

A CONSTITUTION AT A CROSSROADS: THE TWENTY-SEVENTH AMENDMENT AND THE EROSION OF JUDICIAL INDEPENDENCE AND FEDERALISM

Muhammad Anwar Shaheen^{*1}, Shabana Bajwa²

^{*1}Advocate Supreme Court of Pakistan M. Phil Criminology and Criminal Justice System

²Advocate High Court Superior Law College, Lahore

^{*1}muhammadanwarshaheen@gmail.com, ²Snbadvocate14@gmail.com

^{*1}ORCID: 0009-0008-9427-2524

Corresponding Author: *

Muhammad Anwar Shaheen

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ABSTRACT

The twenty-Seventh Amendment to the Constitution of Pakistan marks a radical shift in the country's constitutional architecture. By creating a new Federal Constitutional Court, transferring core powers previously held by the Supreme Court and High Courts, abolishing Article 184, and introducing article 175 E (3), the amendment fundamentally alters judicial review, federal equilibrium and constitutional identity. Passed in haste, mirroring the deeply controversial Twenty-Sixth amendment, the 27th amendment was enacted without public debate, without agreement with bar councils and without transparent deliberation ordinarily expected of constitutional reform¹⁰. Most alarmingly, it creates a self-referential judicial mechanism. Challenges to the amendment must be heard by the very court created by amendment, rendering meaningful constitutional scrutiny nearly impossible¹⁰. This article argues that the amendment undermines judicial independence, distorts provincial autonomy, violates the rule of law and crosses limits of Parliament's amending powers²⁶. Through doctrinal analysis, comparative constitutional experience^{9 11} and Pakistan's own jurisprudence²⁶, it concludes that the 27th amendment incompatible with essential features of the Constitution requires urgent reconsideration or judicial invalidation.

Keywords: Judicial Independence, Basic Structure Doctrine, Federal Constitution Court, Judicial Review, Constitutional Supremacy, Rule of Law, separation of Powers, Procedural Illegitimacy, Lifetime Immunity, Constitutional Identity

INTRODUCTION

Pakistan's constitutional framework has undergone many transformations, some necessary, other politically motivated. The Twenty-Seventh amendment stands among the most far-reaching of these changes. Unlike routine constitutional adjustments, the amendment fundamentally restructures the judicial system by:

- 1) Establishing a new Federal Constitutional court with exclusive jurisdiction;
- 2) Abolishing Article 184, the pillar of the Supreme Court's original constitutional jurisdiction and bestowed to Federal Constitution Court (a creation of 27th amendment)²⁶;

- 3) Diminishing the High Court writ jurisdiction under Article 199²⁶;
- 4) Alters the judicial appointment of judge by imbalanced judicial commission²⁶;
- 5) Introducing Article 175E (3), granting exclusive authority over constitutional questions to the newly created court;
- 6) Curtailing Supreme Court and High Court powers developed over the years²⁶.

These changes are not isolated, they follow closely on the heels of the Twenty-Sixth amendment, which similarly rushed and criticized for its lack of transparency and deliberation¹⁰. The 26th amendment signaled a shift in constitutional culture toward exclusionary law making, and the 27th amendment deepens this trend, this time altering the very structure of judicial power.

The stakes are profound. Judicial review, rule of law, fundamental rights, access to justice, federalism and separation of powers and not merely constitutional provisions; they form the constitutional identity of Pakistan. An amendment that weakens these features destabilizes the very system it seeks to regulate²⁶. This article argues that the 27th Amendment is constitutionally unsustainable, jurisprudentially flawed, democratically illegitimate and structurally damaging. It goes beyond doctrinal critique to examine the paradox created by Article 175E (3), that the amendment can only be challenged before the Federal Constitutional Court. A court created by amendment itself. This creates a constitutional deadlock, raising serious questions about access to justice and constitutional supremacy.

2. Constitutional Context

A Constitution does more than list powers, it constructs a system of governance with checks, balances and distribution of authority. The 1973 Constitution rests on five foundational principles:

- 1) Parliamentary democracy within constitutional limits
- 2) Judicial independence
- 3) Federalism and strong provincial autonomy
- 4) Separation of powers
- 5) Rule of law enforced through judicial review

These are not abstract values; they form the Constitution's structural core. Pakistani constitutional jurisprudence has repeatedly affirmed that these features cannot be compromised, even through constitutional amendment.

The 27th amendment disturbs this carefully calibrated framework. By creating a parallel apex court, reallocating jurisdiction and diluting High Court authority, it reshapes the judiciary in ways inconsistent with Pakistan's constitutional identity. This transformation is closer to constitutional overhaul than amendment.

3. Procedural Illegitimacy

The amendment was introduced through a flawed and undemocratic process. The process leading to the 27th Amendment mirrors and even surpasses the controversies surrounding the 26th amendment. A constitutional amendment that restructures the judicial system requires:

- 1) Extensive committee deliberations
- 2) Public hearings
- 3) Consultation with judiciary, bar associations, bar councils and civil society
- 4) Transparent debate in both houses

None of this occurred. The illegitimacy of 2024 election and controversial decisions of judiciary further cast doubt on the parliament's competence. Instead, both the 26th and 27th Amendment were made through inappropriate manners:

- 1) Introduced abruptly;
- 2) Passed with unusual speed;
- 3) Adopted without meaningful debate;
- 4) Unaccompanied by White Paper, explanatory memoranda or parliamentary justification;
- 5) Lacking engagement with provincial institutions and judiciary

Constitutional amendment cannot be passed in secrecy and haste. Scholars call this phenomenon "Procedural Constitutional Fraud" using constitutional forms to undermine constitutional substance. Process defines legitimacy; when process collapses, legitimacy collapses with it.

The rushed passage of the 27th amendment is therefore not merely undesirable; it is constitutional suspect.

4. The Twenty-Sixth Amendment: A Precursor to Structural Instability

Although the 26th amendment dealt primarily with electoral and institutional mechanism, its passage was controversial for three reasons:

- 1) Lack of debate and public engagement
- 2) Absence of consultation with the judiciary and legal community
- 3) Ambiguity in its long-term institutional consequences

It creates a dangerous precedent: major constitutional reform without democratic deliberation. The 27th Amendment follows this trajectory but goes further: it reshapes the judicial structure itself and bereft the top court of the country of its powers.

The 26th Amendment thus becomes a constitutional warning sign. Together, the 26th and 27th Amendments represent a shift in constitutional governance away from participatory democratic practice toward unilateral parliamentary engineering. The loss of deliberation is not merely procedural, it undermines constitutional culture, legitimacy and stability.

5. Basic Structure and Constitutional Identity

Limits on amending power to constitutional is a well globally recognized principle⁷. The basic structure doctrine, though articulated in India¹, resonates strongly within Pakistan's jurisprudence. Even without explicit adoption, Pakistani case law confirms that certain elements are non-derogable. Relevant cases include:

- 1) *Al-Jehad Trust v Federation of Pakistan* (1996)²
- 2) *Sindh High Court Bar Association Case* (2009)³
- 3) *Supreme Court Bar Association v Federation of Pakistan* (2010)⁴

These judgements collectively affirm:

- 1) Independence of judiciary^{2,6}
- 2) Separation of powers^{2,6}
- 3) Rule of law^{2,6}

- 4) Federal structure^{2,6}
- 5) Access to justice^{2,6}
- 6) Judicial review^{2,6}

The 27th Amendment undermines each of these. A constitutional amendment that destroys essential features ceases to be an amendment; it becomes an act of constitutional destruction.

The introduction of Article 175E (3) and abolition of Article 184 are particularly troubling. Together, they dismantle the Supreme Court's constitutional jurisdiction and reassign it to a court with no institutional history, no jurisprudential continuity and no proven safeguards. Such disruption violates constitutional identity.

6. Judicial Independence Under Threat

Judicial independence is the backbone of the democracy. The 27th Amendment weakens it through five mechanisms:

6.1 Fragmentation of Constitutional Jurisdiction

By dividing constitutional adjudication between the Supreme Court and the new Federal Constitution Court, the amendment creates:

- 1) Jurisdictional overlap
- 2) Conflicting interpretations
- 3) Loss of institutional coherence

Pakistan's judicial system was designed to remain unified; fragmentation undermines stability. Against this background, it is remarkable how newly created Federal Constitutional Court has already begun to distance itself from Supreme Court's earlier jurisprudence. Such departure from established principles not only disrupt doctrinal continuity but also erode confidence in the coherence of constitutional adjudication. This divergence illustrates precisely how the 27th Amendment has destabilized the unity and authority of Pakistan's judicial system.

6.2 Executive Influence in Judicial Appointments

Depending on appointment mechanism and formation of Judicial commission consists of majority of executive appointees, the Federal Constitutional Court could be vulnerable to political influence. A new court is always more

susceptible to executive engineering, especially when created abruptly.

6.3 Abolition of Article 184

Article 184(3) empowered the Supreme Court to enforcement fundamental rights and respond to matters of public importance. Its removal:

- 1) Eliminate direct constitutional oversight
- 2) Restricts public access
- 3) Disrupts many landmarks jurisprudential developments

6.4 Restriction of High Court Writ Jurisdiction

High Courts are the most accessible bodies. Curtailing their powers under Article 199:

- 1) Weakens access to justice
- 2) Centralizes constitutional litigation in Islamabad
- 3) Damage federalism

6.5 Judicial Review Redirected to a Court Born from the Amendment

The new court owes its existence to the amendment. This raises unprecedented conflict of interest: A creature of the amendment cannot be judge of the amendment's validity. This violates every principle of natural justice and judicial independence.

7. Basic Structure Theory (BST)

The Basic Structure Theory (BST) limits the amending power of the legislature by holding that certain fundamental features of a constitution cannot be altered, repealed or destroyed even through a formal constitutional amendment. This doctrine acts as a safeguard against majoritarian excess and preserves the core identity of the constitutional order. Although developed in India, the doctrine has influenced constitutional thought across south Asia and is frequently referenced in comparative constitutional jurisprudence, including Pakistan⁹. Its foundation lies in ensuring that constitutional amendments do not convert the constitutional into something it was never intended to be.

7.1 Kesavananda Bharati v. State of Kerala (1973)

The Kesavananda Bharati case is the landmark decision in which the Supreme Court of India articulated the Basic Structure doctrine. The court held, by a 13-judge bench that:

- 1) Parliament has wide powers to amend the Constitution under Article 368.
- 2) However, Parliament cannot alter the "basic structure" of the Constitution.

Key principles recognized as part of basic structure include:

- 1) Supremacy of the Constitution
- 2) Republican and democratic form of government
- 3) Secularism
- 4) Separation of powers
- 5) Judicial review
- 6) Federalism Rule of law

The judgement represents a balance between constitutional flexibility and stability. It prevents abuse of amendment power and ensures that constitutional transformation remain within the framework of the constitutional identity.

7.2 Dicey's Theory of Constitutionalism and Its Relevance

A.V. Dicey's constitutional theory, especially his exposition on Parliamentary sovereignty and the Rule of Law, provides important intellectual foundations for understanding the critiquing the Basic Structure Doctrine.

(a) Parliamentary Sovereignty

Dicey argued that Parliament is the supreme legal authority and can "make or unmake any law whatsoever." Under strict Diceyan theory, no constitutional limitation can restrict Parliament's amending power.

This view contrasts sharply with the Basic Structure doctrine, which imposes substantive limits on amendment powers. The doctrine effectively rejects absolute parliamentary sovereignty and replaces it with constitutional supremacy.

(b) Rule of Law

Dicey's strongest contribution, consistent with the Basic Structure Doctrine, is the Rule of Law:

- 1) No person is above the law
- 2) All public power must be exercised legally
- 3) Rights cannot be infringed without legal authority

The rule of law is widely recognized as a core element of the basic structure in India and other jurisdictions. Here Dicey's ideas strengthen the rationale for limiting arbitrary constitution amendment.

7.3 Constitutional Amendment as a Deliberate and Responsible Process

Although the Kesavananda Bharati judgement and Dicey's theory stand in contrast, one imposing substantive limits on the amendment powers and the other affirming parliamentary supremacy, both ultimately underscore that constitutional amendment is a critical element of modern constitutional governance. Their divergence highlights a shared recognition that altering a constitution is not a routine legislative task. Any amendment must be approached with deliberation, clarity of purpose and constitutional responsibility. Both perspectives, in their own way, warn against hasty or slipshod alteration that may distort the constitution order. Together, they reinforce that constitutional evolution must remain principled, careful and structurally sound.

8. Rule of Law and the Problem of Lifelong Immunity

The 27th Amendment's introduction of lifelong immunity for specified office holders marks a profound break from constitutional commitment to the rule of law¹². The principles of, equity before law, supremacy of law and across the board accountability stands in direct conflict with such immunity that elevates individuals above legal scrutiny. Immunity of this nature violates constitutional guarantees under Articles 4, 8 10-A and 25 and contradicts Pakistan's human rights obligations under ICCPR, particularly Articles 14 and 26¹⁴. A constitutional order grounded in the rule of law cannot function where personal privilege is

insulated from judicial review and legal responsibility.

8.1 Changing Constitutional Structure of the Armed Forces

The 27th Amendment also alters the structural balance governing key offices within the armed forces shifting them from constitutional accountability toward entrenched personal protection. The extension of tenure of certain officer and the conferment of honorary titles disrupts the established seniority of officer, causing many to retire without due promotion and undermines the functioning and hierarchy with the intuition. Traditionally, military offices operate within a framework of hierarchical responsibility, civilian oversight and constitutional limitation. By introducing provisions that secure long-term or enhanced protections for certain positions, the amendment changes the character of these offices from public role subject to law to privileged positions immune from ordinary constitutional checks. Such structural transformations risk upsetting the equilibrium between civilian supremacy and military discipline, weakening the control mechanism for a constitutional democracy.

8.2 Lifetime Immunity Under the 27th Amendment

The provision of lifetime immunity to selected officeholders, especially those linked to security institutions, represents an unprecedented constitutional insulation. Lifetime immunity dismantles the principle of accountability by shielding individuals from legal inquiry for actions committed during or after tenure. It fosters a parallel legal order in which certain persons are permanently exempt from judicial scrutiny. This not only violates the rule of law but also undermines due process rights of aggrieved citizens, obstructs the administration of justice and erode public confidence in constitutional governance. No constitutional system committed to equality and accountability can legitimately coexist with lifetime legal immunity.

9. A System Without Effective Checks

Judicial review is the cornerstone of constitutional supremacy, ensuring that all state action confirms to the Constitution. The 27th Amendment, by reallocating and restricting this function, significantly weakens this safeguard. It limits citizens access to effective remedies, concentrates constitutional authority in a newly created institution and disregards the decades of Supreme Court jurisprudence. This sudden restructuring generates procedural uncertainty and destabilizes the balance between the legislature, executive and judiciary. Unlike nations such as Germany¹⁰ and Austria, which have developed constitutional courts through gradual evolution and careful institutional design. Pakistan's abrupt creation of a new apex court lacks these protective mechanisms. Consequently, the amendment risks eroding accountability, weakening the rule of law and creating a system without effective constitutional check.

10. Comparative Constitutional Lessons

A comparative examination of constitutional systems highlights the impact of design, political culture and institutional safeguards on stability and the rule of law.

10.1 German Model

Germany's Federal Constitutional Court succeeds due to meticulous design, broad political consensus and respect for federal structures. Judicial review operates within a carefully balanced framework, preventing power concentration and ensuring accountability¹⁰.

10.2 Indian Model

India maintains a single apex court for both appellate and constitutional matters, preserving institutional coherence and preventing fragmentation¹⁰. The approach emphasizes gradual evolution, strong precedent and broad public confidence in judicial independence¹.

10.3 Turkish and Egyptian Models

By contrast, constitutional courts in Turkey and Egypt have frequently been used for political engineering, serving to legitimize executive

overreach and marginalize opposition. The resulting systems suffer from instability, conflict and erosion of democratic norms¹⁰.

The 27th Amendment moves Pakistan closer to the Turkish-Egyptian model rather than the German or Indian experience. By creating a new apex court without gradual institutional evolution or broad political consensus, it risks undermining judicial independence, fragmenting constitutional adjudication and weakening the rule of law. This comparative lens demonstrates that constitutional amendments, particularly those affecting the apex judiciary, must be approached with deliberation and foresight, rather than rushed or politically expedient measures.

11. Flaws and Constitutional Defects in the Twenty-Seventh Amendment

The twenty-Seventh Constitutional Amendment introduces structural, procedural and institutional problems that fundamentally affect country's judicial framework. Instead of strengthening constitutional adjudication, it creates ambiguities, jurisdictional fragmentation and operation gaps that undermine judicial independence, access to justice and coherence of constitutional interpretation.

11.1 Ambiguity in the Scope of Article 175E (4) and its Impact on Pending Intra-Court Appeals

Article 175E (4) directs that "all petitions, and appeals or review application against the judgements rendered or passed under this Article" shall stand transferred to the Federal Constitutional Court. the use of the phrase "under this Article" is critical. It confines the transfer mechanism exclusively to cases arising from Article 175E itself. As a result, intra court appeals earlier pending before the Supreme Court against the judgement or order passed under the now-omitted Article 184(3) technically fall outside this phraseology.

Since such appeals were not instituted "under this Article," the provision does not expressly capture them, creating an interpretive vacuum about their future forum and procedure.

11.2 Legislative Haste and Unresolved Procedural Consequences

The 27th Amendment, enacted with unusual speed, failed to address transitional scenarios involving constitutional jurisdiction previously exercised under Article 199 and 184(3). Because Article 175E (4) does not mention appeals against orders issued by the Supreme Court, nor does it explicitly extend its transfer mechanism. In this way the 27th Amendment creates operation uncertainty. This omission leaves courts, lawyers and litigant without a clear statutory pathway for handling pending intra-court appeals. The resulting ambiguity exposes a structural flaw.

11.3 No Mechanism for Handling Time-Barred Petitions

The amendment creates the Federal constitutional Court at once but does not provide any transition framework for cases that become time barred during the period when the Supreme Court refuses to receive the petitions but the FCC is not still functional. Its offices, registries or provincial branches are not established, rules and Structures are not defined. This omission creates: denial of access to justice, violation of fundamental rights and uncertainty for litigants whose limitation periods expire due to State's inaction.

11.4 Conflict-Creating Hierarchy of Precedent

The amendment introduces an unprecedented and internally inconsistent rule of precedent: decision of Federal Constitutional Court is made binding on all courts including the Supreme Court, while decision of the Supreme Court bind all courts except the Federal Constitutional Court. this structure is fundamentally incompatible with settled principles of interpretation and the doctrinal continuity developed over seventy-eight years by the Supreme Court. it effectively subordinates the Supreme Court in matters of constitutional law and fractures the apex authority that has historically provide uniformity, stability and coherence to jurisprudence. More critically, the amendment provides no mechanism to resolve the conflicting interpretations. In such scenario, lower court and High Courts are left without

guidance on which court to follow, creating constitutional chaos rather than clarity.

11.5 Transfer of High Court Judges as a Threat of Judicial Independence

The amended Article 200 empowers the President, on the recommendation of the judicial commission of Pakistan, to transfer a High Court judge from one High Court to another without the judge's consent and further directs that refusal to accept such a transfer will trigger proceedings under Article 209 within thirty days. This framework fundamentally undermines judicial independence. The power of compulsory transfer creates direct tool of pressure, as judge may fear reassignment to distant or less desirable postings if their judgements displease the executive or other influential actors.

11.6. The Human Cost

As a consequence of 26th and 27th Amendments, ordinary citizens loss immediate remedies. For ordinary people, these amendments mean:

- 1) Delayed access to justice
- 2) Impairing public trust
- 3) Increased procedural barriers
- 4) Concentration of constitutional litigation in Islamabad
- 5) Losses of High Court protection against unlawful detention, abuse of power and administrative justice

12. Constitutionally Morality and Democratic Ethics

Constitutional amendments altering state structure require consensus, transparency and public participation. The hurried passage of the 27th amendment violates:

- 1) Parliamentary Ethics
- 2) Constitutional morality
- 3) Participatory democracy
- 4) Institutional trust

A constitution cannot survive repeated structural changes without deliberation.

13. The Constitution Dilemma

To challenge the 27th Amendment, a litigant must approach the Federal Constitutional Court. But that Court:

- 1) Does not exist without the 27th Amendment
- 2) Is constituted by the amendment
- 3) Owes its authority to the amendment
- 4) Cannot logically examine the legal validity of its own birth

This creates a constitutional loop, effectively insulating the amendment from judicial Scrutiny. No democratic system allows a constitution amendment to create an institution that becomes the sole arbiter of challenges against itself. This violates:

- 1) Natural justice
- 2) Constitutional supremacy
- 3) Access to justice
- 4) Rule of law
- 5) The basic structure of the Constitution

This is the strongest argument for the amendment's invalidation.

14. Conclusion

The Twenty-Seventh amendment is not an ordinary constitutional reform. It is a structural upheaval that:

- 1) Weakens the Supreme Court
- 2) Disempower the High Courts
- 3) Diminishes judicial independence
- 4) Grants unjustifiable immunities
- 5) Dismantles Article 184
- 6) Creates a self-protecting Federal Constitution Court
- 7) Violates constitutional identity
- 8) Ignores democratic process

A Constitution can only survive if protected from internal distortion. Pakistan requires strengthening judicial institutions not dividing or weaken them. The 27th Amendment must be reconsidered through democratic debate and, if necessary, struck down through constitutional adjudication. Guarding the Constitution is not a political choice, it is a connotational duty

OSCOLA Reference List

Cases

1. Kesavananda Bharati v State of Kerala (1973) 4 SCC 225 (India)
2. Al-Jehad Trust v Federation of Pakistan PLD 1996 SC 324.

3. Sindh High Court Bar Association v Federation of Pakistan PLD 2009 SC 879.
4. Supreme Court Bar Association v Federation of Pakistan PLD 2010 SC 265.
5. Federation of Pakistan v Daud Khan PLD 2021 SC 769.
6. Benazir Bhutto v Federation of Pakistan PLD 1988 SC 416.

Books

7. AV Dicey, Introduction to the Study of the Law of the Constitution (Macmillan 1885).
8. HR Khanna, Making of India's Constitution (Eastern Book Company 1981).
9. Walter Murphy, Constitutional Democracy: Creating and Maintaining a Just Political Order (Johns Hopkins University Press 2007).

Articles

10. Yaniv Roznai, 'Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendments' (2017) 15 ICON 781.
11. Tom Ginsburg, 'Judicial Review in Democracies' (2003) 12 Annual Review of Political Science 187.

International Instruments

12. International Covenant on Civil and Political Rights (ICCPR), Articles 14 and 26.