

## Essay

### 7. Constitutional Controversies: Debate on the 26<sup>th</sup> Amendment

Deconstruct the topic properly by avoiding irrelevant details

#### Outline

##### 1. Introduction:

The 26<sup>th</sup> constitutional Amendment makes notable institutional changes in the structure and functioning of Pakistan's judicial system, particularly with respect to the Supreme court and High courts.

##### 2. Features of the 26<sup>th</sup> Amendment:

a- Article 9A added to the constitution, 'right to clean environment'.

b- With this amendment, the advocate general of a province along with an adviser to the provincial government can address the Provincial Assembly.

c- Amendment in article 175A related to the appointment of judges in the higher judiciary.

d- With the Amendment, the composition of the Judicial Commission of Pakistan changed from 11 to 13 members.

e. Tenure of the CJ has been fixed at maximum 3 years or 65 years of age, whichever comes first.

f. The minimum age for a judge to be selected for a High court has been reduced from 45 to 40 years.

g. Another change in article 184, taking away the SC's *suo motu* powers.

h. A new article 191 A, formation of constitutional benches in SC. and according to one more new article 202A, formation of constitutional benches in High courts.

i. Appointment of SC judges for the performance evaluation of judges of the high courts.

j. Elimination of *riba*, article 38.

### Reasons of the 26<sup>th</sup> Amendment:

a. The back-log of cases in Supreme court.

Irrelevant details

b. A lot of time <sup>being</sup> used <sup>up</sup> of Supreme courts in constitutional cases.

- c- A separate system to deal with the Pakistan's political instability
- d- For curtailing the power of judiciary
- e- Ex. Also for controlling the extensive interruption of supreme courts.

Phrase it properly

#### 4- Issues in 26<sup>th</sup> Constitutional Amendment:

- a- Turning of constitutional amendment
- b- There had been no debates on contents
- c- The Horse trading which has occurred.
- d- There is no clear jurisdiction regarding which cases will be considered constitutional cases and which will not.
- e- This constitutional amendment was opposed by main opposition parties
- f- No clarity regarding the tenure of constitutional benches.

#### 5- Possible impacts of the 26<sup>th</sup> Constitutional Amendment:

- a- It is too early to predict implications.
- b- It has countered the narrative of judges appointing the judges.

- c. Unchecked intervention of SC will be curtailed.
  - d. The back-log of unresolved cases will be looked into.
  - e. It will increase the competition between the judges for CSP.
  - g. There are chances that lack of intervention in parliamentary affairs would show a positive effect.
  - h. Finally, a statement related to the impact of climate change.
6. Conclusion:

"In Politics, nothing happens by accident" (Franklin D. Roosevelt). The 26<sup>th</sup> Constitutional Amendment makes significant constitutional changes in the structure and functioning of Pakistan's judicial system. This 26<sup>th</sup> Amendment Act, 2024, also known as the Constitutional Package, is legislation which **took** away the Supreme court's suo motu powers.

sets the Chief Justice of Pakistan's (CJP) term at three years and empowers the Prime Minister to appoint the next CJP from among the three most senior SC judges. Moreover, amendments like inclusion of article 9A 'right to clean' and elimination of riba as soon as possible are also been added which could be seen an initiative towards environment and banking systems.

To begin with, the features of the 26<sup>th</sup> Constitutional amendment are, Article 9A has been added to constitution. It talks about 'right to clean environment' which is a fundamental right. Moreover, through this amendment, the advocate general of a province along with an advisor to the provincial government can address the Provincial Assembly (PA). Before this amendment, only the advocate general was allowed to address the concerned PA, now after the amendment the advisors to the CM can address the

concerned PA. Write full form

Next, the amendment in Article 175A, related to the appointment of judges in the higher judiciary, expansion of parliamentary committee. Before 26<sup>th</sup> Amendment, Judicial Commission of Pakistan comprised upon 8 members. These members include; Chief Justice, 3 senior most judges, 1 retired judge, attorney general, law minister, and member from the Pakistan bar council. After 26<sup>th</sup> Amendment, the same 8<sup>members</sup> are being retained but the total number has increased to 13 as 5 new members being added and all are parliamentarians, 2 from government benches and 2 from the opposition benches and 1 member would be appointed by the speaker. However, tenure of the CJ has been fixed at maximum 3 years or 65 years of age, whichever comes first. Also, the minimum age for a judge to be selected for a HC has been reduced to 40 years from 45 years which would increase the competition.

Parliamentary committee would recommend one name out of top three judges and PM would advise the President to appoint the nominated member as CJ.

Furthermore, the JCP shall also work for the performance evaluation of the HC judges and if a HC judge is understood to be performing under par, a certain time shall be given to that judge to rectify the mistakes and after the set time is over, the performance will be re-evaluated and if it remains under par, the matter will be sent to the Supreme Judicial Council (SJC).

Another change in article 184, taking away SC's suo motu power: Suo Motu power was the exclusive power of the CJP of supreme court and High courts. This power was excessively and even misused by successive CJPs. The 26<sup>th</sup> Amendment, took the power of CJP to exercise suo motu and gave it to the constitutional bench.

In addition, a new article 191A, formation of constitutional benches in SC and HC (article 202A). The concept of constitutional court or bench is not new

in world. Majority of EU countries, Spain, India have constitutional court. In the 26<sup>th</sup> amendment, the government proposed a constitutional court that would be a super judicial body and SC would work under it but all the opposition parties and even the core allies of the government opposed the idea and instead supported the formation of constitutional bench. It is also termed as "court within a court". Also, for the promotion of socio-economic well being of people, eliminate *retra* as early as possible before Jan 1, 2028.

There are various reasons for the 26<sup>th</sup> constitutional amendment. Firstly, due to the backlog of cases in supreme court was increasing day by day. Currently there are 53 thousand cases pending. Secondly, 10% constitutional cases were taking up 90% of time of supreme courts. Moreover, the Parliament have understood that Pakistan's political



instability is chronic, hence to deal with these matters, there needs to be a separate system that is constitutional bench. Though, Pakistan was one of the few countries where judiciary used to appoint judiciary, now this power had to be curtailed.

Moreover, the extensive intervention by Supreme court, under article 184(3) was creating hurdles in political stability of Pakistan. As this power was excessively misused but now according to the amendment, Supreme court shall not make an order or give direction or make a declaration on its own or in the nature of suo motu exercise of jurisdiction beyond the contents of any application filed under this clause. This amendment has curtailed the powers of Supreme court.

However, many issues are also linked

to this constitutional amendment such as the turning of the court amendment is questionable. Everything was done in a hurry before the retirement of Justice Fayyaz Ali. Also, there had been no debate on the contents of the amendment on the floor of the house. Everything, amendment has to be first made a bill to be debated and then follow the process. Moreover, horse trading could be seen, which is not allowed as per article 63-A. As amendment drafted by ~~the government~~ presented by?

Furthermore, there is no clear jurisdiction regarding which case will be considered constitutional and which will not be considered.

On paper things seem clear, but in reality, there will be some confusions on jurisdiction's clarity. Additionally, this amendment was also opposed or boycotted by the main opposition.

party, hence many questions rise here  
And, no clarity is, been given  
regarding the tenure of the constitutional  
benches.

With regard to this amendment,  
various implications of this 26<sup>th</sup> amendment  
could be witnessed. However, it is way  
too early to predict the implications of  
this court amendment because court  
amendments take time to clarify the authors.  
Though, still the possible impacts that  
could be seen are that it has  
countered the narrative of judges  
appointing the judges. Now the power  
has been equally divided between  
Judiciary, Parliament and the others  
(non-governmental entities like civilians).  
Now the Parliament would recommend  
the name out of top three judges.

In addition, undue and unchecked  
intervention of Supreme court will be  
curtailed as in the amendment in 18<sup>th</sup> (3).

As going beyond the certain clause was hindering the political stability as judges started focusing on other things rather than the particular clause. This has restricted the power now. Also, now the back-log of <sup>unresolved</sup> cases in the Supreme court will be looked upon. Hence, the cases related to the constitutional bench will be resolved by them and the other cases would not get pending because of such lengthy constitutional cases in the courts.

Beside this, the competition between the judges for CJP will increase. Because the ability to learn, adapt and innovate is often more critical than the length of one's tenure. Moreover, there are chances that lack of interruption in the parliamentary affairs will help a government to complete its tenure, which Pakistan has a history

of not completing ✓ Other than these  
parliamentary and court affairs,  
initiatives of clean environment  
could also be seen which shows  
the concern for the climate change  
and how could the workings be  
done for the sustainable development  
goals. ✓

In a nutshell, <sup>it is way too early to say anything about</sup> the 26<sup>th</sup>  
constitutional amendment as clarity  
comes with time. ✓ Judiciary, parliament,  
civilians are all part of the same  
function and everyone has the same  
right, therefore balance was required. ✓  
All the institutions should work within  
their boundaries set by the constitution  
for the smooth functioning of state. ✓  
However, 26<sup>th</sup> amendment has  
passed in "urgency" but there are  
chances of its success. ✓ The work  
load division will also increase  
the pace in the processes. ✓ This  
amendment is to achieve transparency

in the processes, and time will  
surely show how this amendment  
bring them into the fold.