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The Crisis Surrounding the Proposed 26th Amendment

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by

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Introduction

Since its birth in 1973, the current constitution of Pakistan has gone through 23 amendments ¹, facing several challenges and providing necessary changes in system. The 18th amendment 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 it seems like the proposed 26th amendment circulating online, is moving from a shattered democracy to a one-party system. If this is what the current government plans to implement, then a collective suicide awaits us.

I. Almost Absolute Power to Executive:

The 26th Amendment states that no constitutional provision or amendment can be challenged in any court, on any ground whatsoever. Any judgment stating otherwise shall be void. Giving unchecked powers in hands of executive, with political elites having the last say in constitutional matters, raises the question:

“How is the country going to establish a separation of power not overhauled by political favouritism?”

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 2015 ², ruled that even a constitutional amendment can be struck down (i.e., declared unconstitutional

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

² District Bar Association (Rawalpindi) v Federation of Pakistan PLD 2015 SC 401

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”.

➤ **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 India³. The judiciary however, has been reluctant to accept it. The theory first appeared in Mahmood Khan Achakzai Case⁴, 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 Jilani⁵, 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 part⁶ 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. Khawaja.⁷

These features form the “Basic Features Theory” which were also recognized in Wukula Mahazl Case⁸. 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.⁹

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.

³ https://pu.edu.pk/images/journal/indianStudies/PDF/5_v6_2_20.pdf

⁴ Mahmood Khan Achakzai Vs. Federation of Pakistan PL D 1997 SC 426

⁵ Asma Jelani v. Government of the Punjab, PLD 1972 SC 139

⁶ inserted through President's Order No.14 of 1985

⁷ District Bar Association, Rawalpindi VERSUS Federation of Pakistan and others (in Const.P.12/10)

⁸ Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263

⁹ JUSTICE (r) FAZAL KARIM (2006), “Judicial Review of Public Actions” Universal Law Publishing Co. Pvt. Ltd. 2006, p.66

➤ **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 proposed 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 proposed amendments are a fuel for further political polarization.

II. Independence of Judiciary and Concept of Fair Trial

The proposed amendment also ends the suo moto power and further requisites under original jurisdiction of Supreme Court and creates a new court to hear constitutional petitions. This wouldn't be an issue as it could lessen the burden on the supreme court and make its functioning smooth. The dilemma is that the chief justice of said court would be hand picked by the president on the sole advice of the prime minister. The remaining judges would also be chosen by the president on the advice of the appointed chief justice. It's also suggested that the judges of a particular case or a case itself can be transferred from one high court to another without the consent of said judge and specifically on the whim of the ruling executive to control the judiciary.

The process outlined clearly demonstrates the overpowering role of executive in defining the supreme hierarchy of the last resort to justice, the decision of which is non-negotiable. Interesting to note how would the people proposing this amendment would defend this as not shattering the very basis of a fair trial and curtailing the independence of judiciary.

The right to seek a fair trial 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 Memon.¹⁰

“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

¹⁰ PLD 1993 SC 341

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 trial 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 case ¹¹ was a significant marker in highlighting the difference between an impartial court and a biased court and in a recent case ¹² the Supreme Court declared that Bhutto 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 witnesses ¹³ 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 existing law our judiciary is still repeating the 44-year-old patterns, then how come the new proposed 26th amendments would guarantee fair trial? When the authorities should be working to free judiciary from the reins of establishment and executive then why it would work to entangle it more into executive domain?

The new Federal Constitutional Court (FCC) seems like a mirror image of military courts in its authority, with only difference being that military courts deal with mostly common men and FCC is being made to deal with political rivals and favour the elites. The historical negative role of military courts in this regard doesn't help either. When civilians are tried in military courts, their fundamental right to a fair trial is being violated as those military courts, being an extension of a branch of the executive, are not competent to follow the due procedure of law.

As stated in the **International Commission of Jurists**¹⁴,

“Military courts in Pakistan are not independent or impartial. Judges of

¹¹ State v Zulfiqar Ali Bhutto PLD 1978 Lahore 523.

¹²https://www.supremecourt.gov.pk/downloads_judgements/reference_1_2011_06mar2024.pdf

¹³ Tribune. (2024, March 14). A case of fair trials Zulfiqar Ali Bhutto and Imran Khan. *The Express Tribune*. Retrieved from <https://tribune.com.pk>

¹⁴ Law Journal - ICJ: (Pakistan: Military trials for civilians, April 2015)

military courts are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy. They are not required to have judicial or legal training, or even a law degree, which are prerequisites of judicial competence and independence.”

If FCC is formed serving as a direct branch of executive, the constitutional rights enshrined in chapter 1 part II of constitution are open to any modification and personalised interpretation as wanted by the ruling majority party.

III. Effects on Judiciary

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 could be fatal blow to judicial independence.

- On grass root level it could effect in several ways. The political sentiments in general public as of recent rise high and if any decision passed by FCC, that is not reviewable and rather acts as a bench mark, it could significantly shift the tension in country from bad to worse. With parliament already burdened with economical, social and public policy issues, adding a supposed judicial role would ultimately be devastating for country.
- Friction between judges Having politically affiliated judges on highest level of Judiciary will transfer a sense of helplessness and bitterness in lower level judges. The judicial commission that's already established would be completely side-lined in appointing higher level judges. Lawyers would 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 proposed amendment not only effects the common man approaching court for the practical enforcement of justice but also hinders the smooth functioning of the state.

IV. Policy Recommendation

- The judiciary in its current state in Pakistan really need changes, as of the recent data¹⁵ there are almost 1.86 million cases pending at the district level and nearly 0.39 million pending cases in higher courts. Forming a new constitutional court could help in decreasing the burden on Supreme Court judges but the executive involvement in appointing the Justices of that supposed apex court, shifting of cases from one high court to other without consent and the timing of this proposed

¹⁵ 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>

amendment makes it questionable. The key points stressed regarding judiciary make it more biased. 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. In Pakistan also, the Practice And Procedure Act 2023, section 4¹⁶ is already enacted that makes a 5-member committee which deals with interpretation of constitution. But the government ignoring the already existing laws and procedure, stripping the supreme court away from its powers and introducing a new court lead by the executive is just showcasing its mala fide. If the government truly wants reform it could make an appellate committee in already existing supreme court, strictly dealing with constitutional queries, to decrease the burden of cases on Supreme Court or introduce any other act or bench subordinate to the Supreme Court, with no involvement of the executive.

V. Conclusion

If the reason is that courts have been politicised and biased, then how can having a court 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 not only we need to reject the idea of a new federal court but rather we need to shut down civilian trials in military courts. 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, the already existing courts should be reformed.

Making the already complex system more complicated would just add to the misery faced by the layman. These recent propositions seem to be more person specific than to advance the cause of justice and given the deteriorating conditions of the country, the proposed bill is questionable.

¹⁶ Interpretation of the Constitution: In the matters where interpretation of the constitutional provision is involved, Committee shall constitute a Bench comprising not less than five Judges of the Supreme Court