. Yet the procedure and practical implications of these are yet to be explained.

¹⁷ <https://www.jstor.org/stable/43496501>

- The judiciary in its current state in Pakistan really need changes but at the district level. As of the recent data¹⁸ there are almost 1.86 million cases pending at the district level and nearly 0.39 million pending cases in higher courts. If the government truly wants to lessen the number of cases and bring reforms, then they need to bring changes in lower courts first. The cases in session courts, magistrate courts are the ones that need immediate attention. The least bit of trust that the general public had on judiciary is fading away due to the irresponsible and unreliable system at the district level. The government needs to introduce new court at such level and increase the number of judges to make justice truly swift.
- Constitutional courts exist in many countries world wide like Russia, Brazil, Germany etc., the concept isn't alien. But the government ignoring the already existing laws and procedure, stripping the supreme court away from its powers and introducing a new bench, lead by the executive, is just showcasing its *mala fide*.

VII. Conclusion

If the reason is that courts have been politicised and biased, then how can having these reforms, with judges appointed by a ruling party depoliticize them? If constitutional principles particularly article 10A and article 9 are so often violated, then how can having a political court as last resort justified? This envisages that we need to reject these amendments. The government and judiciary together, should work on providing better policies for the lower tier of courts, to make the courts less burdened and make justice swift.

Making the already complex system more complicated would just add to the misery faced by the layman. These amendments seem to be more person specific than to advance the cause of justice and given the deteriorating conditions of the country, it would only amount to further chaos.

¹⁸ DAWN.COM. (2024, February 16). July-Dec 2023 statistics show 2.26 million cases pending in courts: report. *DAWN.COM*. Retrieved from <https://www.dawn.com>