

## THE ROLE OF THE JUDICIAL COMMISSION: JUDICIAL INDEPENDENCE IN PAKISTAN POST-26TH AMENDMENT

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### ABSTRACT

Pakistan's judiciary has strived for decades for independence in the face of changing sands of political gravity. This research investigates how the 26th Constitutional Amendment, which has been reformed recently and has also been a matter of immense controversy, has changed the playing field in terms of judicial autonomy and has done so by altering the structure of Judicial Commission of Pakistan (JCP) and by implication: the whole process of appointment. The present study follows the historical context of judicial independence in Pakistan from the point of time prior to the amendment with its emphasis on the constitutional provisions and judicial precedents before the amendment. In subsequent sections, it analyses the most important changes brought in by the 26th Amendment, namely reconstituted JCP, change in the method of appointment of the Chief Justice, introduction of 'constitutional benches,' and augmented executive role in judicial appointments, and considers their impact on judicial independence. The article uses a doctrinal methodology in which constitutional texts, judicial pronouncements and expert commentary are reviewed, and in comparing the pre and post amendment scenarios. The findings reveal that the JCP's composition is now tilting towards the political members, and that the powers of JCP are expanded in ways that critics accuse of compromising separation of powers. An analysis of how judicial independence has been interpreted in Supreme Court and High Court precedents will help in understanding how the interpretation of the issue can affect the future.

**Keywords:** 26th Constitutional Amendment, Judicial Independence, Judicial Commission of Pakistan (JCP), Judicial Appointments, Separation of Powers, Executive Influence, Constitutional Benches.

### INTRODUCTION

Pakistan's constitutional framework is built on the corner stone of judicial independence which is also a necessary ingredient for upholding the rule of law. The constitution of 1973 was made to give an autonomous judiciary by separating the judiciary from the executive (Article 175(3)) to the principle that judges should not be susceptible to external pressure in the performing of their duties. In this context, this research article reflects upon

the impact of the Judicial Commission of Pakistan (JCP) before and after the 26th Amendment on the judicial independence (Khan, H. 2023). At the heart of the debate lies the very body institutionalized by the 18th Amendment in 2010 when the JCP (Judicial Commission) was created to institutionalize merit based and consultative process of judge's appointment. The study assesses the effect of the judicial autonomy by comparing

the structure and the functioning of the JCP before and after the 26th Amendment (Wolf, S. O. 2021). It takes a theological look at historical evolution, analyses the new constitutional provisions, reviews key judicial precedents and takes a view of scholarly and legal opinion. Methodologically the paper is doctrinal in that it settles on constitutional texts (mainly amended articles relevant to succession) and case laws from the superior courts as well as authorities' commentaries from jurists and analysts. Through this approach, the article addresses the following research objectives: (1) to outline the state of judicial independence in Pakistan prior to the 26th Amendment and the role the JCP played in safeguarding (or undermining) it; (2) to identify and explain the major changes brought by the 26th Amendment concerning the judiciary; (3) to assess the implications of these changes on the independence, accountability, and functioning of the judiciary; and (4) to propose recommendations for preserving an appropriate balance between judicial autonomy and necessary reforms (Mangi, D. B. & Ali, U. 2025).

This inquiry is very significant. Fundamental rights and continuous check on arbitrary exercises of power cannot be conducted by courts that are not independent. If indeed the 26th Amendment is a compromise of judicial independence, then the question of future of constitutionalism in Pakistan will be begged in question. On the other hand, it is crucial for formulating balanced improvements to understand any legitimate aims of the reform (e.g. transparency or efficiency improvement). The remainder of this article considers the historical facts of judicial independence in Pakistan and the genesis of the JCP. The key provisions of the 26th Amendment are then dissected and how they change the JCP's role is examined (Khan, A., 2025). The post amendment developments, precedents of independence of judiciary, comparative view about the pre and post amendment system are the subsequent sections which conclude with proposing the way forward and suggestions to strengthen the judicial independence in a changing constitutional landscape of Pakistan.

### 1. Historical Context of Judicial Independence in Pakistan

Pakistan's judiciary has faced upholding independence as a challenge since its inception

amid political upheavals. Executive dominance over the courts can be traced in early constitutional history – such as the 1954 Maulvi Tamizuddin Khan case and the infamous Dosso case (PLD 1958 SC 533) where the courts endorsed the coups or executive actions through the 'doctrine of necessity' and thus refusing to assert its own independence (Choudhury, Z. I. 1989).

Since 2010 until the 26th Amendment in 2024, the primary gatekeeper in superior court appointments was the Judicial Commission of Pakistan. Made up of senior judges dominated by chief judges, and chaired by the chief justice, the JCP was regarded as an insulated buffer for ensuring political interference was not an overt consideration in judicial appointments. To illustrate, the Commission for appointments to the Supreme Court comprised the CJP, the four next senior SC judges, one retired judge, the Law Minister, the Attorney General and a Bar representative – the majority (five out of nine) being sitting judges. The Supreme Court had deemed this "primacy of the Chief Justice" and senior judges' views in selection of peers an element that was essential in the Al-Jehad case and its progeny; this 'judge heavy' composition was intended to ensure just that. Similarly for High Court appointments the Chief Justice of relevant High Court, plus the province's Governor and Bar representative, were involved in those discussions. Although the Parliamentary Committee sometimes refused nominations (because of concerns about competency or integrity), the Supreme Court reviewed such vetoes judicially to guarantee this ultimate censure power was to be transparent. The Court had pronounced in Munir Hussain Bhatti (PLD 2011 SC 407) and other associated cases that decisions of the Parliamentary Committee were justiciable, i.e. a denial could be overturned for want of a solid reason and the JCP's recommendation restored. As a result, between 2010 and 2024, the appointment process was basically controlled by judiciary, with executive and legislature as checks but with limited functions.

It was also the period when the higher judiciary of Pakistan had a high degree of institutional independence in appointments and decision making, even if riddled with criticism. Yet, on the other hand, the new system was hailed for ending the arbitrary appointment that had characterized

previous eras, as there were mechanisms in place to prevent a Prime Minister from picking Supreme Court judges at will. At the same time, the judiciary became ever more combative in protecting rule of law principles (e.g. holding a Prime Minister to be in contempt in 2012, disqualifying another in 2017). On the contrary, some observers and government figures used such language to accuse the post 2009 judiciary of judicial overreach, that is to say, that a tight knit superior judiciary, which has the ability to appoint its subordinates and to issue *Suo motu* directions, was encroaching upon the policy domain (Cheema, M. H. 2018). There was friction such as interference in executive matters and numerous *Suo motu* cases. Also, questions were asked about transparency within the JCP itself, including how deliberations were done behind closed doors and the criteria to elevate judges, especially of the Supreme Court, were not transparent anymore and there were perceived favouritism and factionalisms within the judiciary as a result. One of the notable debates was the seniority versus merit principle debate as concerns seniority when elevating people to the Supreme Court. Senior judges of High Courts were often elevated by norm but the JCP in some cases preferred junior judges or advocates who were regarded meritorious and protests by bar councils followed on account of 'arbitrariness'. These were the issues against which any calls for reform had to be made: tension between preserving independence and ensuring accountability/clarity in appointments. Therefore, before the 26th Amendment, the superior courts of Pakistan had enjoyed a sizeable degree of independence in appointments under the JCP system. It was dominated by judges, and when it came to who could become a judge, the Judicial Commission was supported by supportive jurisprudence from the Supreme Court that had restricted executive or legislative interference. From the establishment of judicial primacy in the *Al-Jehad* case, the Lawyers' Movement and the ensuing constitutional amendments had 'created' the idea that an autonomous judiciary comprising its own appointees formed the pillars of democratic governance. This did not imply the system was perfect: there was infighting internal to the system and question of accountability. However, the pre 26th Amendment status quo was something that, for many, was a fair equation in Favor of judicial autonomy. This is the balance

the 26th Constitutional Amendment sought to topple, allegedly in the name of reform.

## 2. Research Methodology

The research methodology used in this study is doctrinal. The study adopts a doctrinal method which focuses on an intensive examination of constitutional texts, judicial providences and gauging the opinion of experts. Using this method, researchers can use it to analyse the effects caused by the 26th Constitutional Amendment in Pakistan especially in connection with judicial independence. It explores the institutional structure of both the pre-amended and post amended Judicial Commission of Pakistan (JCP) as well as the processes that are employed within the institution as well as the effects of both on judicial autonomy.

Constitutional provisions, case laws and judgements of Supreme Court and High Courts are analysed as primary sources. These are used by the study to understand the evolution of judicial independence and how the working of judiciary is affected by the new constitutional amendments.

## 3. Theoretical Framework

The theoretical framework is based on the principle of judicial independence, which is very essential for maintaining rule of law in Pakistan. The study is based within constitutional theory and more particularly in the theory of separation of powers and the autonomy of the judiciary. Drawing on theories of institutional design, the research assumes the role of the Judicial Commission of Pakistan (JCP) as a gatekeeper meant to provide guarantee of fair and transparent judicial appointments devoid of political interest.

This theoretical framework consists of the key elements as follows:

Research is presented on how the 26th Amendment affects the separation of powers principle that is fundamental to the structure of the Pakistani Constitution.

Judicial autonomy is analysed in terms of the changing relationship between the judiciary, the executive and the legislature.

The study also assesses if the 26th Amendment is an honest attempt at institutional reform or a contravention of the principle of judicial independence.

#### 4. Literature Review

In an effort to identify the historical evolution of judicial power in Pakistan, Kureshi's book inspects the ways in which the judiciary has attempted to gain supremacy with a particular focus on the judicial struggle for independence. Emphasizing on judicial activism, the book primarily discusses the period of Lawyers' Movement and post 2007 judicial reforms. The essay contends that the judiciary has acquisitive power not only as a result of the desire to safeguard the values of constitutionalism, but in particular the independence of judiciary.

Given the relevance of this source, understanding wider judicial independence in Pakistan in relation to the political context and 26th Amendment, is imperative (Kureshi, Y., 2022).

Then in work carried out by Hasan, we are presented with a critical assessment of the judicial crisis in Pakistan, with the point being that political pressure and executive interference at appointment level is a policy flaw. It compares the state of interference on the hard grounds that have encroached autonomy from the judiciary and explores the constitutional safeguards of the judicial independence, how the Judicial Commission of Pakistan (JCP) was meant to safeguard the independence of judiciary. Hasan explains that his analysis on how the judiciary deals with balancing accountability and autonomy and the obstacles comes forth.

Recognizing this, this work gives an important perspective to the implications of political and executive interference in judicial appointments – a central issue in the debate over the 26th Amendment (Hasan, A., 2022).

Khan's book is a historical account of Pakistan's constitutional development with reference to the issue of the judicial independence. Khan traces the evolution of judicial appointments and the role of the Judicial Commission of Pakistan. The book is a comprehensive discussion of the cases and amendments that are important for the ongoing conflicts among the judiciary, executive and the legislative on judicial appointments.

This work is important, firstly to understand the historical trajectory of judicial independence in Pakistan and secondly the constitutional amendment that has shaped it such as the 26th amendment (Khan, H., 2023).

Aziz's work offers an extensive analysis of the constitution of Pakistan and its judiciary, in

particular, on question of judicial independence. The book assesses crucial constitutional amendments as well as its impact of the separation of powers. Change in judicial appointments through the years have reduced the judiciary's ability to act independently of political pressures.

This source is highly relevant because it does provide legal analysis of changes to the constitution that are central to the 26th Amendment and what effect they would have on judicial independence (Aziz, S., 2018).

Cheema's work presents a comparison of judicial autonomy and accountability in Pakistan. It examines the effect of the Judicial Commission in making fair and impartial appointment to the judiciary. In general, the paper explores how institutional reforms have impacted the structure of the judiciary, as done in Pakistan compared to its democratic comparison (Cheema, M. H., 2018). However, this article offers a lens for comparative consideration of the extent to which the changes adopted by the 26th Amendment served to alter judicial autonomy and judicial accountability.

#### Case Law

In this path breaking case, the Supreme Court of Pakistan pronounced that judicial appointments must be made on the basis of merit and seniority and there should be judicial independence. Building on the pre-26th Amendment system in establishing the primacy of judicial opinion in the selection process, it was prescribed as the Constitution now stands, that the name of the appointee would be sent to Congress by the President on the day of his re-election (Al-Jehad Trust Case, (1996).

This case looked at the position taken by the Judicial Commission of Pakistan with reference to judicial appointments and also confirmed the primacy of the judiciary in the process. The JCP made judicial appointments that the Parliamentary Committee could not even arbitrarily reject. By this decision, the judiciary again asserted its role as an arbitrator between the people and the politicians, protecting its autonomy from the politicians (Munir Hussain Bhatti Case, (2011)

#### 5. The 26th Constitutional Amendment: Key Provisions and Implications

The 26th Constitutional Amendment was introduced and passed in October of 2024, in



very charged political climate. The Pakistan Muslim League (N) (with support from the Pakistan People's Party and other allies) pushed a coalition government through to pass the amendment, first in the Senate on 20 October, and then the National Assembly in the early hours of 21 October.

The 26th Amendment incorporated 27 Clauses of changes, a few of them being related to the judiciary and related areas. Included are the changes most pertinent to the Judicial Commission and judicial independence.

Decomposition of the Judicial Commission of Pakistan (JCP): As regards the JCP, this is perhaps the most consequential change by shifting Article 175A. Previously, the JCP had a majority of sitting judges (for example 6 out of 9 members to be appointed to the Superior Courts were judges). The Commission was restructured, and several members were added from the legislature and replaced one of the judicial members.

It also changed the way the Chief Justice of Pakistan (CJP) is appointed: there was a new process of choosing the country's top judge that we got away from the old seniority convention. Under the revised Article 175A (3) [and a new Article 175B which establishes A Special Parliamentary Committee] the Chief Justice of Pakistan is not any more automatically the most senior Justice of the Supreme Court.

Another novel introduction is the creation of 'Constitutional Benches' in the Supreme Court and each High Court in a new Article 191A and amendments to Articles 175 and 202. These benches qualify as the exclusive panels of the judges having the jurisdiction to interpret and enforce the constitutional provisions as well as the fundamental rights. Most importantly, it is the Judicial Commission of Pakistan (not, the Chief Justice) that decides the formation and appointment of judges to these constitutional benches.

Limitation of Suo Motu Powers and Judicial Review: The 26th Amendment aimed at curbing powers of the Supreme Court under Article 184(3): Suo motu jurisdiction (Suo motu jurisdiction [taking action on its own initiative in the public interest]) and the authority of doing 'complete justice' under Article 187. This served to visibly limit the power of the court to accept cases as it willed, and issue broad orders without actual petitions. Indeed, this is a technical change

to the text of the amendment to the Suo motu powers, because the exact text of the changes is difficult, but its import is that any exercise by the Supreme Court of extraordinary original jurisdiction (such as Suo motu action) must follow procedures set by law (indeed, Parliament had already passed the Supreme Court Practice and Procedure Act for this purpose).

In addition, the amendment expanded the ground for removal of judges (Introduction of 'efficiency'), that is, Article 209 that provides that the Supreme Judicial Council (SJC) shall remove the judges of superior courts. Earlier, a judge was removable (on SJC's recommendation to the President) only on the grounds of established dishonourable behaviour or incapability. The SJC can remove on the ground of "inefficient performance of duties," as added by the 26th Amendment (Ahmed, F. A., & Asma, M. 2024).

#### **6. Post-26th Amendment: The Changing Role of the Judicial Commission**

The 26th Amendment is now a part of Constitution of Pakistan, and the Judicial Commission of Pakistan has a new direction, but the first signs of it are promising insofar as how the judicial appointments and matters internal to the court are handled. Such structural changes in the JCP immediately impacted how it made decisions and its output. The Commission is now a forum, where the representatives and allies of government can effectively drive outcomes in a body where judges have ceased to be kings. Thus, one report summed up the amendment, as it "reconstituted [JCP] under controversial tweak, placing power balance firmly in the government camp". It allows the bloc of political members (government aligned lawmakers, law minister etc.) to be in the majority and hence take decisions which previously needed consensus or at least broad agreement of senior judges by majority vote. Thus, executive influence has been formalized: where once the Commission was to a significant extent judicial in character, it has now been turned into a hybrid body that the executive and its legislative allies can run if they stay united.

#### **7. Judicial Precedents and Case Law Analysis**

In Pakistan, the clash between the 26th Amendment and the principle of judicial independence is knocking at the door that will

eventually be decided by courts. Ours is a clash we need to contextualize by understanding how the superior judiciary has in the past understood and preserved judicial independence and what say the existing case laws make about the judiciary's role in the making of appointments and its relationship with the other branches for the 'national good.' The path ahead will also be assessed by any judicial action only in relation to 26th Amendment up until this point (petitions to advisory opinions and interim orders etc.).

Pakistan's Superior Courts have on various occasions declared that judicial independence is not a mere policy preference but a constitutional principle of the highest order. And in the 1990s, the Court's jurisprudence began to do this more assertively. The case of *Al-Jehad Trust* (1996) was seminal in laying down the criterion on which the process of judicial appointments has to be predicated – its outcome has reinforced the view that it is the primacy of judicial opinion that guarantees that the judiciary remains free from any undue executive influence. *Al-Jehad* relied on the Court's constitutional ethos and other cases to buttress the rule of separation of powers by reading into the 'consultation' requirement in the appointment clauses an implicit protection for independence. Moreover, it enshrined the convention (now a rule) that the senior most judge should be the Chief Justice because anything other would mean that the executive will have the power to hand out the leadership of the judiciary according to loyalty rather than merit (Iqbal, A. 2012).

Subsequent cases reinforced these concepts. In *Asad Ali v. Federation* (1998), which also touched upon a controversy related to the appointment of a Chief Justice of the Supreme Court, the Court invalidated the elevation of a junior judge to the office of a Chief Justice, as pursuant to the principle referred to from *Al-Jehad*, seniority must be respected in order to ensure integrity of the institution (the principle applied in *Al-Jehad* was turned into a rule). The Court commented that deviation from established conventions in the appointment of Chief Justice would bring about the loss of independence of the office of Chief Justice, loss of the independence of the judiciary, and loss of the confidence of the judiciary.

However, during General Musharraf's era the judiciary experienced some setbacks to begin with

(notably the *Zafar Ali Shah* case (2000) where the 1999 coup was held necessary) and later on regained some ground. With the judiciary in place after restoration, the post 2007 judiciary nullified Musharraf's actions in the July 31, 2009 judgment (*Sindh High Court Bar Association* case). By doing so, the Supreme Court had not directly spoken about the appointments, but broadly asserted the domain of the constitutional domain and independence of the judiciary while declaring the dismissal of judges outside the Constitution a nullity. It also made clear that judges could not be removed or obliged to take new oaths instantaneously by diktat – referring to security of tenure as an element of independence (Zahoor, U. 2001).

This is a significant episode in the Court's handling of the 18th Amendment (2010), which established the original JCP. In 2010, a full 17 judge bench of Supreme Court went through countless amendments of constitution but the focus was nonetheless Article 175A (Judicial appointments through the JCP and Parliamentary Committee). Petitioners asked for the Court to review the Constitution because Parliament had amended the Constitution, yet the relationship between Parliament and the people and Parliament and the courts had taken on an implicit tension; the amendment might compromise independence of the judiciary. The Supreme Court didn't go as far as striking down the amendment but it did deliver an interim order putting on notice and effectively censuring Parliament to rethink Article 175A. The Court seized an opportunity to fortify the role of the judiciary in the appointments process – e.g. increasing the number of senior judges on the JCP, and making the Commission's recommendation overtly conclusive. Consequently, the 19th Amendment (2011) was passed by the Parliament to conform to the Court's suggestions. This episode is notable for a few reasons: (1) It showed the Supreme Court's willingness to scrutinize even a constitutional amendment for compatibility with judicial independence (though couched as "suggestions," it was a significant check on Parliament's amendment power); (2) It established that any appointment mechanism must preserve the essence of judicial independence, effectively treating it as a constitutional fundamental that even amendments should respect; and (3) It demonstrated a cooperative dialogue between the judiciary and legislature to achieve a solution,

avoiding a direct confrontation over the basic structure doctrine at that time (Munir, B. 2021).

The second, Munir Hussain Bhatti and others v, considers appointments in another light. Following the 19th Amendment, the crunch came from Federation (PLD 2011 SC 407). Here the Supreme Court invalidated the decision of Parliamentary Committee to block some JCP nominees for judgeship on account that the Committee's discretion was not unfettered to the extent that it could be subjected to review where it appears to contravene the constitutional principles and absent cogent cause. Second, the Court read the provisions of the constitution in such a manner whereby that political actors (including, even in the case of Parliamentary Committee) could not arbitrarily override considered judgment of judicial members in appointments: thus, putting primacy of the JCP back in place.

Although never fully acquiesced in Pakistani jurisprudence as a hard and fast doctrine, the idea of 'salient features' of 'basic structure' of the Constitution have been played around by these cases. In 18th Amendment Case the Supreme Court itself acknowledged that the features such as independence of the judiciary, parliamentary form of government, etc., which are the features borrowed, are essential and recognized in the Objectives Resolution. In the later 21st Amendment Case (2015), regarding the amendment that had allowed military courts for terrorism cases, the Court was bitterly divided. Most judges held the amendment (meaning military courts are permissible), but there was a strong minority of judges dissenting that said independence of the judiciary and fair trial rights are part of the basic structure and were impaired. While most didn't deny the existence of salient features, the majority opined that the amendment did not nullify the judiciary as the military courts were exceptional and temporary. Interestingly, in that very case, Justice Jawwad Khawaja's dissent categorically declared that independence of judiciary is such a fundamental feature of constitution that it cannot even be compromised through a constitutional amendment. While a minority opinion, it contributes to a strand of thinking within the Court that might be relevant as to the extent to which a future court looks at the 26-year-old view of Americans.

Under this history, the Supreme Court has a record of saying that whatever appointment procedure is adopted in a given jurisdiction, it must protect judicial independence and has indicated that, to the extent a given amendment would go too far in undermining that, the court has the ability – and perhaps the duty – to curb it. In the past judgments, the concepts such as 'independence of judiciary' have been so closely related with the constitutional fabric that if not called 'basic structure' then it is certainly accepted as an essence of the constitution based on the many provisions (Articles 175, 177, 193, 209 and the Objective Resolution preamble). Judicial independence, too, has been repeatedly cited by the Court as being 'fundamental,' yet 'beyond the reach of majorities,' to which it has often connected the separation of powers, another 'fundamental' principle subject to 'majorities' whimsy. For instance, in Nadeem Ahmed v. In Federation (PLD 2010 SC 1165) – being one of the 18th Amendment cases – the Court also mentioned that unchecked executive or legislative control over the judiciary will contravene the separation of powers enshrined in the constitutional scheme.

While the Supreme Court is naturally the lead player on constitutional questions, Pakistan's High Courts have also played a part in developing the jurisprudence on judicial independence specifically with respect to the lower judiciary and administrative interference. The Sharaf Faridi case (Sindh High Court 1989) was a landmark as it forced separation of judiciary at the district level from executive control. In that case, Article 175(3) was interpreted as the executive authorities, for instance, provincial governments, exercise of disciplinary or administrative control over subordinate judicial officers should not vest on them but would rest on the High Courts. This approach was later affirmed by the Supreme Court and brought about administrative and legislative changes in the 1990s. This is important because, over and over again, it represents a theme: when the Constitution envisages an independent judiciary, the courts have interpreted the provisions broadly to keep the presidency (and its influence on the judiciary) at bay even at the level of first instance judicial appointments. Likewise, High Courts have at times utilized their constitutional jurisdiction to safeguard judges from external pressures such as by getting involved

if there is suspicion that a judge's transfer or removal was politically motivated.

Case law also exists on the judicial review of the terms of the Judicial Commission's decisions. But sometimes in a few instances people who were not recommended to be judges in the JCP or by passed in seniority challenged their decisions either in the High Courts or Supreme Court. These superior courts have been quite circumspect about not allowing the floodgates to open and routinely subject JCP's discretionary decisions to judicial review (literally, there is a political fear that this process may be litigated), but they will say that when JCP have breached a constitutional or a legal rule then that opens one up to judicial review. For example, following the 2011 parliamentary rejection of some names, petitioners came directly to Supreme Court which exercised its review power. In the event that the 26th Amendment survives, it is conceivable that High Courts or the Supreme Court should be petitioned with challenges from disgruntled candidates or other persons claiming bias or illegality of the decisions reached by the new JCP. It's anyone's guess how receptive the courts will be to the new regime, but the past practice points toward no shyness if a constitutional principle (such as improper domination by nonjudicial members) is at stake.

The 26th Amendment Itself on Challenge in the Supreme Court: Since early 2025, the 26th Amendment is being challenged in the Supreme Court. The aforementioned group of former SCBA presidents, as well as political parties (of which, the PTI too has filed a petition) have filed multiple petitions in that regard. Senior lawyers' petition specifically leans on doctrine of salient features to invoke the court to rule that the amendment was 'ab initio void' due to its contravention of basic constitution - the independence of the judiciary and separation of powers. Instead, they have urged the Court to read down the offending provisions (pertaining to change in the JCP constitution, the method for appointment of CJP, creation of constitutional benches, change in SJC) so as to harmonize them with constitutional basics. That is an invitation for the Supreme court to use a basic structure review in striking down an amendment which it has not done till date (The 18th Amendment case was resolved due to cooperation by Parliament;

21st Amendment was taken up and ultimately upheld) (Mir, W. 2015).

It is significant that these petitions were admitted at all. An 8-judge larger (initially Constitutional) bench was formed by the Supreme Court to hear the cases. In some quarters (including within Court) calls have been made to make it into a full court hearing due to the gravity of the issues. The proceedings have moved forward, just more slowly than critics would like to see, which is why the talk is of 'challenges lingering.' Additionally, the applications for convening a full court to decide the matter were noted by Justice Mansoor Ali Shah and others who, accordingly, indicated that perhaps some petitioners or stake holders considered the question as serious enough to be heard by all Supreme Court judges in order to avoid any impression that the fate of that system may be decided by a few select judges who might have been chosen (as opposed to promoted) through the new system.

There is one potential complication: who is on the bench for this case. Questions of propriety may come up if the Chief Justice (Yahya Afridi) or other judges appointed under the new scheme are on the bench (though judges normally do not recuse in constitutional challenges on the basis of their just appointed position unless there's a direct personal interest, and if the latter are inclined to view the new system as involving at least an appearance of interest). In contrast, not including them would mean maintaining the majority of the judges who were in line under the old system (such as Justice Mansoor Ali Shah, Justice Munib Akhtar, etc.), which could then invite complaints from the government side that the bench is biased in favor of the old system. This is carefully something that the Court must do (Munir, A. I. 2023).

Given our knowledge of past case law, the arguments that the 26th Amendment subverts the core principles of the Constitution, instead of amending them, are likely to be the basis of the reasoning on the Court as to why the case should not apply retroactively. Petitioners argue that by allowing politician to appoint the Chief Justice, removing judges' majority in appointments, and bench manipulation, the amendment as passed as a formal amendment so fundamentally changes the separation of powers and independence of judiciary to be unconstitutional. Thereby, they might be said to rely on the Objectives Resolution



and prior judgments (as already mentioned) to conclude that independence of judiciary is an implied limitation upon the power of Parliament to amend. Al-Jehad, the 1998 decisions in Judges and what Justice wrote in his 2015 dissent will likely be quoted to argue that an independent judiciary is intrinsic to the basic structure. The Supreme Court's own acknowledgment in the 18th Amendment case, which mentioned that the Constitutional Reform Committee report, when Parliament itself came up with this idea of incorporating Article, it identified that in the past there have been non-democratic regimes which have amended this basic structure, can also be a one supporting citation. It is for this reason that the petitioners can argue that the basic structure concept recognized there was applicable here as well (Aziz, S. 2018).

But on the other side, while arguing the case in the Court (the government's lawyers), will defend the amendment that under the Constitution of Pakistan there is no formal basic structure doctrine: Article 239 provides that the amendment cannot be invalidated on any ground in any court. Pointing out in the 21st Amendment Judgment, they will highlight that a majority did not strike down the amendment though argument of basic structure; thereby reaffirming the Supreme sovereignty of Parliament's will in amending the Constitution (except outright repeal of the entire Constitution). They might also say that in practice, independence remains intact, in that judges are still immune from dismissal and the preserved criteria for this; the SJC still contains judges (thus dismissals will still be through the competent body although inefficiently so), and the involvement of Parliament in appointments is not a destruction of independence but simply an introduction of accountability. Indeed, they could refer to cases from other jurisdictions, and indeed older Pakistani rulings, stressing accountability of the judges themselves as complementary principle. For instance, a frequently referred point is that independence does not equate to insensibility for oversight or reform. Suppose a government lawyer refers to, say, the observation that, 'without accountability, independence of judiciary is a meaningless myth', to justify why these changes are necessary in order to curb an allegedly unchecked judiciary.

The petitioners will have counter arguments against the government's claims, such as those of the Supreme Court's own precedents, for the example of the government saying that involving Parliament does not destroy the independence and the Supreme Court itself in 2010 declared that the first draft of the Article 175A was problematic enough that the Supreme Court required no change but at that stage, the Commission still had the judges in majority. With minority judges now, the problem is far, far beyond what concerned the Court in 2010. Lastly, one would mention in this context that the government that pushed the amendment so hastily could be brought up as having shown little concern for constitutional process. Despite the lawful way that the amendment was passed, the Court could consider (as a narrower ground) that it violated constitutional norms of deliberation and consultation, a less likely legal ground for invalidation (Munir, M. A. 2007)

Malik Asad Ali v. is yet another relevant case. It is also known as Federation (1998), sometimes colloquially as Judges' Case (No. 2). In such situation, in addition to the issue concerning appointment of Chief Justice, the Supreme Court struck down the whole constitutional amendment (art 14 (x) of the 14th Amendment, regarding floor crossing penalty) on the ground of procedural illegality as it was introduced at the eleventh hour and without due process. But striking down an amendment is rare and the precedent, once again, involves striking down because of a procedural technicality. The 26th Amendment case is one in which it might be argued that procedural regularity (two thirds) etc. were apparent, but the haste would seem decidedly anti-democratic procedure.

Finally, the outcome of the 26th Amendment litigation will itself become a landmark with immense impact. The effect of the amendment would be, if the Supreme Court upholds it, a reversal from the increase in judicial empowerment that started in the 1990s. This could mean that from now on, courts shall fall within the adjudication of the judiciary only insofar as appointments and court administration are concerned. Such laws will further encourage more legislative moves to regulate the judiciary, thereby encouraging the parliament to go-ahead and pass laws to control the judiciary processes (of which they have even attempted, for example the

Practice and Procedure Act). On the other hand, if the Supreme Court invalidates the amendment (partly or totally), it would be an unprecedented declaration of the basic structure doctrine – that there are limits on what constitutional amendments can achieve, and that the judicial independence is one such boundary. It could thus undo the constitutional benches and CJP appointment change, and restore the situation ante as regards appointments (restoring the composition and rules of the old JCP). But such a decision might lead to a constitutional crisis, since such government rejecting it, would be at the brink of conflicting with the Parliament and the Court. Pakistan's past experience is that wherever the judiciary has taken a very strong position against the executive or the legislature (e.g. ousting Prime Minister Gilani in 2012, firm stand in 1997 against Prime Minister Nawaz Sharif's interference), it has led to high political drama and even institutional clash. In Pakistan, striking down a constitutional amendment would be unprecedented and the Court will have to offer some very careful justification to retain public legitimacy (Kureshi, Y. 2022).

Some guidance as to how the Court may alleviate the situation is provided by past cases. The Court may instead choose to 'read down' some provisions instead of an outright strike down. For instance, it could uphold the amendment in principle but interpret the new Articles in a way that preserves judicial independence – such as ruling that the JCP, even with its new composition, must operate by consensus or at least give heavy weight to judicial members' opinions; or that the Special Parliamentary Committee's choice for CJP must not violate the principle of seniority without compelling reasons (i.e., reading in a requirement that if the SPC bypasses the most senior judge, it must justify why in terms of competence or integrity). The Court could so construe "inefficiency" in Article 209 as to reduce the fear of misuse (e.g., as solely referring to lack of ability to perform duties on account of ill health or continuous neglect, an instance of incapacity). Such an approach makes it aware of Parliament's ability to amend, but that amendment it is to be subjected to the constitutional process. This is arguable also a case for the 18/19th Amendment since the proposed approach was already used back then, and could be a palatable middle ground again.

For example, the situation might be clarified by an analogy made by the Supreme Court to how the Indian Supreme court managed the issue. In 2014, the 99th Amendment was passed by the Parliament in India creating a National Judicial Appointments Commission (NJAC) consisting of political appointees and civil society members for the appointment of judges instead of the 'collegium' system led by judges. In *Supreme Court Advocates-on-Record Association v. Union of India* (2015), the Indian Supreme Court found the above-mentioned amendment to be violative of the basic structure, particularly the independence of the judiciary. The NJAC judgment evokes the primacy of judiciary in appointments, becoming the first repeal of an amendment to the constitution on basis of basic structure grounds since 1973 in India (Kumar, C. R., 2015). Pakistani courts have no obligation to follow Indian position, however, the situations are mirror images of each other. If a constitutional amendment may be invalidated because it adversely impacts the essence of the constitutional institution, surely, an amendment (which is, after all, part of the Constitution of India) should and can be invalidated, petitioners in Pakistan had surely pointed to the NJAC case as persuasive authority. Considering the common legal heritage and comparable constitutional principles involved (albeit with the knowledge that Pakistan had traditionally been more hesitant to adopt the doctrine of basic structure than India), the reasoning in its Indian counterpart could be helpful for Pakistan's Supreme Court.

Ultimately, before the 26th Amendment, Pakistan pioneer jurisprudence constructed a very strong foundation of protecting judicial independence by interpreting the existing constitutional text and going so far as frustrating challenges to constitutional amendments that may harm judicial independence. With a new amendment that directly calls into question this principle now in place, the courts are now left with the task of adjudicating between the formal and written constitutional change at issue and the unwritten foundational principles that the courts have been supporting all these years. Whether they resolve this or not will not only determine the fate of the 26th Amendment, but also will either reinforce or recalibrate the idea of judicial independence in Pakistan's constitutional order. However, the legacy of cases from *Al-Jehad* to 18th and 21st

Amendment decisions indicates that the superior judiciary considers itself kind of a guardian of certain higher norms, including, of course, the independence. The stage is thus set for a judicial milestone that may find place among some of the other great Supreme Court rulings defining Pakistan's democratic culture.

#### 8. Comparative Analysis: Pakistan's Judicial System Pre- and Post-26th Amendment

An understanding of the 26th Amendment can be gained by examining the some of the key features of Pakistan's judicial system and the workings of the Judicial Commission before and after it. The comparative lens that this paper provides makes a case for appointing Justices through a reinforced, more coherent and universal mechanism, creating a semblance in judicial functioning, and appropriate balancing of power, where the result is supposed to be greater accountability and neutrality.

Judicial Appointments – Pre vs Post Amended (1935 – 2024): The role of Judicial Commission of Pakistan, which was predominantly composed of judges, had very limited representation of nonjudicial members (Judges of High Courts and the Supreme Court), hence influencing their judicial appointments in a very notable way (2010 – 2024). For example, in appointments to the Supreme Court, the Commission made up of 6 of its 9 members (CJP + 4 most senior justices of the SC + 1 retired justice) had a majority or at least parity in terms of judicial voices, and this was also the case in High Courts appointments made by the same Commission including the Chief Justice of the respective High Court and the most senior justices in the SC. As a result, the executive and legislature had an indirect control over judicial appointments through the Parliamentary Committees veto power, with judicial hands very significantly influencing control of judicial appointments. The judges on the Commission were so enamoured with a candidate that the candidate had little chance to be blocked (and could, in fact, be blocked by the courts if the Commission wanted to uphold it). After 26th Amendment, and contrastively, the JCP consists of 13 members including 5 judges. A large part – 8 representatives – are political or non-awarding actors (law minister, AG, political figures, and so on). Therefore, the influence tilts decisively towards the executive and its legislative allies in

the appointment process. Votes are now won by 7 out of 13, a simple majority. Practically, if the government can pull votes from the Law Minister, AG, and the 5 elected parliamentary members plus perhaps the bar representative, who too currently appears to be on the bar friend of the government side, then they achieve the magic number. That they are in the minority on their own turf is a danger for the Chief Justice and judges on the Commission. In a marked departure from the earlier era, it was rarely the case that the CJP and other senior judges would carry the Commission. You can tell much by the fact that before, the executive needed to persuade judges or work with them to get a nominee through; now it is the judges who need to persuade or show alignment with politicians in order to approve a nominee they want. This is a role reversal which has so many implications already on who can become a judge, before the amendment such a role was in the hands of the judiciary (High Court chief justices or CJP suggesting names from the bar or lower bench) and now the amendment will offer much more scope to the law ministry and the ruling party in naming / favouring names, knowing they can have the names pushed through the Commission even over judicial objections (Mangi, D. B., 2025).

**Summing up, the main differences are as follows:**

- There's a factor of appointments since it is a meritocratic process overseen by a Judge vs. a process overseen by Politicians who could potentially Favor Loyalty.
- Selection of Chief Justice: From seniority (by automatic) or political choice, with a term limit.
- Chief Justice has the prerogative of deciding benches with political input as Commission.
- Broad judicial power, sometimes activist vs. Smaller judicial power potentially within the executive's preference.
- Accountability: Internal (peer review, SJC) vs. External (political oversight via appointments and removal criteria).

Whether it makes Pakistan's justice system stronger or weaker is a matter for debate. But the outcry and the recourse to court challenges bear out the fear of many experts that this was the latter. The remainder of this Part turns to remaining challenges for judicial autonomy, and

recommendations touching on the negative consequences while seeking to maintain the goals of reform.

## 9. Recommendations

Meeting these challenges would require the implementation of a multi-pronged set of recommendations, each of which can be pursued by different stakeholders, namely, the judiciary itself, Parliament (maybe after a period of reflection or a change in political leadership), the legal community and civil society.

1. The most direct way to overcome structural problems is further constitutional or statutory amendments that amends or refines the provisions in the 26th Amendment. While it may be impossible politically in the short term to have outright reversal of the 26th Amendment, targeted amendments that could be made would, at the very least, ameliorate the worst aspects. For example:

2. They can take actions within Judicial Branch (Internal Reforms and Safeguards): judicial branch is not a passive player – can make reforms on internal processes to protect independence.

3. Involvement of the Bar and Civil Society: The Bar and civil society both can be the bulwark of judicial independence. Some recommendations in this vein:

4. In the bigger scheme, once the immediate tempest subsides, Pakistan may need to set up an institutionalized appointments body. A possible model could be to learn from models abroad: the creation of a permanent Judicial Appointments Commission with a balanced makeup – judges, legislators, lawyers and laypersons – but with a built – in guarantee of judicial majority or parity and independent members (not sitting ministers or MPs but perhaps retired judges, eminent jurists, etc.).

5. A Soft Recommendation: a culture of merit and integrity toward the judiciary is prized by all institutions beyond formal rules. Political leaders would probably be less interested in excessive interference if they could be persuaded that a strong, impartial judiciary is in the country's interest (regarding economic development, credible dispute resolution, and, yes, the legitimacy of whoever is in power).

The above recommendations strive to reestablish those safeguards without denigrating the demand

for accountability that was, in part, what led to the 26th Amendment. Pakistan must recalibrate the system so as to promote merit, balance and transparency that will allow us to have the best of both worlds; a judiciary that is independent but accountable to the standards of justice, not to any political master.

## 10. CONCLUSION

It is beyond doubt that the 26th Constitutional Amendment has established a significant milestone in the constitutional and judicial history of Pakistan. In this context, the purpose of this research was to investigate the role of Judicial Commission of Pakistan prior and post 26th Amendment and to assess the implication of this amendment to judicial independence. We find the story of an enfeebled judiciary regularly moved between the poles of executive subservience and the manners of an independent judiciary, a movement that may be nearing its highest point at the moment an exception to that autonomy is added to the Constitution.

The introduction of the 26th Amendment has completely changed the dynamics of judicial appointments and the independence of judiciary in Pakistan. This study attempts to evaluate the impact of these changes through the analysis of doctrinal research, constitutional texts, case laws, scholarly commentary, with the purpose of developing recommendations of how to keep the system for judicial autonomy and accountability in equilibrium.

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