

Judicial independence vs legislative control: The role of 26th Constitutional Amendments in Pakistan.

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"There is a danger to judicial independence when people have no understanding of how the judiciary fits into the constitutional scheme." David Souter.

Constitution is a supreme law of a state, which provides principles for other laws. But, in case of ambiguity, judiciary in a state interprets the constitution and laws. Therefore, the judicial organ ~~must~~ ^{shall} be independent to interpret the law according to its purpose. In Pakistan, the independence of judiciary has affected through constitutional amendments from time to time. In the same way, recently passed, ~~in~~ ^{the} twenty-sixth Constitutional Amendment has affected the independence of judiciary in Pakistan.

Judiciary is controlled by legislative branch of government through Judicial Commission by appointing the judges of Supreme Court. Similarly, the appointment of Chief Justice of Pakistan by Parliamentary Committee is controlling the judiciary. In the same way, judicial independence has affected by the process of removal of judge on performance base, under the twenty-sixth Constitutional Amendment. Furthermore, the power of Supreme Court to transfer cases from lower courts is ~~also~~ ^a blow to independence of judiciary. Restricting the suo motu power of higher judiciary that was used in cases of public importance, is further disturbing the judicial power.

^{Contrary} Some people believe that there is independence of judiciary through twenty-sixth Constitutional Amendment. They believe qualifications for judges in higher judiciary

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under twenty-sixth Constitutional Amendments package is important for constitutionally independence of judiciary. Moreover, distribution of ~~for~~ judicial work in judiciary is also improving judicial independence. But, the thoughts forwarded by this group of people, are not important for judicial independence. Therefore, twenty-sixth Constitutional Amendments is an attempt to control judiciary by legislative. Although, some believe it independence of judiciary, but ~~that~~ it is against the reality.

Judicial independence is separation of judiciary from other organs of the government in its functions. In legal way, judicial independence is the practice in which the powers and functions of judiciary are mentioned in constitution. For a democratic state, judicial independence is an important thing. But, when judiciary is controlled by legislative organ of a state, then the basic democracy are in that state. Legislative control includes: appointment of judges, removal of judges, changes in numbers of judges for political purposes, and other judicial manipulations. The twenty-sixth Constitutional Amendments of Pakistan is the amendment Act passed by legislation on 20th October, 2024. ~~by~~ This amendment changed twenty-seven articles of Constitution of Pakistan, majority related to judiciary.

To start with, the new method of Commission formation for Supreme Court judges appointment, is actually controlling the judiciary by legislative organ of government. The Judicial Commission of Pakistan is the organ which appoint judges in higher judiciary. Under previous method of appointment, there were nine members, majority were judicial members, but under twenty-sixth Constitutional Amendments, the number of

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its members increased to fourteen - thirteen. Now, four members from the Parliament are included in Commission. It reduce the influence of judges in the appointment of top judges because majority in Commission are now non-judicial members. Hence, the new method of formation of Judicial Commission of Pakistan under the influence of legislature is controlling the judiciary.

Further more, the appointment of Chief Justice of Pakistan by Parliamentary Committee is making judiciary under the control of Parliament. Parliamentary Committee is consists of the members of Parliament. These members are non-judicial persons taken from Senate and National Assembly. They are controlling the appointment of the apex judge of Pakistan. There are twelve members in the Committee, eight from National Assembly and four from Senate, with representation on the basis of proportional bases from ruling party and opposition. This committee select the Chief Justice of Pakistan on two-by-third majority. In short, the Parliamentary Committee is making the judiciary under its control.

In the same way, the process of removal of judges on the basis of performance is making the judiciary weak. The removal of judge is a process in which, if a judge does not complete the given task then in a given duration of time then he will be removed from his post. This process is against the independence of the judiciary. Under Article 209 of the Constitution of Pakistan, there will be a Supreme Judicial Council, consists of five judges, who will inquire against the judge upon the report of Commission under Article 175-A. This process of removal is a useless check on judiciary. To sum up, judiciary has weakened by the process of removal of judges.

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Moreover, the transferring of cases by Supreme Court to itself or other high court is making judiciary weak. Cases transferring is a technique, in which the superior court transfer a case from one inferior court to another or itself. This power is curtailing the independence of judiciary because it is against the principles of judicial independence. Under Article 186-A, Supreme Court has power to transfer case from one high court to another or itself, without the consent of that court, for the purpose of justice. This power was disused several time. For example, in Memogate case (2011), the supreme court transferred the case from the Sindh High Court to itself, citing national security concerns. This violated the autonomy of the Sindh High Court. So, judicial independence ~~was~~ is weak now by the power of transferring cases of apex court under the twenty-sixth Constitutional Amendments.

Likewise, restricting suo motu power of higher judiciary has made a scar on judicial independence. Suo motu is the power under which a court take action against an issue which is in the importance of public at large. This suo motu power is important for judiciary, which is restricted under this constitutional amendments by Parliament. Under Article 184 of Constitution of Pakistan, no suo motu can be taken by a single judge against any public importance issue. Several time this power was used for important issues. For example, in missing persons case, the Supreme Court took suo motu notice of the disappearance of hundreds of people in the country. Hence, an important power, suo motu, of higher judiciary is restricted by parliamentary assembly under the new amendment in constitution.

Equally, curtailing the original jurisdictions of Supreme Court and high courts ~~are~~ ~~are~~ are like the cutting of wings of independent judiciary. Original jurisdiction is the jurisdiction of a court in which that court can

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hear the case on the first time. After twenty-sixth Amendments of Constitution of Pakistan, the original jurisdiction of Supreme Court and high courts are abolished. Under Article 184 and 199 of Constitution of Pakistan, the original jurisdiction of Supreme court and high court, respectively, has taken from them and now this power is now given to constitutional benches of Supreme court and high courts. Supreme court and high court can now only hear the cases in appeal. In brief, curtailing the original jurisdiction by Parliament has denied the independence of judiciary.

In the same way, abolishing the seniority base appointment of the chief justice of Pakistan has made the judiciary under the control of legislature. Seniority base appointment means that the senior most judge will become the chief justice if the one chief justice tenure is expired. This clause is abolished under new amendment, which is a blow to independence of judiciary. Under this clause, a judge know already that when he will become a chief justice. There was no chance of influence that a judge will be appointed by the will of parliament. Hence, seniority base appointment was a good remedy for judicial independence, which is now abolished by constitutional amendment.

In last, there is increasing political influence on judges appointment under new constitutional amendments. Political influence means that the appointment of judges by a ruling party for its favour or influencing already existing judges for own purpose. This influence of parties is against the judicial independence and separation of power, which is necessary in a government. According to "International Commission of Jurists" (ICJ), "The twenty-sixth Constitutional Amendments of Pakistan is a blow to the independence of the judiciary and

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increasing political influence. It is violating Article 14 of International Covenant of Civil and Political Rights." So, twenty-sixth Constitutional Amendment is boosting the political influence on judiciary.

Despite these self-evidence truths, it is yet argued that twenty-sixth constitutional amendment is a step towards the independence of judiciary in Pakistan. Some of these arguments have been discussed below.

To begin with, qualifications for judges in higher judiciary is a step of judicial independence. Qualifications for judges means the minimum requirements which must be fulfilled by a person to become a judge of supreme court or high court. Adding such qualification is the feature of independent judicial system. Under Article 177 of Constitution, a person to become the supreme court judge, must be a citizen of Pakistan. He must already performed his duty as a judge in high court for five years or have experience of fifteen year as practicing advocate of high court. The retiring age of the Chief Justice of Pakistan is sixty-five year or three year as a Chief Justice. In a nutshell, judiciary independence has achieved by the above given qualifications.

Furthermore, distribution of work between higher judiciary is important for independent judiciary. Distribution of work means that some specific work shall be performed by a specific court. If a court perform some given tasks without interference is said to be an independent court. Under Article 184 and Article 199, the work of supreme court and high court respectively, and their respective constitutional benches, are given. The constitutional benches shall deal with cases of original jurisdictions, and the cases which are related to fundamental rights.

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The Supreme Court and High Court will only hear the cases in appeal. To sum up, twenty-sixth constitutional amendment made the judiciary independent by distributing work in courts.

Last but not the least, specified remuneration for judicial staff is important for judicial independence. Remuneration of judicial staff is the returned to the officials of judiciary which is specified in a judicial independent state under its constitution. Under Article 81 of constitution of Pakistan, there shall be administrative expenses of staff of the Supreme Court, the Judicial Commission of Pakistan, the Supreme Judicial Council, and other Court members. This fund shall be paid from Federal Consolidated fund. In short, judicial independence is achieved through specified remuneration for judicial officials.

To conclude it, the last constitutional amendments of Pakistan is an attempt to central judiciary by legislative body. Although, some believe it independence of judiciary. They believe that this amendment has distributed the work between the courts of law, which is a great step towards independence of judiciary. They also argue that the remuneration specified under this amendment for judicial staff is important for their stance. Under this constitutional amendments, the legislative body made judiciary under its control. The legislature restricted the suo motu power of higher judiciary. It also marginalize the supreme court and high court in its original jurisdiction.

Furthermore, this amendment also abolished the seniority base appointment of chief justice of Pakistan, which was an important part of its judicial independence in Pakistan. Similarly, it also increased the influence of political parties on judicial bodies. So, judicial independence is a necessary principle of a democratic state in which judiciary is ~~not~~ separate from other organs of the government in its functions. In Pakistan, it is the need of the day to make the judiciary independent. The sooner it is done, the better it will be for our country.