

JUDICIAL INDEPENDENCE AND CONSTITUTIONAL REFORMS IN PAKISTAN: IMPLICATIONS FOR INSTITUTIONAL GOVERNANCE AND HUMAN CAPITAL DEVELOPMENT

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ABSTRACT

Pakistan's constitutional trajectory has been marked by enduring contentions surrounding the balance of power between the civilian legislature and the judiciary, particularly regarding the mechanics of judicial appointments. The recent enactment of the Twenty-Sixth and Twenty-Seventh Amendments represents a pivotal paradigm shift, fundamentally altering the structural architecture of the superior judiciary under the 1973 Constitution. Employing a qualitative, doctrinal legal methodology, this study analyses the constitutional validity of these amendments against the touchstone of judicial independence and the separation of powers. The scope of analysis encompasses the text of the amendments, relevant Supreme Court of Pakistan jurisprudence, including seminal precedents on the basic structure doctrine and Article 175A, and comparative constitutional paradigms regarding Federal Constitutional Courts. The findings reveal that by restructuring the Judicial Commission of Pakistan and revising the appointment mechanism of the Chief Justice, these amendments significantly expand executive and parliamentary oversight, potentially compromising the effective structural independence of the courts. Ultimately, this institutional realignment extends beyond pure jurisprudence; a weakened or highly politicized judicial landscape directly erodes the rule of law and destabilizes contract enforcement. By assessing these legal shifts through an institutional economics lens, this study demonstrates how diminishing judicial autonomy impairs domestic and foreign investor confidence, precipitates professional brain drains, and ultimately undermines the foundational institutional framework necessary to safeguard and develop Pakistan's human capital.

Keywords: Judicial Independence; Basic Structure Doctrine; Effective Structural Independence; Federal Constitutional Court; Separation of Powers.

JEL Classifications: K10, K40, O43, J24

1.0 INTRODUCTION

Judicial independence is not a professional prerogative of judges, but a structural feature of constitutional government. In a democratic state of affairs, a democratic government, in any true sense, cannot coexist with the Judiciary, the tribunal to which the people resort when the government acts outside its lawful limits or in an arbitrary manner, but must be a check upon it. In the absence of a truly independent judiciary, constitutional rights are hopes, not guarantees, and the rule of law is a mantra, not a reality. The threat is greatest when the court is called into service to settle conflicts between citizen and state itself, when a corrupt judiciary is most useful and most dangerous to those in power.

Impartiality in appearance is as important as impartiality in fact, and independence is not satisfied with the former. It was strongly argued in *ex parte Pinochet* (No 2), where the House of Lords did not have to find that there was actual bias, only that there was a perception of it to be so to cast doubt on the process (*R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 2), 2000). This is true of Pakistan, where the history of its constitution is interspersed with frequent conflicts between the courts and the government. This background should be the frame of reference in judging the Twenty-Sixth and Twenty-Seventh Amendments as interventions that can impinge upon the structure of the constitutional order.

Both amendments should be considered as a chain, not as a single event, and it is necessary to be specific as to what each did. The Twenty-Sixth Amendment, passed in October 2024, restructured the Judicial Commission of Pakistan (JCP), which is tasked with the selection of judges, to give executive and parliamentary nominees more weight and proportion and to make judges a minority (Constitution (Twenty-Sixth Amendment) Act, 2024; Khan, 2024). It overturned the practice of the previous Supreme Court, where the most senior judge of the Supreme Court would automatically assume the role of Chief Justice, and instead established a new system of appointing the Chief Justice from among the three most senior judges on the Supreme Court with a fixed tenure of three years. It also gave the new Commission the power to form constitutional benches in the Supreme Court and High Courts which have exclusive jurisdiction over constitutional issues.

The 13 November 2025 passed 27th Amendment was much further-going. It established a new Federal Constitutional Court (FCC), which has replaced the constitutional functions of the Supreme Court; it stripped the Supreme Court of most of its constitutional jurisdiction and gave the FCC the power to move judges between High Courts and between the Supreme Court and FCC (International Commission of Jurists, 2024; Constitution (Twenty-Seventh Amendment) Act, 2025). Right away, it should be noted that the Federal Constitutional Court is not a creation of the Twenty-Sixth Amendment, but the Twenty-Seventh. The two instruments combined had the greatest impact on the superior judiciary since adoption of the Constitution of 1973, and two senior Supreme Court judges resigned at once over the Twenty-Seventh Amendment (International Commission of Jurists, 2025; Malik, 2025). These interventions received immediate incompatible characterizations. They were couched in the terms of democratic legitimacy and institutional accountability: parliamentary participation in

appointments was described not as a violation of independence but as a corrective measure to restore elected authority over institutions perceived as lacking in accountability, and the reforms were dressed up as much-needed measures to enhance transparency and efficiency (Tripathi & Kumar, 2024). This account was contested by home practitioners, opposition parties, and international institutions. The International Commission of Jurists found that the changes give judges an “extraordinary degree of political influence,” and “reduce the autonomy of the judiciary in relation to the other branches of government” (International Commission of Jurists, 2024). Petitions filed before the Supreme Court argue that the amendments are the exercise of an unlimited amendment power that renders certain basic characteristics of the Constitution unconstitutional. The controversy has become institutionalized, for the very judges presiding over challenges to the Twenty-Sixth Amendment were appointed under the very same provisions that they are now challenging.

This article argues that both amendments raise constitutional issues as they undermine the structural protections of judicial independence in Pakistan, including in respect of judicial appointments, constitutional adjudication and transfers between the courts. It concludes that the Judicial Commission’s restoration, the new method of selection of the Chief Justice, the division of the apex powers with the formation of the FCC and the expansion of transfer powers create an institutional structure that can be easily manipulated by political actors. Judicial independence, from this perspective, is not an ingredient in the design of institutions or a matter of administrative efficiency, but rather a structural constitutional principle, and any measure that has the effect of impairing or destroying the basis for its independent exercise must be considered with great care from a constitutional point of view. The article is not intended to foretell, let alone prevent, the final ruling on validity; it is intended merely to say what the doctrinal context for the final ruling on validity is.

Conclusively, this study aims to achieve three primary objectives: (1) to dissect the structural changes introduced by the Twenty-Sixth and Twenty-Seventh Amendments to the Constitution of Pakistan, (2) to evaluate their compliance with the historic “independence of the judiciary” doctrine and the separation of powers framework, and (3) to appraise the downstream socioeconomic impacts of these alterations on Pakistan’s broader institutional development. By addressing these objectives, this article contributes a novel, legally grounded perspective to human capital literature, demonstrating that institutional stability and the rule of law are absolute prerequisites for sustainable human resource growth.

2.0 LITERATURE REVIEW AND THEORETICAL FRAMEWORK

The changes have already elicited a considerable amount of discussion, and it is important to place the current discussion in the context of it. Three main strands can be discerned. The first is from the institutional-assessment literature, and here too, the International Commission of Jurists has offered detailed assessments of both amendments. In the ICJ’s 2024 evaluation, the focus was on the

reconstitution of the Judicial Commission, and its warning that "the reduction of the members of the judiciary to a minority opens the door to direct political influence on the nomination and the constitution of the benches (International Commission of Jurists, 2024). When the Federal Constitutional Court was established, and the responsibility for constitutional affairs was shifted from the Supreme Court to the Federal Constitutional Court, its 2025 assessment of the Twenty-Seventh Amendment called it a fundamental change in the role of the judiciary (International Commission of Jurists, 2025).

This article is based on those evaluations when it comes to the content of the amendments, and offers doctrinal analysis that the evaluations do not pretend to offer. The second strand is comparative and theoretical. They have characterized the Twenty-Sixth Amendment as being synonymous with "court-capture/court-curb/court-manage" (CCCM) and have placed Pakistan in a broader context of such measures taken by the other countries, Hungary, Poland, and Turkey, in the 2010s and others more recently (Kureshi, 2025). That literature is of value in placing Pakistan in a comparative perspective, but its focus is mainly of a political-science nature; the present article is useful in terms of the specific doctrinal language of Pakistani constitutional law. The third is a domestic constitutional-law debate, which has simmered for long on whether Pakistan acknowledges substantive restrictions on the amending power. In this case, the centre of gravity is *District Bar Association, Rawalpindi v Federation of Pakistan* (2015), where a majority of the Supreme Court, for the first time, held that it has the power to review the substance of the constitutional changes, while also confirming the parliamentary committee's appointment power (*District Bar Association, Rawalpindi v. Federation of Pakistan*, 2015).

The media has interpreted that ruling as a sign of the judges' authority and also as a wise political gesture on the part of Parliament ("District Bar Association... Marbury-Style," 2024). The existing literature has not, however, systematically applied the salient-features reasoning of *District Bar Association* to the amendments for 2024-2025, and, at the same time, has not faced the awkward reality that the same decision provides the Government's strongest counter-authority. That's the unique role of this article to fill that void — and solve that tension. The article thus has two contributions: one original and one complementary. First, it provides a clear and criteria-based definition of effective structural independence, which is an often-used, but seldom-specified phrase. Second, it applies that standard to both amendments and is not oblivious to but is sensitive to the authority that runs counter to the thesis. It is important to state at the outset the theoretical assumptions that underlie the argument, before moving to the constitutional documents. The doctrinal analysis that follows is not self-supporting; it is rooted in three sets of constitutional theories which provide its conceptual bases. It is useful to state the reasons why it is legitimate to restrict the amending power at all, and it also gives the standard of effective structural independence a theoretical framework which is not an ad hoc test.

2.1 Constituent Power and the Limits of Amendment

The first and most fundamental obligation is the separation of 'constituent power' and 'constituted power'. The difference is Sieyès' distinction, which has been expanded throughout modern constitutional theory: the constituent power (the extraordinary, basic power that creates the constitution) differs from the constituted powers (the normal, legally limited powers established by the constitution and governed by it) (Loughlin & Walker, 2007). The amending power is in a middle ground, one that is much debated. The most important theoretical position, argued most lucidly in Yaniv Roznai's model of "unconstitutional constitutional amendments," is that the amending power is not a primary constituent power, but rather a secondary or delegated constituent power, a power that is subordinate and dependent on the power of the constitution itself (Roznai, 2017). On this conception, a body exercising delegated constituent power can change the constitution but cannot use its delegated power to dismantle the constitution or to take away the identity of the constitution; it cannot exercise a primary constituent power it does not have (Schmitt, 2008).

This provides the theoretical impetus to the amend/destroy dichotomy that is used repeatedly throughout the article. The conception that the amendment limits are not arbitrary judicial inventions, but the limits imposed by the nature of a delegated power, is exactly the one that Part VI is invoking when it argues that there is a power of adaptation but no power of transformation in Article 239. In this interpretation, the basic structure doctrine is the doctrinal statement of a previous theoretical truth about the nature of the powers of an amending body. It also makes clear what is being borrowed from Indian jurisprudence: it is not a set of protected features, but rather the insight that a constitution cannot be defined solely by the amending power delegated to those who are not its creators; an insight which is not particular to any constitutional order but is theoretical, and therefore travelable.

2.2 Abusive Constitutionalism and Democratic Erosion

The second point of theory is that of the way in which constitutional orders are set about in the present. There has been a large comparative literature on today's threat to constitutional democracy: not the coup but the weakening of the conditions of constitutional democracy from within by use of apparently legal instruments (amendment, legislation, court reform). The mechanisms of constitutional change in the service of entrenching power and disabling or packing accountability institutions, and courts in particular, are the subject of David Landau's account of abusive constitutionalism (Landau, 2013). But autocratic legalism, as Kim Lane Scheppele's cognate term describes it, views the same issue from a different perspective: the use of legality to break the checks that legality provides (Scheppele, 2018). Dixon and Landau go further and explain how courts and judicial reform instruments can be used to work against the order of democracy (Dixon & Landau, 2020).

This literature is theoretical and not just descriptive because it changes the way a particular reform is assessed. It focuses attention not on the legal formality of each measure (usually impeccable), but on the structural effect of defensible measures that destroy. Only the latter is methodologically

relevant to the current argument as well as theoretically supporting the cumulative-effect analysis in Part X: the argument is not that any particular provision of the amendments is alone constitutionally fatally flawed, but that taken as a whole, the package is. It isn't a rhetorical identification, but a way of looking at Pakistan that reveals the structural significance of erosion as a process that cannot be detected by the provision-by-provision formalism of formalism.

2.3 Conceptions of Judicial Independence

The third body of theory is related to the object that is being modified. The level of good structural independence outlined in Part VII is not out of the blue; it builds on a long-standing theoretical divide in the literature on judicial independence. Two are central. The first is the idea of the individual judge having decisional autonomy, that is, his or her judgment is not influenced by other people in the case before him or her; the second is the idea of the judiciary being structurally or institutionally independent, that is, it is insulated from external influences through its composition, governance and security of tenure (Fiss, 1993). The point of this article is to make it second level: that the institutional architecture is being reshaped so that the judiciary as such is reliant on the political branches.

The second is de jure independence (the constitutional guarantees provided in the text) and de facto independence (the real power of courts to act independently (Ferejohn, 1999)). For the present purpose, this distinction is important because formal guarantees may be nominal while the structural circumstances for their functioning are emptied, which is why the criterion used in the present case is one of effective structural independence. The adjective is theoretical work: it requires that the constitutional guarantee of Article 2A is fulfilled only if independence is not just declared but is also structurally effective. All four of the criteria outlined in Part VII can be regarded as an effort to express the de jure/de facto and decisional/institutional dichotomy in terms of a usable doctrinal test for constitutional change. These three theoretical convictions – delegated constituent power, abusive constitutionalism, and a structural-and-effective approach to independence – provide a constitutional framework for the analysis that follows.

2.4 Legal Analytical Framework

To evaluate the institutional trajectory initiated by these legislative actions, this study establishes a qualitative Legal Analytical Framework. Rather than utilizing an empirical conceptual model designed for statistical variables, this framework maps the profound structural transformations across core constitutional dynamics. Table 1 conceptualizes these operational and structural shifts, illustrating how the balance of power has been fundamentally recalibrated between the judicial, legislative, and executive branches.

Table 1: Legal Analytical Framework of Pakistan's Superior Judiciary Post-Amendments

Constitutional Dynamic	Pre-26th Amendment Era	Post-26th / 27th Amendment Era	Institutional/HRD Implication
Chief Justice (CJP) Appointment	The senior-most judge of the Supreme Court was automatically appointed under established constitutional convention.	A Special Parliamentary Committee selects the CJP from a panel of the three senior-most judges, subject to executive confirmation.	Introduces political discretion into judicial elevation, shifting institutional incentives toward political compliance.
Judicial Commission of Pakistan (JCP)	Dominant judicial representation, reinforcing peer review and insulating appointments from political interference.	Expanded legislative and executive representation, diluting the voting power of the judicial members.	Increases external political oversight over the evaluation, selection, and performance review of judges.
Constitutional Benches	The Chief Justice maintained sole administrative discretion over bench composition and case assignment.	Separate, dedicated Constitutional Benches are formed by a specialized committee within the reconstituted JCP.	Bifurcates the apex court's jurisdiction, creating a parallel structure explicitly tasked with political-constitutional adjudication.

3.0 METHODOLOGY

This article uses a doctrinal approach. The question here is an internal question to the legal system: Can certain constitutional changes be accommodated within constitutional commitments that are in turn internal to the legal system, i.e., are expressed in text, structure and precedent? The process is carried out through a close reading of the constitutional text, a systematic examination of the case law, and a reconstruction of the principles that the constitutional text and case law reveal. It is the approach most appropriate to a normative rather than empirical (how judges actually behave) or political (the desirability of change) question regarding constitutional validity.

This study utilizes a qualitative, doctrinal research design. Rather than relying on empirical, statistical modelling (such as PLS-SEM or cross-sectional surveys) which is methodologically inapplicable to pure constitutional analysis, this paper systematically evaluates primary legal texts, legislative debates, and seminal judicial precedents. The robustness of this methodology stems from its internal coherence and its systematic application of established tools of constitutional interpretation, namely text, context, structure, and historical purpose, to evaluate institutional shifts. Secondary sources, including peer-reviewed legal commentary and reports from international consultative bodies, are analysed using contextual and purposive interpretation tools to triangulate and corroborate the structural findings rather than to serve as standalone statistical metrics.

The choice of a qualitative, doctrinal framework is accompanied by a corresponding limitation, one that is not hidden, however: The article does not provide an empirical description of judicial decision-making, a quantitative measure of judicial independence, or a political-economic regression analysis of why the amendments were passed. Those are good questions, but it's not this one.

The main materials include the constitutional text (Articles 2A, 175, 177, 193, 205, 209 and 239), the text of the Twenty-sixth and Twenty-seventh Amendments, and the jurisprudence of the Supreme Court of Pakistan regarding judicial independence and the scope of the amending power (Constitution of the Islamic Republic of Pakistan, 1973). The content of the amendments is supported by secondary sources such as published evaluations of the International Commission of Jurists and scholarly works, which are used as a means for corroboration, but not as a source of authority. The discussion is limitedly comparative with reference to Indian constitutional law and in particular to *Kesavananda Bharati*, and only for conceptual purposes in order to clarify the concept of substantive limits on the amending power. The comparison is made carefully because of the differences between the constitutional landscape of India and Pakistan: notably the presence of Islamic provisions and the controversial nature of parliamentary sovereignty in Pakistan, and because the article makes use of the Indian material for a principle rather than a piece of constitutional transplant. ("District Bar Association... Marbury-Style," 2024)

The article's analytical development of a standard it labels "effective structural independence" is based on the constitutional text and the Supreme Court's own formulation of independence as a structural, not formal, guarantee. The standard is determined by clear criteria in Part VII and then applied provision by provision to the institutional changes brought by the amendments. The scope of this article is limited to the judicial-architecture aspects of the two amendments. Though those changes were significant, of federal fiscal arrangements and armed forces command, they are not examined in this analysis because they are not directly focused on judicial independence. (Chatham House, 2025)

4.0 RESULT AND DISCUSSION

Judicial independence in Pakistan is not secured by a single provision. It is a composite of constitutional text, institutional design and judicial interpretation, and the strength of any constitutional objection to the amendments depends on the strength of those foundations.

4.1 The Constitutional Text

Article 2A is, at its starkest form, to infuse the Objectives Resolution into the main text of the Constitution and establish that the independence of the judiciary shall be ‘fully secured’ (Constitution of the Islamic Republic of Pakistan, 1973, art. 2A). That's the formulation that deserves to be paid attention to. It is not merely a declaration or aspirational, but a positive constitutional mandate for all organs of the State, including the legislature, to ensure judicial independence. An amendment which attacks in substance the structure of the independence which the Constitution guarantees does not raise a policy question but a question of the validity of the Constitution. Article 2A thus provides the textual support to the argument that parliamentary majorities, no matter how large, cannot unilaterally enact independence.

Institutionally, this promise is realized in the manner of organising the superior judiciary (Constitution of the Islamic Republic of Pakistan, 1973, arts. 175, 177, 193, 205, 209). Judicial Power is vested in the Supreme Court and High Courts, and Article 175 mandates separation of the judiciary from the executive, structural separation, not functional separation. The appointment of Supreme Court judges and High Court judges is regulated by Articles 177 and 193, respectively, which illustrate the concern of the Constitution that the Supreme Court and the High Courts be protected from the domination of the executive. Judges' terms and conditions are protected by Article 205, which states that their terms of service cannot be altered after they are appointed, and Article 209, which provides a limited and formal procedure for their removal before a Supreme Judicial Council. Taken together, these provisions are a conscious constitutional structure to guarantee that judges can perform their duties without the risk of being removed, financially coerced or pressured from within an institution.

4.2 Judicial Interpretation

The Supreme Court has always interpreted these in the context of the general rule of judicial independence and has applied this rule liberally. In *Al-Jihad Trust v Federation of Pakistan*, the Court ruled that the position of the Chief Justice is not advisory but also decisive in the appointment of judges. The importance of that holding is not in the facts. The Court did not formalize the structural principle that the judiciary must have effective institutional authority over its composition and that executive actors must not have too much say in the appointment process. The formation of the Judicial Commission and the creation of a parliamentary committee to oversee the appointment of the Chief Justice have now handed over the power of determining who gets appointed as a Chief Justice to the political arms in just the way *Al-Jihad Trust* wanted to avert.

In *Mehram Ali v Federation of Pakistan*, the Court articulated the institutional aspect of independence as follows: "Judicial functions ought to be carried out by structures that are independent of the executive, and the establishment of parallel adjudicatory structures that do not have this structural independence is constitutionally unacceptable (*Mehram Ali v. Federation of Pakistan*, 1998). That logic is directly relevant to the structures of adjudication that have been established based on a new Commission that has a political majority. The Court echoed the same in *Sheikh Liaquat Hussain v Federation of Pakistan*, which had invalidated the trial of civilians by military courts, holding that the right to adjudicate the rights and liabilities should be within the exclusive jurisdiction of constitutionally created courts which are not under the control of the executive (*Sheikh Liaquat Hussain v. Federation of Pakistan*, 1999). The above was cited in the original draft but the case is *Sheikh Liaquat Hussain*, PLD 1999 SC 504. Combined, these decisions create a judiciary that is not only independent from the influence of others but also from the influence of the other branches of government.

In *District Bar Association v Federation of Pakistan*, the Court equated the concept of judicial independence with the machinery of appointment, security of tenure and institutional autonomy and also in the same judgment held that the substance of constitutional amendment is subject of review (*District Bar Association, Rawalpindi v. Federation of Pakistan*, 2015). The guarantee does not require the presence of a formal court, it requires a structure of courts in which the judge or judges are not influenced by any executive or legislative action, nor are they influenced by a combination of the two. Indirect control, whether by shaping the appointment process, by the transfer of judges or by the development of institutional interdependence, is just as constitutionally troublesome as direct interference. That tension is tackled head-on in Part X, although *District Bar Association* also accepted a form of parliamentary involvement in appointments, and it was a central examination of that present argument.

4.3 Judicial Transfers as a Constitutional Issue

There is comparatively little written on constitutional aspects of judicial transfers in Pakistan, yet the principle is firmly rooted. The security of tenure under Article 205 and 209 is not just against removal, it is also against any mechanism that allows an impediment to the judge's independent authority. A transfer of power (without specified clear criteria and independent checks) is exactly this mechanism. The authority to shift judges from one court to another, particularly from one forum to another of varying importance, creates a structural incentive for judges to comply, one did not base on any real threat of removal. The judge who knows that he is likely to be transferred to a less important position if he makes an inconvenient decision is subjected to a kind of institutional force which, constitutionally speaking, can be compared with more explicit forms of interference. The transfer provisions in the Twenty-Seventh Amendment thus need to be examined on the same doctrinal plane as the appointment provisions (which were discussed in Part IX).

5.0 THE BASIC STRUCTURE DOCTRINE AND LIMITS ON THE AMENDING POWER

5.1 Conceptual Foundation

Before considering the amendments, it is important to consider whether the power of constitutional amendment in Article 239 is subject to substantive restrictions (Constitution of the Islamic Republic of Pakistan, 1973, art. 239). The power to amend the Constitution under Article 239 is very broad in itself and, on its own terms, it is very easy to imagine it being used to alter the Constitution in a way the framers never envisioned. Whether powers can be invoked to change or destroy the very nature of the constitutional order is the crucial issue. The basis of the departure is the very simple, yet very important distinction between amending a constitution and destroying it. A power to amend is a power to modify, improve or adapt, rather than a power to abrogate the underlying commitments from which the constitution derives its power. The amending power is constitutional; it exists because it is so provided in the constitution and is exercised pursuant to the procedures set forth in the constitution; it is, therefore, subject to the constitutional framework it seeks to modify. Using that power as limitless would be to allow the constitution to be the machinery that destroys itself – something no sensible constitutional doctrine would allow.

5.2 The Comparative Anchor: Kesavananda Bharati

The most important judicial interpretation of this principle is the one delivered by a thirteen-judge bench of the Indian Supreme Court in the case of *Kesavananda Bharati v State of Kerala*, which held by a narrow majority that while the power of amendment may be exercised by Parliament in a very wide range, it cannot be exercised to abrogate or destroy the basic structure of the Constitution. The Court did not give a comprehensive list of the features of the basic structure but said that the rule of law, the supremacy of the Constitution, the separation of powers and independence of the judiciary were covered by the protection of the basic structure (*Kesavananda Bharati v. State of Kerala*, 1973). Kesavananda's conceptual legacy lies not in the list of features that were to be protected, but in the underlying principle that a constitution is a tightly-knit normative framework, not an independent set of addendums which can be changed at will; and that the nature of a constitution must be safeguarded by the same institutions that it establishes. So, understood, the amending power is a power of adaptation, rather than a power of transformation. The principle, and not any Indian precedent, is of interest to Pakistani constitutional law.

5.3 The Pakistani Jurisprudence

Intellectual honesty demands that it be admitted that Pakistan has not yet accepted the basic structure doctrine as Kesavananda has interpreted it. In Pakistan it has grown unevenly and is subject to some

controversy. But the course of the jurisprudence shows that some aspects of the constitutional order are increasingly beyond the scope of the amending power. In the case of *Federation of Pakistan v Mahmood Khan Achakzai*, the Court lent content to the idea of constitutional salient features and stated that the federal system, independence of the judiciary and trichotomy of powers are some of the fundamental characteristics of the constitutional order but did not go so far as to argue that interference with these is justiciable on that basis alone (*Federation of Pakistan v. Mahmood Khan Achakzai*, 1997). In *Wukala Mahaz Barai Tahaffuz Dastoor v Federation of Pakistan*, the Court once again tossed light upon limitations on the amending power and restated, with caution, that the fundamental features of the Constitution are not like any other provision susceptible to amendment by a simple majority of Parliament (*Wukala Mahaz Barai Tahaffuz Dastoor v. Federation of Pakistan*, 1998). The most important was the case on challenges to the Eighteenth and Twenty-First Amendments from *District Bar Association, Rawalpindi v Federation of Pakistan*. A majority answered in the affirmative the previously open question whether the judiciary may review the substance of constitutional amendments — an unprecedented assertion in the apex court's history (*District Bar Association, Rawalpindi v. Federation of Pakistan*, 2015). Justice Jawwad S Khawaja (with whom Justice Umar Ata Bandial agreed) expressed, on the express side, that Parliament was not sovereign and that the constitutional scheme contained judicially enforceable limits on the Parliament's power to amend the Constitution; Justice Sh Azmat Saeed (with whom Justice Ejaz Afzal Khan agreed) held that the Constitution represented a coherent scheme of salient features, including democracy and judicial independence, which could not be meaningfully altered by amendment. Justice Ejaz Afzal Khan invoked the doctrine of basic structure to strike down part of the Twenty-First Amendment. The ruling thus carries more than the appearance of being a whiff in the wind: it is substantive that judicial independence is an important characteristic of the system, and that amendments that impinge upon it are subject to substantive review. The earlier observation by Justice Zafar Ali Shah in the case of *Pervez Musharraf* that the basic features of the Constitution – independence of judiciary, federalism and a parliamentary system with Islamic provisions – cannot be altered even by Parliament is in the same vein (*Zafar Ali Shah v. Pervez Musharraf*, 2000). Together, these decisions do not create a firmly established rule of law with clear boundaries with respect to the basic structure doctrine in Pakistan. What they create is something more solidly based—a judicial awareness that the Constitution represents underlying commitments which the amending power cannot be used without restraint to repugn, and that judicial independence is one of these commitments. The answer to the question that the Twenty-Sixth and Twenty-Seventh Amendments now force upon us is whether the legislative action of 2024 and 2025 trespasses beyond this jurisprudence, which this Court has been tracing.

5.4 Judicial Independence as a Structural Salient Feature

Three mutually reinforcing pillars support the judicial independence as a structural positive aspect of the Constitution. The first is a textual one: Article 2A's promise of "full security" of independence cannot be logically interpreted to allow the legislature, through the amendment process, to make substantive changes that run contrary to that commitment. The second is structural: If the clauses of Article 175, 177, 193, 205 and 209 are removed or significantly changed, they undermine the conditions on which the Article 2A commitment depends. The third is jurisprudential: The Supreme Court has made it clear that independence is not just another value but a structural principle which lies at the heart of the constitutional order and that the guarantee needs effective structural conditions, not the mere presence of courts. As a whole, these foundations provide a sound doctrinal basis to conclude that judicial independence is a fundamental structural component, which, even if the requirements of Article 239, in its procedural aspect, are satisfied, cannot be removed by the amending power.

5.5 Implication for the Amendments

The implication is clear. Judicial independence is a structural salient feature, of which the text, the design, and the authority are elements, is realized only when the conditions are met. So when the conditions are being materially undermined, the amendment is not an ordinary policy choice, and is subject to substantive review. It is a constitutional measure which is bound by substantive restrictions on the amending power and subject to strict scrutiny. It does not mean that the legislature cannot at any time change the appointments, reorganise adjudicatory bodies, or establish mechanisms to hold them accountable – that is constitutionally within its power. What is not allowed is reform that in reality and substance gives decision-making authority over the composition and actions of the judiciary to the political branches, weakening the separation of powers. There is no clear distinction between reform and erosion, but it is constitutionally required and the standard developed next will aid in making the distinction.

6.0 THE STANDARD: EFFECTIVE STRUCTURAL INDEPENDENCE

The term 'structural independence' is frequently thrown around and seldom defined. It provides it analytical content by suggesting a test of effective structural independence, which is not whether judges are formally impartial, but whether the structure of the courts – its composition, its leadership, the distribution of work among judges, and the protection of their tenure, etc. – continues to meet the conditions required for their independent exercise of judicial power. The standard is based on the text of the Constitution, and on the Supreme Court's repeated insistence that independence must be real and not merely formal. It has four criteria.

Firstly, institutional control over composition. The judiciary should exercise an effective, rather than merely symbolic, role in the appointment of judges and the leadership of the judiciary. If the

political branches have a controlling influence on the appointments, or if the cohesion of the political branches is necessary for appointments, then the criterion is not fulfilled.

Secondly, insulation of adjudicatory assignment. The flow of cases to the courts and the allocation of judges to particular cases should be left to the judiciary and not be subject to manipulation by outside interests. The powers of constituting benches or of allocating constitutional cases are tools of independence; the more they are susceptible to political manipulation, the more the impartiality of constitutional adjudication is jeopardised.

Thirdly, structural inducement security. Tenure protection should not only give protection from removal, but from any other method that can be used to make the individual comply with the organisation: transfer, re-posting, downgrade of function. Even if judges' removal is not threatened, a power that can reward or punish them offends the criterion.

Fourth, public confidence. As in *ex parte Pinochet* (No 2), there should be no reasonable apprehension of dependence (*Ex parte Pinochet* (No. 2), 2000). Whether or not there is in fact improper influence, a system of formal institutions that a reasonable observer would be led to expect to affect the decisions of judges does not meet the standard.

The standards are not conjunctive; that is, a failure of any one of them may be enough to trigger a constitutional concern, and failures of multiple standards compound. The standard does not rule out change in itself, it recognizes the circumstances of structural change that make it permissible to become constitutionally suspect when it is a restructuring. It is against these four criteria that the provisions of the two amendments are now assessed.

7.0 THE TWENTY-SIXTH AMENDMENT: A DOCTRINAL ANALYSIS

7.1 The Reconstitution of the Judicial Commission of Pakistan

The one major change in the appointment system is the reorganisation of the Judicial Commission of Pakistan effected by the Twenty-Sixth Amendment in the Constitution which modified Article 175A. As it was before the amendment, the Commission consisted of a majority of judges. The amendment kept the judicial members but added on members from the National Assembly and Senate and an additional member nominated by the Speaker, and as a consequence, judges were nominated by a minority of the body (International Commission of Jurists, 2024; Tripathi & Kumar, 2024). The issue under the first test of effective structural independence — institutional control over composition — is whether the judiciary has the final say on who sits on the bench. The proposed Commission does not, as it stands, suggest so. If the cohesion of a political bloc can influence or decide how things will turn out in the appointing body, independence is not institutionally guaranteed anymore, but depends on the political restraint of that bloc. That is at odds with *Al-Jihad Trust*, which demanded to be protected from executive influence and let the judiciary have a decisive say (*Al-Jihad Trust v. Federation of Pakistan*, 1997). The constitutional issue is not just the role of non-judicial actors, which is a constant in the

Commission, but the institutional reality that judicial appointments could now be based on political affiliation.

7.2 The Appointment of the Chief Justice

The changed means of the appointment of the Chief Justice adds to these concerns. A three-year term of office and the removal of the seniority convention (which provided a regular, non-discretionary method of succession) bring in a degree of discretion and a change in the nature of the office. According to the second and fourth criteria, the constitutional significance of that discretion is in the office involved. The Chief Justice, through his position, has great administrative and judicial authority, such as influencing the constitution of benches and case allocation. Such a process could give political actors an indirect influence on judicial functioning more broadly, and thus entail an inherently reasonable apprehension of dependence, which is what the confidence criterion is supposed to protect against. The worry is not theoretical: commentators have connected the new mechanism to the actual ability to circumvent judges who are deemed to be “unfavourable.”

7.3 Constitutional Benches

The Twenty-Sixth Amendment also gave the newly-created Commission the power to establish constitutional benches, within the Supreme Court and the High Courts, and limited their jurisdiction to constitutional issues and the application of fundamental rights (International Commission of Jurists, 2024). The doctrine of Mehram Ali is that judge's work should be done by the institutions which are structurally independent of the executive (*Mehram Ali v. Federation of Pakistan*, 1998). If composition of such benches is open to the political influence of the body that exercises it, then the second criterion — insulation of adjudicatory assignment — is directly challenged: the ability to form the bench that decides politically important cases can be used as a tool to create forums with specific composition. In doctrinal terms, the ICJ's worry about these benches ‘will not be independent and impartial’ is a concern that the appointment power has been taken out of the purely judicial sphere (International Commission of Jurists, 2024). It is not the specialization per se that is objectionable, one that can have a legitimate purpose, but the influence of factors outside the judicial process on the composition of the bench.

7.4 Performance Evaluation and the Executive-Advice Shield

The pattern is strengthened by two other features of the Twenty-Sixth Amendment. The amendment provides for an annual evaluation of the performance of High Court judges by the Commission, and refers to any High Court judge whose performance is deemed ‘unsatisfactory’ after a ‘period of improvement’ to the Supreme Judicial Council, the open textured standard of ‘inefficiency’ providing another lever with which to hold High Court judges accountable, despite their independence accorded

by the Constitution (Constitution (Twenty-Sixth Amendment) Act, 2024). The amendment, on its own, had the effect of protecting some executive counsel from judicial review. An individual measure could be argued to be administrative alone; taken individually, each one could serve as a basis for a heightened sense of security on the part of the judge to expect the counter-productive behavior of a politically motivated institution. These features are covered in Part IX.

8.0 THE TWENTY-SEVENTH AMENDMENT: A DOCTRINAL ANALYSIS

If the Twenty-Sixth Amendment reconfigured how the superior judiciary is composed and led, the Twenty-Seventh Amendment reconfigured the architecture of constitutional adjudication itself. Because the original draft conflated the two, it is worth restating the correction: the Federal Constitutional Court and the expanded transfer powers are creatures of the Twenty-Seventh Amendment of November 2025, not of the Twenty-Sixth (Constitution (Twenty-Seventh Amendment) Act, 2025).

8.1 The Federal Constitutional Court and the Bifurcation of Apex Jurisdiction

The key innovation of the Twenty-Seventh amendment is the establishment of a separate Federal Constitutional Court, at the top of constitutional adjudication, where the majority of the Supreme Court's constitutional functions are now transferred, along with all pending cases that had been heard by the Supreme Court under its constitutional jurisdiction, which is interpreted, settled and enforced by the new court (International Commission of Jurists, 2025). The Supreme Court is thus effectively limited in its function to non-constitutional appellate jurisdiction (International Commission of Jurists, 2025). The problem with the constitution is the manner of establishment of the new court and the split itself. The President proposes the FCC appointments through the advice of the Prime Minister, subsequent appointments go through a Judicial Commission of which the judicial members are the minority, and the political members decide the majority (Malik, 2025). The design, evaluated in the light of the first and second criteria, significantly leaves constitutional issues in the hands of politics. Mehram Ali's ban on adjudication of constitutional rights by institutions that have no structural autonomy is directly challenged in a new apex constitutional forum that has been composed under political influence.

The other is a more structural one. When there are two apex courts, the division of jurisdiction undermines the institutional integrity of constitutional interpretation. One structurally independent apex court is already a protection: It focuses the power to measure the meaning of the Constitution in a body shielded from the political reshaping of the Constitution. The establishment, together with it, of an institutionally weak constitutional court which is politically tainted is to put the most delicate adjudicative power in the weakest hands. The two prominent Supreme Court judges who tendered resignation in protest, alleging that the amendment was intended to take the judiciary under the control

of the executive, is a reflection not on the merit of the amendment but its seriousness of the structural mismatch (International Commission of Jurists, 2025; Malik, 2025).

8.2 Judicial Transfers and Structural Pressure

The Twenty-Seventh Amendment also conferred expansive powers to transfer judges — between High Courts, and between the Supreme Court and the Federal Constitutional Court (Constitution (Twenty-Seventh Amendment) Act, 2025). As the foregoing explains in Part IV, the security of tenure guaranteed by Article 205 and 209 is not limited to protection against removal but is also protection against any means by which a decision-making is likely to be affected by institutional pressure. Transfer powers exercised in the absence of explicit standards or genuine consent are such a transfer, and they involve the third criterion of effective structural independence directly. The judicial system does not have to issue a "fear appeal" to pressure a judge into compliance, it is enough to be able to tell that judge that if he doesn't do it, then he will be transferred to some other and less significant forum. The presence of an unstructured transfer power, without any actual use for improper purposes, detracts from the conditions of impartial adjudication and violates the confidence criterion, because a reasonable observer might conclude that the power could be used for improper purposes.

The concern is magnified by the interaction of the two powers of transfer and the bifurcation of jurisdiction. When a separate constitutional court has been established, and judges can be moved into and out of this forum, the power to transfer becomes a power to shape the composition that decides the most politically sensitive questions: it is a power that incorporates the risks identified under all four criteria.

9.0 CUMULATIVE EFFECT, THE COUNTER-CASE, AND THE SELF-REFERENTIAL PROBLEM

9.1 Judicial Transfers and Structural Pressure

No one can understand the meaning of the amendments in isolation because the meaning of each amendment is inextricably linked to the meaning of the others. Several of the changes could be packaged as administrative reforms or as changes that fall within the realm of legislative judgement taken individually. Overall, they delineate a meaningful structural change. The reconstitution of the appointing body, the inclusion of discretion into the selection of judicial leadership, the political exposure of the composition of the bench, the politically constituted apex Constitutional Court and the expansion of transfer powers are not separate adjustments; they are just redistributions of the control of the judiciary to the political branches. When viewed through the lens of effective structural independence, it does not meet any of the four criteria and the lacking reinforce each other. The result is not a series of individual changes, but a reconfiguration of the control of the judiciary — the kind of change the structural conception of independence is designed to fend off.

9.2 Socioeconomic Implications: The Rule of Law and Human Capital

While the restructuring initiated by the Twenty-Sixth and Twenty-Seventh Amendments can be evaluated through pure constitutional doctrine, its ultimate ramifications spill over heavily into the domain of national development economics. Judicial independence is not an insulated legal abstraction; it is the structural bedrock of the rule of law, which institutional economics establishes as a core driver of human capital accumulation and retention. When a state's superior judiciary is perceived as structurally compromised or systematically politicized, the resulting erosion of legal certainty triggers severe socio-developmental liabilities across three interconnected axes:

1. **Contract Enforcement and Capital Flight:** Secure property rights and predictable contract enforcement depend entirely on an insulated, neutral arbiter. When external political metrics infiltrate the judicial apparatus, domestic and foreign investors face heightened institutional risks. This systemic uncertainty precipitates capital flight and dampens foreign direct investment (FDI). Without robust economic inflows, macro-level funding for domestic human capital infrastructure such as specialized training, technology transfers, and advanced research facilities rapidly desiccates.
2. **Institutional Decay and Resource Misallocation:** A judiciary entangled with the political branches distorts the operational incentives of state organs. When legal checks are diluted, public institutions divert scarce national resources away from public-goods optimization such as healthcare networks, primary education, and technical skill cultivation and toward political survival, rent-seeking, and bureaucratic self-preservation. This systemic misallocation directly impairs the state's capacity to build a resilient human resource framework.
3. **Institutional Instability and Brain Drain:** Human capital is highly mobile and risk-averse. When professionals including medical doctors, legal experts, software engineers, and academics perceive that the domestic constitutional framework can no longer guarantee fundamental rights, equal protection, or an objective rule of law, high-skilled emigration accelerates. This "brain drain" represents a catastrophic and often permanent liquidation of a nation's premium human capital stock, severely depleting the intellectual and professional infrastructure necessary to drive sustainable human resource development (HRD) within Pakistan.

9.3 The Democratic-Legitimacy Counter-Argument

A serious analysis should be made on the strongest, not the weakest, case for amendments. There are two limbs to that case. The first is one of democratic legitimacy: In a constitutional democracy, the argument goes, an elected legislature should have a meaningful role in the creation of the institutions of the state, including the judiciary, and those of a self-perpetuating judicial body are inherently conflicted with accountability. According to this perspective, parliamentary participation is a way to

remedy a democratic deficit and the suggestion of “capture” seems a bit like assuming that judicial self-selection is the rule.

The second step is doctrinal and it is the stronger of the two, as it is provided by the Supreme Court itself. In *District Bar Association, Rawalpindi*, the Court was of the opinion that the participation of a parliamentary committee in judicial appointments as laid down in Article 175A, did not per se violate the independence of the judiciary nor affect the principle of separation of powers (*District Bar Association, Rawalpindi v. Federation of Pakistan*, 2015). Why not in 2024-2025 if it was constitutionally acceptable in 2015?

Three responses address the counter-case, but do not reject it. First, the democratic-legitimacy argument is not as strong as it sounded. Judicial independence does not need to be achieved through judicial self-selection, it must be achieved by ensuring that the judiciary has a decisive influence and that the design is not such that it leaves the judiciary open to political control. A model in which the political branches have a role in, but do not dominate, appointments is consistent with the standard. The point of objection here is not against any legislative role but against a form of a legislative role being dominated by the political branches with the judges acting in a minority and subservient capacity. The objection here is not to a legislative role but to a different arrangement, one where the minority and “decisive” control is shifted into the political branches.

Second, that is the difference between the present amendments and those approved by the District Bar Association. The committee which considered in 2015 was set in an environment where the Judicial Commission had a judicial majority and a confirmatory rather than initiating function and the tolerance of the Court was based on the continued structural predominance of the judiciary. The Twenty-Sixth and Twenty-Seventh Amendments change that predicate, first by bringing the judges to a minority, and second by inserting into the constitution a politically constituted court to settle constitutional matters. A holding that a limited role for the legislature is possible with independence is not authority that a decisive role for the legislature is possible with independence.

Third, and most importantly, *District Bar Association* is a two-edged sword; its very decision, so much touted as the basis to justify the legislature's involvement, is the basis that established substantive review of amendments and marked judicial independence as a key element (*District Bar Association, Rawalpindi v. Federation of Pakistan*, 2015). The Government is unable to assert its basic-structure holding and at the same time deny its appointments holding. The case provides the doctrinal tool for reviewing, and the limiting principle from which the present amendments are going.

9.4 The Self-Referential Problem

A distinct difficulty attends adjudication of these challenges. The bench hearing challenges to the Twenty-Sixth Amendment is itself constituted under the impugned provisions, and the Twenty-Seventh Amendment has relocated constitutional jurisdiction into a court whose composition the amendments

shaped. This produces a problem of constitutional self-reference: a forum is asked to pronounce upon the validity of the very arrangements that constituted it. The difficulty is not merely optical. Under the confidence criterion, a reasonable observer may question whether a court owing its composition to the impugned provisions can dispassionately assess their validity; under the institutional-control criterion, the capacity of the political branches to shape that forum is itself part of what is challenged. The point is not that such adjudication is impossible — courts not infrequently determine questions touching their own jurisdiction — but that the amendments have engineered a structure in which the ordinary remedy for unconstitutional restructuring is itself compromised by the restructuring. That feature is not incidental; it is among the most serious of the structural concerns, because it weakens the corrective mechanism on which constitutional self-limitation ultimately depends.

9.5 Preliminary Constitutional Evaluation

Once judicial independence is accepted as a structural salient feature — secured by text, structure and a consistent line of authority culminating in *District Bar Association* — the amendments must be assessed against the substantive limits on the amending power examined in Part VI. The question is not whether reform of judicial institutions is permissible, but whether these particular reforms preserve or destroy the structural conditions required for independent adjudication. In the analysis offered here, they raise serious constitutional difficulties, because cumulatively they install arrangements that render judicial independence vulnerable to political control across each criterion of the standard. That conclusion does not pre-empt the courts' ultimate determination of validity; it identifies the framework within which that determination must be made and the threshold the amendments must clear.

10.0 CONCLUSION

The Twenty-Sixth and Twenty-Seventh Amendments together effect a major restructuring of Pakistan's superior judiciary. This article has assessed that restructuring against the constitutional framework of judicial independence and the developing doctrine of substantive limits on the amending power. It has argued that independence in Pakistan is not merely a functional attribute of courts but a structural constitutional commitment, anchored in Article 2A, built into the design of Articles 175 to 209, and consistently affirmed in the jurisprudence of the Supreme Court.

Applying a defined standard of effective structural independence, the article has shown that the reconstitution of the Judicial Commission, the discretion introduced into the appointment of the Chief Justice, the exposure of bench composition to political influence, the creation of a politically constituted Federal Constitutional Court, and the expansion of transfer powers each erode one or more of the conditions on which independent adjudication depends, and that cumulatively they shift institutional control of the judiciary towards the political branches. It has taken seriously the strongest counter-case — the democratic-legitimacy argument and the Court's own holding in *District Bar Association* — and

has explained why that authority, properly read, both supplies the tool for substantive review and marks the limit these amendments exceed.

None of this implies that the Constitution is inert to institutional change. Constitutional orders must be capable of adaptation, and reform of the judiciary is constitutionally legitimate. What the analysis requires is that reform be pursued within the limits the Constitution itself imposes, and that the distinction between what may be reformed and what may not be eroded be confronted rather than evaded. The amendments examined here bring that distinction into unusually sharp relief. Whether they ultimately survive constitutional scrutiny is for the courts to decide; what this article has sought to establish is the doctrinal framework within which that decision must be made, and the serious questions the amendments raise about their compatibility with the structural principle of judicial independence and, through it, with the constitutional order of Pakistan.

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DATA AVAILABILITY

The data supporting the findings of this study are available from the corresponding author upon reasonable request.

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The authors declare that artificial intelligence tools (such as ChatGPT or similar technologies) were used to assist in language editing and improve the readability of the manuscript. The authors take full responsibility for the content, accuracy, and integrity of the manuscript

AUTHOR CONTRIBUTIONS STATEMENT

R.S.H.: Conceptualization, Methodology, Formal analysis, Writing – original draft preparation, Writing – review & editing; A.I.: Methodology, Formal analysis, Writing – original draft preparation, Writing – review & editing. All authors have read and agreed to the published version of the manuscript.

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