

PARLIAMENTARY SUPREMACY VERSUS JUDICIAL INDEPENDENCE: AN ANALYSIS OF 26TH CONSTITUTIONAL AMENDMENT IN PAKISTAN

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ABSTRACT

The 26th Constitutional Amendment has spurred an uproar amongst the masses and legal fraternity, few praising it while others criticizing. It has been stated that this amendment is direct attack on the independence of judiciary by the current parliamentarians. Whereas, another view entails that the Parliament has restored its supremacy through this much needed amendment, which was taken away by the hyper-active, wild and unbound judiciary exercising its political and ulterior wishes on the pretext of original powers and suo motu, in the guise of protecting the fundamental rights of the people and ensuring constitutional norms and rule of law. In the above debate, the real vires of 26th amendment have been lost. This article is an attempt to explain the 26th constitutional amendment as it is and also to delve into the parliamentary supremacy and judicial independence debate, to be termed as, sovereignty-independence debate in pure Pakistani context. At the end a critical analysis of the current amendment is provided with few recommendations for the future line of action.

Keywords: *Parliamentary sovereignty, judicial independence, constitution, Pakistan, 26th amendment*

INTRODUCTION

The Parliament of Pakistan has recently passed and implemented 26th Constitutional Amendment and there has been hue and cry from every nook and corner of the society regarding pros and cons of this amendment. The advocates of current political regime are all praise towards the amendment, whereas, the other side has its own arguments considering the amendment a tool to linger on their rule and politicize the judiciary for future. The recent amendment has to be seen as a whole in order to comment upon its merits and demerits. There are around twenty six changes brought about through this amendment into different constitutional provisions. Some are good while few have become controversial. However, the major impact of this amendment is on the judicial appointments, removal

and functioning. It is expected that this amendment will bring one major change into the judiciary and judicial outlook i.e. judiciary will be transitioning from *like-minded* judges to *executive-minded* judges. Pakistan has seen very turbulent history, when we look at the correlation paradigm of parliament-judiciary and judiciary-executive relationships. The tussle for power between all organs of the state has resulted into political unrest, legal dearth, administrative mal-practices and very strong establishment. In between this, the people of Pakistan are the only sufferers and beneficiaries are the elites, whether they be political, business, legal or military ones. There has been tug of war between the Parliamentary sovereignty and judicial independence reality in Pakistan. This research work will look into

the 26th amendment through the lens of *sovereignty-independence* debate in Pakistani perspective, highlighting the major cases de-balancing the equilibrium and resulting into total disregard to the norms of rule of law, separation of powers and checks and balances.

Research Methodology:

The present paper is qualitative in nature and analytical, interpretative as well as, descriptive approach has been employed. The reliance has been kept on primary as well as, secondary data and sources. The author has taken support from the case law, constitutional provisions, and commentaries by renowned legal experts and cross border literature.

Parliamentary Sovereignty versus Judicial Independence: Debate

In this article author has firstly explained the history of judicial independence in Pakistan with the relevant important landmark cases and events and then Parliamentary sovereignty is discussed in Pakistani context, along-with the role of judiciary hindering that voyage of parliament becoming supreme in the true sense of the word. Sovereignty of an institution means where that institution functions without any external influence or interference (Hussain, M. 2013). AV Dicey defines Parliamentary sovereignty as, “*the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.*” In Pakistan the Parliamentary sovereignty has always been subject to judicial scrutiny or review as we call it. Both the judicial review and parliamentary sovereignty have been the basic tenets of democracy (Atta Ur Rehman, K et al, 2024). In constitutional principles, this sovereignty does not come without any limitations, as these restrictions may be in the shape of constitutional restraints through certain clauses written in constitution restricting Parliament’s powers to legislate (like article 8 and 227) and in this highly interdependent globalized world, there might be some international obligations, which pose restrictions on parliament to legislate in a certain way. Like parliamentary sovereignty, the judicial independence is also not an unlimited power, it also comes with certain limitations and restrictions too. If

the judicial independence means a power to do whatever a judge or an institution wants, then anything curtailing judicial review power would seem to be unconstitutional, and if, it means a reasonable power with certain checks like judicial restraint and/or application of the principles of separation of powers within the preset boundaries of each institution, then one will have to look at the whole concept through a totally different lens. In Pakistan the tussle between different institutions, for power and authority, has been very old and whenever one institution gets the chance to show its teeth, it does so without any bounds whether, it be parliament or judiciary. Each institution and its advocates, want unbound sovereignty or independence, without considering the aspect, already narrated by Lord Atkin stating, “*All power corrupts, but absolute power tends to corrupt absolutely*”. In parliamentary system the legislation is the prerogative of parliament and in Pakistan too there is trichotomy of powers, parliament having supremacy in law making, executive in the implementation of laws and governance and judiciary in interpreting laws (Usman, A. et al, 2022). The constitution being the grund norm, is the law from where all other laws get their validity and legality, however, constitution’s legality itself depends upon the support of people and a successful revolution [from the people only] can overthrow a constitutional system (Corwin, 1914); therefore in case of amendment, alteration or revocation of constitution other than by the people, the grund norm is violated and this is not good for the legal system’s long term legitimacy and consistency and here the courts enter to protect and safeguard the constitutional principles. According to Dr. Pasha M.I. et al (2023) the executive himself emerges from the parliament, yet tries to mud the lines between executive authority and legislative authority, resulting into blending the two rather than keeping the separation principle alive. The thin line and intricate relation between sovereignty and independence has always been crossed in Pakistan, creating troubles for the balance needed to run the affairs of the State smoothly and ultimately resulting into unrest, injustice, undemocratic regimes and tensions between different state institutions.

Independence of Judiciary: Pakistan

Article 175 (3) of the Pakistan Constitution 1973 states that the Judiciary shall be separated progressively from the Executive. This judicial separation principle is important and backbone of every democratic system (International Commission of Jurists, 2009). The independence of judiciary is a corner stone for rule of law, protection of fundamental rights and just and equitable society (Fakhruddin G., 2013). An independent judiciary is one which decides as per the law, provides justice to ordinary people of the society, without any pressure or interference, whether it be political, from executive or any other influential segment of the society (Farooq, S. et al, 2016). The history of independence of judiciary in Pakistan is not smooth and there have been many ups and downs in this regard. As held in Constitutional Petition No 06/2023 by the full bench of honorable Supreme Court of Pakistan, the judicial independence means the presence of those judges who are not manipulated for political gains, who are impartial towards parties and who are capable of regulating the legality of governmental behavior, provide neutral justice and uphold constitutional and legal values. The tussle for power between the executive and judiciary in Pakistan has also been seen in the military dictatorship eras, curtailing the judicial independence and removing the judges through PCOs (especially the eras of General Zia and General Musharraf) and in the political eras like that of Nawaz Sharif's 1997 episode regarding the Supreme Court hearing cases and stopping it from adjudicating specific type of cases against the Executive (Kalthan, 2013) the PM was unwilling to cooperate with the judiciary and the vice versa. Then during the Musharraf era, the Chief Justice Iftikhar Chaudhry's numerous decisions against the Executive triggered the military dictator and clashes started between the judiciary and the military regime and Steel Mills case (2006) happened to be the triggering point, where judiciary refused to lay down before the military dictator and decided independently (Kausor, 2012). Musharraf removing around 61 judges and imposing emergency in the Country, led to resistance from the judges, lawyers and political parties (Jan, 2014), leading to famous lawyers' movement and restoration of judiciary as a result. The judicial decisions which enhanced the

judicial independence include Sharaf Faridi case 1994 (financial autonomy); Al-Jihad Trust case 1996 (appointments); PCO Judges case 2011 (Justice Hasnat Ahmed Khan case, where Supreme Court sent back more than 100 PCO judges without consulting Supreme Judicial Council (SJC) and Presidential Reference of 2013 due to Justice Riaz A Khan and Anwar Kasi's appointment issue in Islamabad High Court, where seniority principle was overlooked by the then Chief Justice of Pakistan (CJP). The Constitutional amendments numbering 5, 6, 18, 19 and 26 are worth mentioning. The 5th amendment restricted the powers of High Courts to enforce natural fundamental rights, however was a step to separate judiciary from the executive (Talbot, 2009); the 6th amendment set the retirement age of Supreme Court judge at 65 and High Court judge at 62 years; suspension of 14th amendment, limiting number of Supreme Court judges, was also a step towards independence (Kantana, 2003); the Charter of Democracy (2006) also included provisions for judicial reforms regarding the selection of judges, by suggesting the formation of a tribunal on the advice of judges of the Superior Courts and to be forwarded to the Prime Minister by the Board. But the issue was the discretionary powers of the Prime Minister and Joint Parliamentary Committee, which could have politicized the whole process; 18th amendment added article 175A with new procedure for appointment of judges through Judicial Commission of Pakistan and Parliamentary Committee, which was challenged in Munir H. Bhatti case 2011 on the pretext of curtailing the independence of judiciary and taken up by the then Chief Justice of Pakistan (CJP) Iftikhar Chaudhry, directing the Parliament to bring further changes in the composition and working of JCP and Parliamentary Committee, hence 19th amendment came to incorporate the Supreme Court's recommendations given in Munir H Bhatti case, 2011, with power given to JCP led by CJP to be the sole authority to initiate nominations and Parliamentary Committee became almost redundant. In Sind High Bar Association v. Federation of Pakistan, 2012, it was reiterated that the JCP had full authority and competence over the appointment and determination of the criteria for the appointment of Superior Court judges. After the 19th amendment, judiciary started to gain its full independence-financial, administrative and appointments as well as

removals- started to challenge the day to day functioning of the Executive and Parliament and dictating them to work in a certain way. This type of judicial independence and autonomy was unprecedented in the history of Pakistan.

The Centre for the Freedom of Judges and Lawyers (2004) is of the view that the countries where there is political and constitutional unrest, armed conflicts and post-conflict instability, the judiciary of those states remain under immense pressure. In these states the judicial powers are curtailed by the executive's interference. Pakistan is not different from this due to its socio-political and lego-constitutional unstable situation.

Parliamentary Sovereignty: Pakistan

The concept of parliamentary sovereignty actually explains the extent of powers of parliament, to be unlimited and unconditional within the state (Hashmi, R.S, 2018). The Parliament in Pakistan is not supreme in the true sense of the word, as it cannot make a law which is against the fundamental rights of the citizens (article 8 of the Constitution); it cannot make a law repugnant to the injunctions of Islam (article 227); it cannot alter the territorial limits of a province through an amendment, except with the consent of the provincial assembly (article 239) to name a few. However, it has power to amend the Constitution under article 238 and this amendment cannot be challenged [article 239 (5)] and courts are only there to interpret that, which pose the limitations on the court's power to review parliamentary laws. In Pakistan the history of judicial intervention into the legislative affairs of the Parliament is not new, it started from the very first infamous Moulvi Tamizudin Khan case (1955), where judiciary validated the interference of executive branch into the legislative domains of the Parliament. Again when martial law was imposed in 1977 and General Zia promulgated Provisional Constitutional Order (PCO), it was validated by the Judiciary, despite being presence of article 6 and recognition of the concept of judiciary being the custodian of the Constitution, democratic norms and rule of law (Begum Nusrat Bhutto case, 1977). The Judiciary again took refuge behind the doctrine of state necessity, shattering the constitutional norms. In majority of cases, where military directly or indirectly under the guise of article 58 (2) (b)

dissolved the assemblies, it was judiciary which legitimized those actions, on one pretext or the other. The resentment and hatred in the Parliament against the Judiciary became deep rooted and got strengthened with every such decision. The infamous Benazir Bhutto's attempt to appoint eleven judges was declared unconstitutional in 1996. Once again the military coup of General Musharraf was declared legal in Zafar Ali Shah versus General Pervaz Musharraf Chief Executive of Pakistan case (2000), with one exception this time stating that the elections to be held within three years. The Supreme Court also let Musharraf allow to include Legal Framework Order (LFO) 2002 into the Constitution through 17th amendment, giving an impression that Supreme Court was subservient to military rule (Hashmi, RS, 2018) and not the protector of parliament and the democratic norms. The period from 2008 to 2013 saw high level of confrontation between all institutions in the country and judiciary became more powerful out of those turbulent times. Judiciary made the Parliament to further amend the 18th amendment and bring 19th amendment. The judges of Supreme Court encroached into declaring illegal, the appointments of Chairman OGRA, President NBP, Chairman SECP, pushed itself into the political and economic domain of the Government, directly dealing with promotions, transfers and appointments (Akhtar, N. et al, 2022). Its role as hyperactive, excessive suo motus taker in guise of activism and interference into exclusive domains of Executive and Legislature, led to deepen the will to curb its powers among the politicians. The sending of two elected PMs' back to home (Yusuf Raza Gillani and MN Shareef) and interfering into the Parliamentary sessions and proceedings, later on by the judges, left no room for the Parliament to step ahead and restrict them for the future. The full bench of honorable Supreme Court of Pakistan held in District Bar Association, Rawalpindi versus Federation of Pakistan case (2015), "*where as a result of two conflicting provisions in the Constitution, independence of the judiciary was found to be pitched against the sovereignty of parliament, then one should lean in favor of sovereignty of the Parliament because without sovereignty of parliament there may be no true democracy and without democracy, independence of judiciary may be nothing more than an illusion*". The proponents of

unlimited parliamentary sovereignty with judiciary having no review powers, sometimes argue that can a creature (judiciary) challenge the will of creator (parliament) in constitutional settings, where constitution is passed by parliament?

26th Constitutional Amendment: Brief Overview

It is better to firstly look into the 26th amendment as a whole, to have a better understanding as to what it is all about and what changes it has introduced into the Constitution. On 21st October 2024, the President of Pakistan gave assent to the Constitution (Twenty-sixth Amendment) Act, 2024 and this brought the 26th amendment into force. Following is the brief overview of the amendment:-

New Articles inserted

Substitution of articles

Amendments in different articles

New Articles Inserted:

Following new articles have been added/ inserted into the Constitution through 26th Constitutional amendment:-

A new **article namely 9-A** has been inserted dealing with clean, healthy and sustainable environment as a fundamental right of every citizen. Before that this right was treated as an extended aspect of right to life provided under Article 9. This was much needed and Pakistan was obliged by its international commitments and Millennium Development Goals (no 7) to do the same.

Another new article namely **191A** regarding *Constitutional Benches* of the Supreme Court is inserted. This is completely new concept adopted through this constitutional amendment and for that purpose role of Judicial Commission of Pakistan (JCP) has been revisited. There is a provision for the equal representation of judges from all provinces in such benches. And most senior judge nominated for the Bench shall be its head. The original jurisdiction under article 184 along-with the appellate jurisdiction under article 185, where constitutionality of any law or a substantial question of law, as to interpretation of the Constitution is involved, shall be heard and decided by such constitutional benches. Further, the advisory jurisdiction of the Supreme Court under article 186 shall also be exercised by such benches. The Committee comprising of three most senior judges will be empowered to constitute a bench of not less than 5 members, which shall hear

and dispose of such matters. These judges will also have power to make rules for their practice and procedure under constitutional benches. The amendment also calls for transfer of all pending appeals, petitions and review applications under the article to these benches.

Through new article namely **202A** dealing with the *Constitutional Benches of High Courts*, a new jurisprudence has been applied, the pros and cons of which will be clarified, once applied thoroughly. However, through this new article the wires of article 199 have been changed and power of writ jurisdiction has been revisited and rearranged. The number of constitutional judges has not been fixed and is left for the Judicial Commission of Pakistan to decide. Here the most senior judge is given the headship of the Bench and the powers under writ dealing with directing a person performing his functions with affairs of the Federation, Provincial or Local authority and/or refraining from doing anything he is not permitted by law to do so, for the enforcement of fundamental rights, have been taken from High Court's ordinary judges and is transferred to the Constitutional Benches. The pending appeals or relevant writs are to be transferred to such benches. Whereas, the amending article further states that in order to come into force in respect of Islamabad High Court, both Houses of *Majlis-e-Shura* in joint sitting and in case of other High Courts, the respective Provincial Assemblies shall through a resolution of majority of the total membership to give effect to this provision. This aspect has created ambiguity regarding implementation of the amendment as, almost all the writ petitions have a constitutional aspect as well as, some governmental institution is involved, so how the things will proceed, needs further clarity and deliberations in this regard.

(b) Substitution of Articles

Following articles are substituted through completely new articles by the 26th Constitutional amendment:-

Article 186A dealing with the power of Supreme Court of Pakistan to transfer cases has been substituted and has further given the power to transfer the case/s, appeal/s or other proceedings pending before any high court, in the interest of justice and expediency, to any other high court or even to itself. This article has extended the

jurisdiction to the effect that now Supreme Court can transfer a case to itself, which was not the case before 26th amendment.

Article 209 dealing with Supreme Judicial Council has also been substituted and rearranged as comprising five members including CJP, two next most senior Supreme Court judges and two most senior chief justices of high courts. It further elaborates as to how the seniority of chief justices will be determined, firstly from their dates of appointments on the post of chief justice and in case the date is same then from the dates of their appointment as the judges of high court. The article is a lengthy one, explaining different scenarios where Council is inquiring the capacity, efficiency or conduct of any of its member or if a member is absent due to any reason including illness, then a complete hierarchy is discussed, which is to be followed, like where CJP or judge of Supreme Court is such person, then the one next in seniority will join in as a member for the meeting and where such person is chief justice of a high court then next senior most chief justice of remaining high courts will join in as a member to replace the original member. The report of the Council to the President will be in terms of majority decision of its members. The Council is further empowered to take the matter of incapacity-physical or mental, inefficiency in the performance of duties (newly added) or misconduct either on its own (*suo motu*), on the report of the Commission or on the direction of the President to inquire the matter. The time frame for submission of report to president regarding incapability of a judge of performing duties or misconduct is six months, for recommending his/her removal. There is no other mechanism provided in the Constitution for the removal of any judge of Supreme Court or High Court. The Council is also empowered to issue a code of conduct to be observed by these judges. The Council's Secretariat is to be established with Secretary to be its head along-with other necessary staff.

(c) *Amendment in the Articles*

Total 20 articles and one schedule have been amended through this twenty sixth amendment. Following is a gist of those articles:-

Pre-Amendment Status	Post Amendment Status
Chief Justice of Pakistan	Chief Justice of Pakistan
4 Most Senior Judges of Supreme Court	3 Most Senior Judges of Supreme Court

Article 38 has been amended by substituting the paragraph (f) with commitment to eliminate *riba* completely till first day of January 2028. It is to be remembered that this article belongs to the part of the Constitution which deals with principles of policy, the implementation of which depends upon the resources and congenial environment / situation within the State. However, it is a good sign at least to the extent of commitment and this will have lasting effects on the Islamic banking industry, as now government will make pro-Islamic banking rules, laws and policies.

Article 48 clause (4) has also been amended which is regarding advice to the President, where as in the original clause minister or minister of state were included, which have been removed and now only Cabinet and Prime Minister are mentioned. The article is regarding advice to President, the nature and vires of which cannot be inquired into by any court, tribunal or any other authority.

Article 81 deals with expenditures from federal consolidated fund and in this article Judicial Commission of Pakistan, Supreme Judicial Council, sums required for elections including elections of national assembly, senate, provincial assemblies and local governments have been added.

There has been an addition in the **article 111** dealing with right to speak in the provincial assembly, adding an advisor too alongside Advocate General of the province.

Major changes have been brought into the appointment of judges' procedure provided under **article 175A**. The composition of the Judicial Commission of Pakistan has been changed, along-with introduction of *Special Parliamentary Committee* for the nomination of Chief Justice of Pakistan, further the number of members of Parliamentary Committee has also been enhanced, two new members have been introduced into the Committee for the appointment of Islamabad High Court judges, additionally the Commission has been empowered to conduct the performance evaluation of judges of High Courts. In nut shell, following composition of Judicial Commission of Pakistan got changed:-

1 Retired CJP or Supreme Court Judge for two years	
Federal Law Minister	Federal Law Minister
Attorney General for Pakistan	Attorney General for Pakistan
1 Senior Advocate nominated by PBC for two years	1 Senior Advocate of Supreme Court having not less than 15-year experience, nominated by PBC for 2 years
	2 members from the Senate (1 from treasury bench and 1 from opposition) each to be nominated by leader of the House and Leader of the Opposition
	2 members from National Assembly (1 from treasury bench and 1 from opposition) each to be nominated by leader of the House and Leader of the Opposition
	1 woman or non-Muslim other than a member of <i>Majlis-e-Shura</i> , qualified to be a member of Senate as a technocrat, to be nominated by the Speaker National Assembly for a period of two years.
	Most senior judge of the Constitutional benches
Total Members 9	Total Members 13

The discretion of CJP has ended due to the increase in the total number of membership in JCP through this amendment. A **Special Parliamentary Committee** has also been formed under this article for the nomination of Chief Justice of Pakistan (CJP), comprising 12 members, in which parliamentary parties will be having *proportionate representation* based upon their strength in the Parliament. The Committee shall decide the nomination with the majority of 2/3rd members within fourteen days prior to the retirement of CJP. The composition of this Special Parliamentary Committee is as under:-

8 members from National Assembly	4 members from Senate
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The meetings of the Committee are to be held in camera and the Commission can make its own rules for procedure, criteria, evaluation and fitness of judges for appointment. It is further to be noted that for the appointment of High Courts judges following changes have been brought into composition of the Commission.

Pre-amendment scenario	Post-amendment scenario
Chief Justice of the High Court concerned	Chief Justice of the High Court concerned
The most senior judge of that High Court	Head of Constitutional Benches of that High Court
Provincial Law Minister	Provincial Law Minister
A senior advocate having not less than 15 years of practice in high court nominated by concerned provincial bar council for 2 years	A senior advocate having not less than 15 years of practice in high court nominated by concerned provincial bar council for 2 years

For Islamabad High Court following is the addition into the composition:-

Pre-amendment scenario	Post-amendment scenario
Chief Justice of the Islamabad High Court	Chief Justice of the High Court concerned
The most senior judge of Islamabad High Court	Head of Constitutional Bench of Islamabad High Court
	A Federal Minister nominated by the Prime Minister
	A senior advocate having not less than 15 years of practice in high court nominated by the Islamabad Bar Council for 2 years

For an ordinary vacancy in Supreme Court, High Court or Federal Shariat Court, simple majority in the Commission is needed, which shall send the name to the Prime Minister to be further sent to the President. There has been another addition in this article i.e. performance evaluation of High Court judges has been included for the very first time and this right is given to the Commission and in case the Commission finds someone's performance inefficient, it can grant him such time for improvement, as it deems fit and where the performance remains same even after that time period, the Commission can send the name to the Supreme Judicial Council for removal from the service. There is also mention of call of meeting of the Commission through 1/3rd members' requisition through a written request to the Chairman, who then will be obliged to call the meeting within 15 days from the date of receiving the requisition and where the Chairman fails to convene a meeting within that stipulated period then Secretary will be empowered to call the meeting within 7 days of the expiry of said period. Each member of the Commission is also given power to send nominations against any vacancy (anticipated or actual) in the Supreme Court, the High Court or Federal Shariat Court.

Article 177 dealing with appointment of judges of honorable Supreme Court of Pakistan is also amended, and redundant part dealing with experience of someone before the commencing day of the Constitution has been omitted. Further, license of Supreme Court of Pakistan is made compulsory for appointment along-with other already stated experience in the pre-amendment article.

Article 179 dealing with age of retirement of judges has also been amended to the tune of the tenure of Chief Justice of Pakistan fixed for three years, unless he retires earlier or is removed from the service. It is further clarified that if a CJP's tenure of three years ends before his age of retirement, he shall stand retired without further continuation as a Supreme Court judge. To an extent fixation of tenure of CJP is a good sign provided all other posts under the Constitution also have the same non-extension principle applied in letter and spirit.

The vires of original jurisdiction of Supreme Court of Pakistan (**article 184**) have been amended through insertion of a proviso, which has taken the suo motu powers from the Supreme Court of Pakistan along-with further curtailing its powers to make a direction

or declaration beyond the contents of any application before it. This aspect is debatable and amounts to restricting the Apex judiciary's powers. The question is whether judiciary will take up this aspect as a review to be declared as unconstitutional or describe its vires afresh?

In **article 185** dealing with appellate jurisdiction, the value of subject matter of the dispute has been increased from fifty thousand to one million rupees. It is to be remembered that this is not the court fee involved, it's the value of subject matter involved and seems to be proper and much needed to lessen the burden of petty cases in the Apex Court.

The article dealing with issue and execution of process of Supreme Court i.e. **article 187** has also been added with a proviso, restricting the complete justice power and limiting only to hear the cases coming under the jurisdiction expressly vested in the Supreme Court of Pakistan.

In **article 193** dealing with appointment of High Court judges, the age to be eligible to become a high court judge is decreased from 45 to 40 years. And further the eligibility of members of civil services with certain qualifications and experiences, has been taken off and now only a lawyer with ten-year high court experience or a judicial officer with ten-year service can become high court judge. To a personal note by the author, decreasing the age to become a judge does not seem plausible, as the legal acumen and understanding develops through rigorous training and experience. In case, it was needed to bring change into the age, there should have been an increase in the retirement age of judges by 3 to 5 years, as judges don't have to do physical work and all is needed is their mental capabilities and legal expertise at that age and those seasoned judges would be able to serve the purpose well. Further, when the retired judges are having huge retirement benefits and pensions, then why not they be made to work and contribute to the disposal of cases. Obliging few above forty and below forty five years of age people, during this tenure of the government, does not seem equitable and justified.

The article dealing with writ jurisdiction of high courts i.e. **article 199** has further been amended, restricting the powers of high courts with no suo motu and only to remain within the contents of the application before them. The same has to be read

with new article 202A dealing with the constitutional benches and their powers and functions.

In **article 203C** regarding Chief Justice of Federal Shariat Court (FSC), the eligibility criteria has been extended to include a judge of Federal Shariat Court who is qualified to become a Supreme Court judge, can also become Chief Justice of the FSC.

Article 203D dealing with powers, jurisdiction and functions of the FSC, has also encountered an addition of a proviso regarding appeal against its decision has to be decided within 12 months, otherwise it would take effect unless suspended by the Supreme Court.

The **article 208** has been amended by adding the Islamabad High Court into the already mentioned Supreme Court and FSC regarding the powers to make rules for the officers and servants of the Court. Remember that these rules are subject to the approval of President or the Governor, as the case may be.

The government has added a new proviso into the **article 215** dealing with Chief Election Commissioner, where until a new has been appointed the outgoing will continue to hold his office. This provision is open without specifying any time for the government to appoint a new one, which can be very fatal for the democratic process in the future.

For sending any law which seems to be repugnant to the injunctions of Islam the voting percentage has been changed from 2/3rd to 1/4th under **article 229**. This article hails within the Islamic provisions of the Constitution regarding reference by the Parliament to the Islamic Council for advice on proposed law's repugnancy to the injunctions of Islam.

A new proviso is added into **article 230** (functions of Islamic Council) that the final report shall be considered within twelve months after it has been laid.

There is a minor amendment into **article 255** dealing with oath of the office where the oath is required to be made before a specific person and due to some reason it is impracticable for the oath to be made before that person, the expression "that person" has been substituted with the Chief Justice of the province or the Chief Justice of Pakistan as the case may be, to take oath in all other cases.

For the bestowment of national awards under **article 259**, new fields like science, technology, arts, medicine and public services have been added in place of nursing mentioned there.

The Fourth Schedule has also been amended by adding the expressions local taxes, fees, cess, charges, and tolls in the cantonment areas. Remember that this Schedule's part one deals with the Federal Legislative list.

Analysis in the Context of Sovereignty-Independence Debate

The selection process of judges has been altered by bringing changes in the composition of Judicial Commission of Pakistan. The new ground of "inefficiency" for the removal of judges has been introduced, seems like borrowing the concept from the "good-behavior" principle applied in USA for judges to continue their office as a judge. Yet, the irony is that the inefficiency has not been defined and has been kept subjective for the Committee to decide, making judges more prone to political scrutiny and deciding in favor of government to avoid that "inefficiency" clause. There has been an argument regarding the amendment violating all the international norms of independence of judiciary set by International Covenant on Civil and Political Rights (ICCPR) and UN Basic Principles on the Independence of Judiciary. The judiciary which lacks autonomy from executive and legislature, cannot act as watchdog and take actions against the abuse of powers by these institutions. This amendment may have brought changes to address many problems within the Judiciary, but it has eroded the judicial independence and democratic governance in Pakistan. The seniority principle for the automatic appointment of Chief Justice of Pakistan, has been abolished through this amendment and the reins have been taken by the political parties into their hands, making the incumbent CJP controversial and chances of appointment of the one, more inclined to the treasury bench in the Parliament. Although careful reading of the amendment suggests that in order for the government to apply its own whims and wishes, it will be needing sweeping majority in the Parliament, otherwise opposition will be able to play its role in Judicial Commission of Pakistan. In USA too, judges of superior courts are appointed by the political elite through nomination by the President, here political appointments are also done, whereas Department of Justice reviews the nominations (article 2 section 2 of US Constitution) then the Senate confirms by

advice and consent through Senate's Judiciary Committee, which holds confirmation hearings for each nominee and then Commission is given by the President to the appointed justice. The judges are removed through impeachment by the House of Representatives and conviction by the Senate through required number of votes in each House. There are few voices amongst the legal fraternity giving example of appointment of judges in India through "*Judiciary's Collegium*" where President of India appoints Superior Court judges upon the recommendation of this Collegium. This Collegium system is not based upon any law but of precedents based on three judges' cases. The removal of a judge in India is through Parliament, by 2/3rd majority of any of the Houses backing the move on the grounds of misconduct or incapacity. But, this Collegium system is not devoid of flaws and criticism from within the India like, it creates democratic deficiency, lacks accountability of judges, encourages nepotism and favoritism, involves non-transparent process, violates checks and balances principle and that, it is a closed door mechanism, not open to public scrutiny.

The new concept of constitutional benches, empowered to exercise original jurisdiction (without suo motu) and protect fundamental rights within the bounds of petition in front of them, may lead to politicized decisions and defeat the very principles of natural justice and rule of law. It is important to note that how the right to fair trial, being a constitutional right (article 10-A) and internationally established right (article 14 of ICCPR) can be ensured from the politicized appointments? As independence of judges through transparent and meritocratic principles is at the core of the whole concept of fair trial, worldwide. Where example from US is given to justify the political interference into the appointment of judges, it is like comparing apples with the oranges; for Pakistan to reach at that level of self and social accountability and transparency, there is a long row to hoe and ours is the society full of nepotism, corruption and prejudices. The systems within the institutions are not strong and people sitting at the helm of the affairs are not ready to shatter the status quo. So, this argument lacks its legitimacy in Pakistani context, if we look at the role of political parties and military establishment while dealing with judicial institution in the past. When a judge will

have in mind that his performance is being evaluated by the politicians, his decision-making capacity in one or other aspect would be compromised and tilted towards the Executive, hence the balance of power will be affected. It would be a new experience to see the outcomes of politically sensitive cases after this amendment and the impacts on the human rights violations by the governmental officials. Further to note that, the smooth running of democratic system needs a "*self-governing judiciary*" especially in countries like Pakistan, which has corrupt politicians, unbound establishment, dishonest bureaucracy and hyper emotional people and this amendment has taken that self-governance aspect from the Judiciary. The checks and balances principle is compromised, which will lead towards the authoritarianism on the part of parliament and executive towards judiciary undermining the very constitutional basis of separation of powers and political system, this aspect might impact negatively in the long run on the rule of law and protection of fundamental freedoms of the people.

Factors leading to hurdles in Independence of Judiciary:

Keeping aside this amendment there have been many factors which have, over the time, contributed to the slow or crippled journey towards the independence of judiciary in Pakistan. The role of judges in further slowing down the process is also very important, as whenever they were given the chance to change the history and take a firm instance, they did not apply the rule of law principles, like in the cases challenging military martial laws, they disguised under the infamous doctrine of necessity and justified the illegal actions of military dictators. Further, where there was a democratic government, they took the path of judicial overreach and judicial wild-ism, encroaching into the policy domain and day to day functioning of the Government, almost halting the whole political and social system. In short, following are major causes leading to hurdles in the journey of independence of judiciary in Pakistan:-

1. Political instability in the Country is one of the major factors hindering the judicial independence. This has led to more judicial interference and encroachment into the policy domain of the Parliament, especially in the recent

past, leaving aside the true role of judges i.e. to provide relief to common people as litigants, resulting into piles of pending cases.

2. Role of military establishment can never be negated in this regard. The martial laws, the LFOs and PCOs have been legalized through judiciary every now and then, making the Institution a puppet and losing its credibility and trust among the masses.
3. Lack of implementation of separation of powers principle. Whenever, judiciary got a chance it intruded into the domains of other institutions and same happened with other institutions, which upon getting powers curtailed the judicial independence and autonomy.
4. Disrespect of constitution and constitutional norms. In Pakistan, the constitutional jurisprudence has not been consistent, the judges remain adamant in following constitutional principles for a longer period of time and establishing a legally sound jurisprudence especially when it comes to illegal martial laws, the infamous theory of necessity is the only constant, which has been applied by the Judiciary to save its face. It only took instance, when martial law administrator came for the judicial institution otherwise it remained aloof by justifying all coups when the case was otherwise against the Parliament and political system of the Country.
5. Nepotism and corruption is rampant in the society as a whole and judges are not an exception. The appointments made after lawyers' movement on the "*Us versus them*" principle led to elevation of like-minded judges in the Superior Courts by the Judicial Commission of Pakistan. The criteria for the elevation has never been clarified by the judges to the public, except that few judges appointing the chamber fellows and relatives of few other like-minded judges in majority of cases, before their appointments to keep the room open for their acquaintances to be appointed by those appointed by them. This factor has also contributed to the resentment and voices to change the appointment mechanism of Superior Courts judges.
6. Politicized and corrupt judges in the Superior Courts has been another major issue for Pakistan.

Independence of judiciary does not mean being only able to be save from the outside influence or interference, in the author's humble opinion, it also means that the judiciary is independent from "*inside*" too.

7. There is no rule of law in Pakistan, rather there is "*fool of law*" in the hands of political, social, business, legal, bureaucratic and military elite.
8. Non-existence of democratic rules and set judicial norms. It is well settled principle that it is not the judges, who speak, but their decisions. Unfortunately the situation in Pakistan appears to be contrary to this.
9. Socio-economic and political inequality is rampant in the society.

The power struggle between executive/parliament and judiciary is ongoing in Pakistan. It is not settled yet and in the near future there is no chance that it would bring stability into the political and legal system. The "*beneficiaries*" on both sides – politicians and judges- always remain in power through their relatives and acquaintances and it is them who are the real problem for the rule of law and constitutional norms.

Conclusion and Recommendations:

In the end, it is important to understand that parliamentary sovereignty and judicial independence are not two opposite concepts, where ensuring one would mean ending or restricting the other, rather these are complementary to each other, one ensuring the other. In a democratic system, all state institutions have to work within their pre-set domains of action to ensure smooth and proper functioning of each other, it is just like people living in the society with peace and tranquility with each other. The well-established principles of separation of powers and checks and balances along with upholding constitutional norms and rule of law are at the bedrock of every legal and political system. When it comes to parliament, it needs to adhere to the bounds set by the Constitution regarding law making and executive needs to avoid going ultra vires to its powers. Same is the case with the judicial independence, it is not boundless or limitless, the judges of the countries like US have strong power of judicial review, yet they rarely use such power which ensures the smooth functioning of the political and

legal system, they have devised the judicial restraint principle for themselves.

There have been many unclear aspects in the current amendment, which need to be clarified through further amendment. The balance in appointment of judges needs to be more equitable, which is lacking in the 26th amendment. The criteria upon which judges are to be appointed and removed, needs to be more objective and known to the public and stake holders, keeping it subjective and secretive will not serve the purpose, where the proceedings of both Judicial Commission of Pakistan and Supreme Judicial Council need to be live and public, why to keep them in camera? There is a dire need to engage public into the process and ensure transparency in judicial reforms through incorporating international legal standards and practices. There is another ambiguity where if nominated CJP refuses, and next from him also refuses, then next senior most from remaining judges will be nominated, but what about the third one from the original seniority list? This aspect needs further clarification. The constitutional bench's appeal process is also not clarified, as to how many judges will take up the matter and in what time frame that will be disposed of? Wouldn't there be a legal stagnation, when the Constitution will take away the right of constitutional interpretation from few judges and bestow the same to other fellow judges of same caliber and hierarchy? This amendment right now seems against the judicial independence and gives an impression in favor of current ruling regime, yet time will tell, as it might come up with a different outlook after passing of few years, as in future without 2/3rd majority in the Parliament, the ruling party will have to rely upon other parties whether those be in the treasury bench or opposition. Further the scope of Article 199 has been revisited, this needs serious deliberations and clarity, as almost every writ involves some constitutional interpretation and the jurisdiction adopted by high courts in the guise of complete justice principle, will now be restructured and redefined through new parameters, as already set parameteria is taken away by this amendment. The role of provincial parliaments in implementing this amendment to the tune of article 199, will strengthen the federal outlook of provinces.

There is a dire need to understand that there are two realities existing side by sides-*political reality and*

legal reality- and need of the time is to create balance between the two and not to mix both. The judicial independence cannot be achieved in silos and same is the case with parliamentary supremacy, the relationship between the two is critical and intricate, with both institutions having extraordinary powers and scope to play. All they have to understand is that snatching each other's powers is not the solution, recognizing the powers and exclusive domains of others and let them work smoothly, efficiently and diligently, is what is needed to run the political and legal system smoothly. It is good to have power but it is never recommended to use it every now and then, this is what is needed to be understood. Curbing the independence of one organ through amendment or restricting the working of another organ through activism, is not the solution and is never good for the democratic norms, social and legal system of the state. It is the will to let others work within their domains and do your work in your domain, which matters and which is practiced in all the established democracies; Pakistani institutions will have to learn this, as in between this win-loss game, it is Pakistan and its people who are losing, not the political or legal elite. If it is accepted for the sake of argument that the amendment was much needed, especially regarding judicial appointments and removals, then the time of amendment was not right, and that too from a parliament whose legitimacy is put to a question by national and international media and legal experts or to put it in another way, one should think upon that what forced the Parliament to bring this amendment in haste, without opening for deliberations and discussing in public, before passing the same?

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