

## THE RESTRUCTURED STATE: BIFURCATED JURISPRUDENCE, EXECUTIVE AGGRANDIZEMENT, AND HYBRID CONSTITUTIONALISM UNDER PAKISTAN'S 26TH AND 27TH AMENDMENTS

Muhammad Ali Rashid

LLM Scholar

[ar909017@gmail.com](mailto:ar909017@gmail.com)

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Corresponding Author: \*  
Muhammad Ali Rashid

### Abstract

This article examines the legal, structural, and institutional consequences of Pakistan's 26th and 27th Constitutional Amendments for separation of powers, judicial independence, and civil-military balance. It argues that the amendments collectively effect a profound reconfiguration of constitutional authority by bifurcating jurisdiction through Constitutional Benches and the Federal Constitutional Court, restructuring the Judicial Commission of Pakistan to enhance executive-parliamentary influence, departing from the seniority principle in judicial elevation, and constitutionally entrenching military command through the office of Chief of Defence Forces. Using a doctrinal and institutional framework grounded in Pakistani constitutional jurisprudence, particularly *Al-Jehad Trust and District Bar Association*, the article evaluates whether these reforms are compatible with the Constitution's salient features and the basic structure doctrine. It further situates the amendments within international standards on judicial independence and comparative constitutional experience. The article concludes that, although framed as measures of efficiency and reform, the amendments significantly expand executive and military leverage over core constitutional institutions, raising serious concerns about judicial autonomy, constitutional supremacy, and democratic accountability in Pakistan.

### INTRODUCTION:

Pakistan's recent constitutional package, 26th Amendment (October 2024) and 27th Amendment (November 2025), is a first for Pakistan, through which the fundamental state institutions are being overhauled. These amendments, in a systematic manner, change the very basic structure of the Pakistani constitution

by transforming the role of the judiciary, re-engineering the mechanisms of appointments and institutionalizing the constitutional role of the military. The 26th Amendment inserted Article 191A, which established temporary "Constitutional Benches" in the superior courts. Furthermore, it made amendments to Article 175A through which the mode of appointment

of the Chief Justice was altered, the term of office of the Chief Justice was limited, and *suo motu* powers were restricted. The 27th Amendment did more: it took away the original jurisdiction of the Supreme Court, created a separate Federal Constitutional Court (FCC) that shall have jurisdiction on all constitutional questions, elevated the Army Chief to Chief of Defence Forces and formally abolished the position of Chairman Joint Chiefs, and extended the immunity from Article 248 to the President and new five-star-ranking officers. The changes have led to institutional tension so far, senior judges' resignations and loud bar protest, and have raised deep doubts about whether Pakistan is moving towards strengthening democratic governance or towards a "codified and "hybrid" constitutionalism that secures military and political power. This article examines the implications of these amendments from a legal, structural and institutional point of view with reference to Pakistani precedent such as Al-Jehad Trust (PLD 1996 SC 324) and the District Bar Assn. Comparative constitutional experiences, International norms (UN Basic Principles, ICCPR) and (PLD 2015 SC 401).

## **Statutory Restructuring and Jurisdictional Bifurcation:**

The twenty-sixth amendment was passed with unusual haste, in less than 24 hours, in October 2024. The amendment changed the composition of the Judicial Commission of Pakistan (JCP), the body responsible for appointment of judges of the supreme and high courts, adding members of parliament which, as the International Commission of Jurists (ICJ) notes, reduced the judicial members of the commission to a minority. In accordance with the 26th Amendment, Pakistan's highest courts were divided. It introduced Article 191A into the Constitution, making Constitutional Benches in Supreme Court and High Courts specifically empowered to hear "substantial questions of law as to the interpretation of the Constitution". The Supreme Court's original and advisory jurisdiction was removed and given only to these new benches under Article 184 and Article 186

of the constitution. Pending petitions challenging the constitutionality of the laws were forcibly moved to Constitutional Benches and all constitutional review, under the new constitution, was to be dealt with by benches nominated by the new JCP. This legal engineering involves a division of jurisdiction - the authority of the traditional Supreme Court was split up and allocated to a politically chosen group of judges. Critics have raised concerns about forum-shopping and the lack of consistency and collegial leadership in the Supreme Court's fundamental law interpretation (see Amnesty Int'l 2026).

Furthermore, Twenty-seventh amendment to the Constitution poses a grave threat to the independence of the judiciary and the rule of law in Pakistan by creating a Federal Constitutional Court that lacks independence, erodes judges' security of tenure of and insulates the president and heads of the naval, armed and air forces from accountability. Despite its far-reaching consequences, the amendment was steamrolled through parliament with no consultation with civil society and opposition parties. The 27th Amendment completed the bifurcation by abolishing the Supreme Court-level Constitutional Bench and installing a Federal Constitutional Court (FCC) via a new Chapter 1A; Articles 175B and 175F. The FCC is empowered with original jurisdiction over inter-government disputes and any question of constitutional law, and has the sole power to hear appeals on "substantial questions of law" from high courts. Its first Chief Justice and judges are appointed by the President on the Prime Minister's advice, in consultation with the outgoing CFF or Chief Justice of Pakistan, after which future appointments fall to a revised Judicial Commission of Pakistan, which now includes Parliament. Notably, Article 175C(7) and 175D(5) provide for initial FCC appointments by the executive in tandem with a "collegial primacy" mechanism, before vesting the Judicial Commission of Pakistan with further nominations.

This jurisdictional reshuffle has major implications. By creating a court parallel to the

Supreme Court, the amendments dilute the Supreme Court's historic role as final guardian of the Constitution. As one analyst puts it, "the amendment authorizes the creation of a Federal Constitutional Court with powers to override decisions by the Supreme Court". The Supreme Court's traditional avenues of original jurisdiction under Article 184, where the Court could suo motu strike down laws or provide advice on important legal questions, are now usurped. Only benches hand-picked under Article 191A and now the FCC may exercise constitutional review. This structure risks "preempting any move to question the bill's legality," since future challenges will be heard by an institution shaped by the very amendment it would review.

The removal of the Supreme Court's self-starting jurisdiction and its exclusive constitutional powers (Art. 184, 186) undermines judicial uniformity and collegial independence. A multi-layered court system allows executive or legislative actors, through control of Judicial Commission of Pakistan or initial appointments, to effectively steer constitutional interpretation. Critics call this "executive and parliamentary aggrandizement" of the bench-formation process. The jurisprudential independence of the Supreme Court is compromised when its ultimate say on constitutional law is transferred to an entirely new body whose first cohort is politically appointed. In sum, the amendments create a hierarchy that many fear privileges political convenience over consistent legal reasoning.

### **Politicizing the Bench; Appointment Reconstitution and the Erosion of the Seniority Doctrine in Pakistan**

A centerpiece of the 26th Amendment was Article 175A, which governs the Judicial Commission of Pakistan. Before the amendment, the Judicial Commission of Pakistan had a judicial majority including Chief Justice of Pakistan, senior judges, law minister, AGP, Bar representatives. The 26th Amendment reconfigured 175A to add two Members of the National Assembly, two Senators, and one female or minority member, nominated by the NA Speaker. It also retained the Law Minister,

Attorney General, and Bar Council nominee. In practical terms, this means only five out of thirteen Commission members are guaranteed judges, while five are parliamentarians. In ICJ's words, the Judicial Commission of Pakistan's "judicial members" are now a minority, opening the appointments process to direct political influence.

Crucially, the amendment allowed a Special Parliamentary Committee (SPC) to select the Chief Justice of Pakistan. Under the new clause, a twelve-member SPC eight MNAs and four Senators, pro-rata by party strength convenes in camera to nominate the Chief Justice of Pakistan from among the three most senior Supreme Court judges. There are no written criteria or standard of merit; the Committee simply votes by a two-thirds threshold. This departs radically from the post-Al-Jehad norm (PLD 1996 SC 324), which had mandated that the senior-most Supreme Court judge automatically accede to the position of Chief Justice absent disqualification. Now, parliamentary actors can veto or override the convention of seniority. This innovation subverts the "primacy of judicial collegiality" and allows partisan considerations to dictate the court's leadership.

Beyond appointments, the 26th Amendment expanded grounds for judicial removal. It amended the Supreme Judicial Council through Article 209 to allow removal of judges found "inefficient in the performance of their duties". No standard for "inefficiency" is defined; judges fear this will become a catch-all ground for political purges. In sum, the institutional friction is stark: several senior judges resigned in protest, decrying the amendments as an attempt to "subjugate the judiciary" to the executive.

The central point of contention is really between merit and seniority and between majoritarian rule. Seniority was well entrenched and there was a predictable, predictable, non-partisan path to the Chief Justiceship. The amendments sever this tie: politicians can now be as lax as they like in their elevation or bypassing of judges as long as it is not based on merit. This can lead to the impression that judicial appointments are political, and weaken judges' institutional

commitment. But with the decrease in judges' numbers in the Judicial Commission of Pakistan and the increasing powers of the cabinet members to review the performance of judges under the new empowered Judicial Commission of Pakistan and Supreme Judicial Council, the autonomy of the judiciary has been significantly reduced, critics allege. The potential consequence is executive aggrandizement: the executive and legislature are now granted formal vetoes, and there are now large majorities of jurists in bodies that were previously dominated by them.

#### **The CDF Paradigm; Institutional Monopolization, Legislative Capitulation, and the Restructuring of Article 243:**

The 27th Amendment extensively constitutionalizes Pakistan's civil, military arrangements, arguably to the detriment of civilian oversight. Most notably, Article 243, which governs military command, was rewritten. Clause (4) now reads that the President, on the Prime Minister's advice, appoints the Army Chief concurrently as the Chief of the Defence Forces (CDF), and the chiefs of the Navy and Air Force. In other words, the Army Chief automatically becomes the five-star CDF, a new post with primacy over the other services. Clause (5) abolishes the office of Chairman Joint Chiefs of Staff Committee (CJCS) as of 27 November 2025. These changes formalize what had long been a de facto practice, but now enshrine it in Article 243.

Furthermore, the amendment grants extraordinary protections to top military officers. If the Federal Government promotes an officer to the rank of Field Marshal, Marshal of the Air Force, or Admiral of the Fleet, that officer "shall retain the rank, privileges and remain in uniform for life". Article 243(8) goes further: such five-star officers are declared "national heroes" who "shall not be removed from office except on grounds and in the manner provided under Article 47". Article 243(9) then extends the expanded immunity of the President to these military figures.

In parallel, Article 248, long governing presidential and gubernatorial immunity, was altered dramatically. Subsection (1) now begins with "Notwithstanding any judgment of any court..." shielding the President from suits retroactively. Subsection (2) is replaced by a broad ban: "No criminal proceedings whatsoever shall be initiated or continued against the President for his life". Thus the President and by mutatis, the five-star officers per Art.243(9) enjoy lifetime immunity, far beyond the term-in-office immunity in the pre-amendment law. In effect, any past or future presidential action is unreviewable by criminal courts.

This adds to the constitutional role of the military and further shields the executive. The amendment gives the Chief of Defence forces the power to take all decisions regarding the Army, and eliminates the Chairman Joint Chiefs of Staff Committee, thus putting the Army under one man rule. The amendment places the Army under, the Chief of Defence forces, who will have all the powers to decide on the Army, with only parliamentary super majority to remove him. A combination of the new privileges for five-star officers, along with the blanket immunity granted in Article 248, effectively puts the President and top generals above the Law. The amendments "shield the president and leaders of the military forces from responsibility", as one analysis observed. In terms of separation of powers, this is a reversal of the civilian supremacy: the military leadership is now guaranteed, life-tenured, immune, and secure, and has the same or greater protection than the civilian executive. International observers say these measures are also risking to "restrict the autonomy of judiciary, the right to fair trial and the rule of law in Pakistan." Amnesty International rates the amendment as "the culmination of a long and ongoing assault on the independence of the judiciary, the right to fair trial and the rule of law in Pakistan". From a practical perspective, the constitutional rebalancing establishes what commentators have dubbed "hybrid rule", a combination of elected government and corporatized military rule formalized under Article 243.

**Comparative Autocratic Legalism: Pakistan's Bifurcated Judiciary in the Mirror of Global Constitutional Backsliding**

These sweeping reforms must be measured against Pakistan's own basic-structure jurisprudence and global standards of judicial independence. In *District Bar Association v. Federation* (PLD 2015 SC 401), a 17-judge bench held by majority that the Constitution's "salient features", including separation of powers, federalism, and judicial independence, constitute implicit limits on amendment power. By that doctrine, any amendment that abrogates these basic features can be struck down by the Court itself. The 26th and 27th Amendments arguably clash with this principle. For instance, *District Bar Association v. Federation* affirmed that judicial review of amendments is permissible when core structure is at stake. The wholesale transfer of jurisdiction and politicized appointment process could be seen as altering the basic structure of judicial autonomy and checks and balances. Although Pakistan's courts have not yet invalidated these amendments, they have stepped into this fraught terrain, with two Supreme Court judges resigning "condemning the amendment as 'a grave assault on the constitution'" and the bar publicly decrying the change.

International legal norms also do a critical glance. This standard is enshrined in the UN Basic Principles on the Independence of the Judiciary (1985) which require that judges be appointed "on the basis of merit" and be shielded from improper influences, and have impartial disciplinary processes. The amendments are contrary to this, by bringing parliamentary politics into judicial appointments and by establishing a non-defined concept of "inefficiency" that can be used to remove judges. In its concluding observations for 2024, the UN Human Rights Committee specifically highlighted the negative impact that the 26th Amendment had had on appointments and judicial independence in Pakistan. Similarly, Article 14 of the ICCPR provides for equality before the courts, and impartial adjudication, and by placing heads of state and military beyond

the reach of prosecution, and reducing the accountability of the judiciary, Pakistan may now be restricting the right to an effective remedy. Amnesty International, on the other hand, says that the new lifetime immunities are inconsistent with the ICCPR's principle of equality and the right to remedy. To sum up, by international norms the amendments concentrate unchecked power, which is precisely opposed by the rule of law.

Comparatively, Pakistan's path diverges from other constitutional systems. India's judiciary, for example, has long upheld its power to invalidate constitutional amendments (*Kesavananda Bharati v. State of Kerala*, 1973) and maintains a judicial-dominated Collegium for appointments. In contrast, the Pakistani amendments substitute a legislative superstructure (the SPC and expanded Judicial Commission of Pakistan) for that system. South Africa's 1996 Constitution entrenchment requires a 75% super-majority and provinces' consent for amendments affecting the judiciary or executive, reflecting a very different balance. Likewise, robust democracies counsel that reforms to judicial structure be pursued via transparent, incremental legislation, not via opaque omnibus bills.

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As a normative question, the issue is whether a constitution, essentially written in a partisan

manner, can be regarded as legitimate. Such institutional changes can become entrenched under the guise of legality unless they are implemented carefully in line with previous practice (Article 7), objective criteria and international standards (UN Basic Principles, etc.). The amendment package must be in sync with the rule of law and only consensus-based reforms, based on Pakistan's culture and global values, can achieve this.

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