Federal Constitutional Court of Pakistan: Prospects and Lessons from Indonesia

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Abstract

This study aims to examine the institutional design of the newly established Constitutional Court of Pakistan under the 27th Constitutional Amendment to the 1973 Constitution through a comparative analysis with the Constitutional Court of Indonesia, focusing on judicial independence, accountability, and the protection of constitutional rights. The contribution of this research lies in providing a comparative constitutional law perspective on the compatibility of Pakistan's new constitutional adjudication framework while identifying institutional lessons from the Indonesian model. This study employs normative legal research using descriptive and prescriptive approaches. The findings show that establishing a specialized Constitutional Court can strengthen constitutionalism, democracy, and the protection of fundamental rights. However, several provisions introduced by the 27th Constitutional Amendment raise concerns regarding judicial independence, accountability, and the right to a fair trial. The comparative analysis indicates that the Indonesian Constitutional Court provides a more balanced framework for safeguarding judicial autonomy while maintaining institutional accountability through constitutional mechanisms. This study concludes that, although the establishment of the Constitutional Court represents a significant constitutional development in Pakistan, certain aspects of its institutional arrangement remain inconsistent with international human rights obligations and universally recognized standards of judicial independence. Therefore, the amendment should be subject to constitutional review and reform to ensure conformity with Pakistan's international commitments. It is recommended that the Constitutional Court adopt a rights-based interpretative approach grounded in the International Bill of Rights and strengthen the constitutional principles of equality and non-discrimination as fundamental norms guiding constitutional adjudication and the protection of human rights.

Keywords: *Constitutional Amendment; Constitutional Supremacy; Judicial Review; Sharia; Specialised Constitutional Court*

Introduction

The Islamic Republic of Pakistan (hereinafter, Pakistan) is an independent South Asian state with a long history of both the rule of and the "rule of the military" since independence on 14 August 1947. Pakistan started as a secular state with a Westminster-style constitution stemming from its British colonial background. Although it was widely anticipated that Pakistan would quickly replace this transitory arrangement with an autochthonous constitution, it was another issue entirely to infuse this with the Islamic ethos that contributed to the country's justification for breaking away from India. The country's first two constitutions, the 1956 and 1962 Constitutions, were repealed.[1] There has been a constitutional migration of constitutional provisions protecting religious freedom ("subject to public order") to Pakistan through deliberate constitutional borrowing.[2] The state has been oscillating between two constitutional models: one, the "viceregal model" supported by bureaucrats and direct military rule premised on the British colonial model; and two, a weaker parliamentary model supported by civilian politicians and initially, by the state's Constituent Assembly.[3]

So, Pakistan's legal system is a hybrid of English common law influenced by shariah and codified statutes, forming a mixture of secular and religious norms. It is a federal state with a parliamentary system.[4] It recognises and upholds the separation of powers comprising the executive, the legislature and the judiciary. This helps to establish a government under the law. The principle, which resonates as

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[1] Howard Brasted, Imran Ahmed, and Saira Bano Orakzai, "Whither Pakistan: The Ambivalence of Constitutional Road Mapping?," in *Governance and Political Adaptation in Fragile States* (Cham: Springer International Publishing, 2019), 167–94, https://doi.org/10.1007/978-3-319-90749-9_7.
[2] Matthew J. Nelson, "Constitutional Migration and the Meaning of Religious Freedom: From Ireland and India to the Islamic Republic of Pakistan," *The Journal of Asian Studies* 79, no. 1 (February 2020): 129–54, https://doi.org/10.1017/S0021911819000615.
[3] Sheer Abbas, Ghufran Ahmed, and Raza ul Mustafa, "Development of Constitutionalism in Pakistan: An Appraisal," *Global Legal Studies Review* VII, no. I (March 2022): 125–35, https://doi.org/10.31703/glsr.2022(VII-I).16.
[4] Seema Gul, Riaz Ahmad, and Dr. Sami Ur Rahman, "Constitutional Dualities: Reconciling Islamic Normativity with Common Law Principles in Hybrid Legal Systems," *Indus Journal of Social Sciences* 3, no. 2 (May 2025): 674–93, https://doi.org/10.59075/ijss.v3i2.1501.

'constitutionalism', is an important concept that transformed the perspective of Pakistanis on governance.[5] Paradoxically, over the years, adherence to the Constitution's values has diminished, prompting re-evaluation.[6]

The 27th amendment to the Constitution of Pakistan ushers in institutional reform that creates the new Federal Constitutional Court with the mandate "to interpret the Constitution with clarity, independence and fidelity; to safeguard the fundamental rights guaranteed to the people; and to ensure that the constitutional order remains a source of stability, justice and balance for all institutions of the state."[7] This is an aftermath of what scholars argue to be a fragile constitutional system of the country caused by military interventions, which sought to retain high authoritarian prerogative,[8] and a balance of power between non-elected actors and civil institutions.[9] It is worth noting that this latest amendment covers many issues, including curtailing the military's power and the Supreme Court's original jurisdiction in matters of constitutional interpretation. However, this study is concerned only with the introduction of the Constitutional Court in Sections 175(1) and 175A of the 1973 Constitution of Pakistan, including the court's establishment and the appointment of judges to it, respectively.[10]

Pakistan's constitutional origins unfolded amid imperial dismemberment, as it inherited the Government of India Act, 1935. The Objectives Resolution (1949),

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[5] Amber Javaid and Ammara Tariq Cheema, "Future of Governance in Pakistan: Issues and Challenges," *Journal of Political Stability Archive* 3, no. 4 (December 2025): 851–59, https://doi.org/10.63468/jpsa.3.4.51.

[6] Ali Bhatti, "The Legal Doctrine of Separation of Power in the Constitution," *International Journal of Law and Policy* 4, no. 1 (January 2026): 35–54, https://doi.org/10.59022/ijlp.467.

[7] Muhammad Saqlain Haider, Shahadat Ali, and Zafar Muhammad Khan, "27th Amendment in the Constitution of Pakistan and Its Effects," *The Critical Review of Social Sciences Studies* 4, no. 1 (March 2026): 5045–48, https://doi.org/10.59075/5jyjj175.

[8] Aqil Shah, "Constraining Consolidation: Military Politics and Democracy in Pakistan (2007–2013)," *Democratization* 21, no. 6 (September 2014): 1007–33, https://doi.org/10.1080/13510347.2013.781586.

[9] Imran Ahmed, "The Struggle for Pakistan: A Muslim Homeland and Global Politics, by Ayesha Jalal," *Asian Studies Review* 42, no. 4 (October 2018): 727–28, https://doi.org/10.1080/10357823.2018.1524259.

[10] Ousu Mendy and Gregorius Sri Nurhartanto, "Federal Constitutional Court of Pakistan: Prospects and Lessons From Indonesia's Constitutional Court," 2026, https://doi.org/10.2139/ssrn.6481940.

tabled by Liaquat Ali Khan, pledged Islamic democracy and provided for the protection of minorities, but its enforcement remained only an aspiration due to bureaucratic delays. After nine years of discussion, the 1956 Constitution, adopted on March 23, provided a federal-parliamentary structure with 234 articles, including a bicameral legislature, provincial autonomy, and enforceable fundamental rights.[11]

Amidst this quest for sovereignty is the notion of judicial independence. Pakistan's reliance on external jurisprudence and the 27th constitutional amendment, which creates a new constitutional court, is quite normative, especially in Asia. The question is: will this court bring lasting constitutional legitimacy as a core value of Pakistan's governance system, or will it wither over time? Through a comparative institutional study of its sister court in Indonesia – the Constitutional Court of Indonesia – this research establishes a comparative perspective between the two constitutions and identifies a "buffer system" that can help the Constitutional Court of Pakistan navigate the intricate nature of politics in a constitutional democracy. As articulated elsewhere in *"The judiciary in governance: understanding the juridical nature and function of the Constitutional Court of Indonesi*a", the notion of creating a constitutional court was one of the 20th century's greatest contributions to modern political and legal theory.

A previous study showed that the 1973 Constitution has challenges between the federation, provinces, and state institutions.[12] In spite of this, recent research shows that in many countries, constitutional amendments are frequently used as tools to justify the ruling regime's harsh practices. As a result, altering the constitution is now to undermine and destroy its fundamental principles rather than

[11] Humayun Akram, Khizar Hayat, and Wajid Ali, "The Interplay of Islamic Ideology and Political Authority in Pakistan's Constitutional Framework (1947-1988)," *Journal of Political Stability Archive* 3, no. 2 (April 2025): 368–78, https://doi.org/10.63468/jpsa.3.2.21.

[12] Fazail Asrar Ahmed, Mehwish Asma, and Taabeer, "Legal Implications of Pakistan's 26th Constitutional Amendment: A Critical Analysis," *Journal for Social Science Archives* 2, no. 2 (December 2024): 351–68, https://doi.org/10.59075/jssa.v2i2.66.

to build or improve it.[13] In a similar study, Anwar and Noor[14] looked at the judicial integrity of courts where judicial decisions often align with political interests instead of constitutional or human rights values. Melissa identified that corruption is one of the challenges faced by specialized courts in fighting for fairness and justice.[15] In their study on the role of the Constitutional Court in Indonesia, the authors expatriated on the court as a main pillar in maintaining constitutional supremacy and the rule of law in general.[16] Based on this background, the novelty of this research lies in comparing the new court of Pakistan with the Constitutional Court of Indonesia to assess the former's framework for judicial independence and accountability. This helps determine the new court's weaknesses regarding its independence, accountability, and protection of fundamental human rights.

Method

This study applies both historical.[17] and normative legal research[18] to examine sufficient literature on the Constitutional Court of Indonesia, Pakistan's constitutional jurisprudence, the effects of military interventions in Pakistan and how constitutional supremacy can be sustained through its newly established court. A descriptive-analytical method is used to analyze Pakistan's constitutional model and to compare it with Indonesia's Constitutional Court, including its strengths and

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[13] Arifin Tumuhulawa et al., "Judicial Review of Constitutional Amendments: Comparative Experiences and Their Relevance to Indonesia," *Jambe Law Journal* 8, no. 2 (December 2025): 611–46, https://doi.org/10.22437/hrajxb07.

[14] Maulana Anwar and Afif Noor, "Political Jurisprudence in Action: How Political Power Shapes Legal Outcomes in Southeast Asia," *Journal of Legal, Political, and Humanistic Inquiry* 1, no. 1 (September 2025): 1–12, https://doi.org/10.65310/a8t22t48.

[15] Melissa Crouch, "The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia," *Constitutional Review* 7, no. 1 (May 2021): 1, https://doi.org/10.31078/consrev711.

[16] Siti Fatia Nazela, "The Role of the Constitutional Court As A Guardian of the Balance of Power Between State Institutions," *Journal of Law, Politic and Humanities* 6, no. 3 (April 2026): 2080–90, https://doi.org/10.38035/jlph.v6i3.3166.

[17] Philip Langbroek et al., "Editorial Methodology of Legal Research: Challenges and Opportunities," *Utrecht Law Review* 13, no. 3 (December 2017): 1, https://doi.org/10.18352/ulr.411.

[18] Theresia Anita Christiani, "Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object," *Procedia - Social and Behavioral Sciences* 219 (May 2016): 201–7, https://doi.org/10.1016/j.sbspro.2016.05.006.

weaknesses. Furthermore, the prospect of this new court is explored. Here, institutional independence and interdependence are examined to give a perspective on the "new dawn of an era" for Pakistan's constitutional democracy through comparative scholarship. The purpose of the comparison is to establish the legal and political relationships and differences between the two states. We used this to make a finding on the prospects of the new court and the challenges it might face.

Discussion

Pakistan's Constitutional Democracy: History and Contexts

Before the British rule in India, Muslims had immigrated to the country from Western and Central Asia, and many of the native Hindustanis were converted to Islam. For over a millennium, this society thrived and governed India. These Muslims stood firmly against the British invasion of India as early as the mid-eighteenth century.[19] They withstood the British for nearly a century, culminating in a significant battle in 1857.[20] Muslims fought these battles to free India from British rule rather than to create a Muslim state there. Muslims were unsuccessful in their endeavor, though, and the British started enacting political and legal changes in India in the aftermath of the war.[21] After Pakistan's separation from India, it became independent without a constitution at the time. *The Government of India Act 1935* was modified to serve as Pakistan's ad hoc constitution, creating a centralized government until a new constitution was promulgated in 1956. Pakistan's first constituent assembly was formed under the India 1947 Act. The mandate of the

[19] Abdullah Ahsan, "Pakistan since Independence: An Historical Analysis," *The Muslim World* 93, no. 3–4 (July 2003): 351–71, https://doi.org/10.1111/1478-1913.00027.
[20] Mohsin Ali, "Indian Muslim Minorities and the 1857 Rebellion," *American Journal of Islam and Society* 35, no. 2 (December 2021): 81–84, https://doi.org/10.35632/ajis.v35i2.832.
[21] Sabbaq Ahmed, "Ideology and Muslim Militancy in India: Selected Case Studies of the 1857 Indian Rebellion" (Open Access Te Herenga Waka-Victoria University of Wellington, 2015), https://doi.org/10.26686/wgtn.17012351.

Assembly was to make a constitution for the country due to the lack of a legislature at the time.[22]

The court in a constitutional regime aims to exercise this control over executive power by defending the public's constitutional rights. A written constitution's entrenchment of rights legally prevents the state and private citizens from violating these rights. The goal of the philosophy of constitutionalism is to elevate the constitution above regular laws. The Constitution serves as a check on even the constitutionality of legislation. Pakistan's constitution-making process was turbulent, but after nine years, the nation was able to create its first constitution. The first constitution was designed to uphold constitutionalism by putting a legal restraint on government. When the 1956 Constitution was put into effect, the nation had high expectations for the skilled administrators appointed to high positions. It was believed that this would reduce the power of professional politicians and, as a result, address the actual needs of the populace by combating corruption, implementing agrarian reforms, and fostering economic growth.[23] Unfortunately, this did not see the light of day due to military interventions that have taken almost half of the country's independence.

The post-independence history of the country is dotted with episodes sandwiched between military and civilian rule. In the first decade following independence, the military's political rise became a defining characteristic of Pakistani civilian politics (1958, 1977 and 1999). Therefore, that pivotal moment "during which the state institutional structure was cast into an enduring, even rigid, mould" must be taken into consideration in any understanding of the military's frequent and unrelenting intrusions.[24] Thus, in an attempt to preserve their control over the political system, some politicians benefited strategically from the

[22] Nasir Abbas, "Constitutional Crisis of Pakistan: A Historical Study," *Pakistan Journal of International Affairs* 6, no. 2 (June 2023), https://doi.org/10.52337/pjia.v6i2.842.
[23] Abbas, Ahmed, and Mustafa, "Development of Constitutionalism in Pakistan: An Appraisal."
[24] Aqil Shah, "Waging War, Building a Nation," in *The Army and Democracy* (Harvard University Press, 2014), 31–71, https://doi.org/10.4159/harvard.9780674419766.c4.

dissolution of the first constituent assembly and the creation and content of the 1956 Constitution. Elections were a problem, but the timing and content of the constitutional amendment had followed a strict political logic. Even with the support of other political players, elites, and institutions, the 1956 Constitution could only provide short-term political legitimacy if a return to the polls was promised.[25] The dictatorship had attempted to avoid electoral politics by promoting the idea of a "controlled democracy," but failed.

Nevertheless, despite controversy, the new Constitution did provide the regime some leeway (albeit it was unable to conceal authoritarianism). Elections were supposed to strengthen the Constitution's legitimacy, but they never took place. Ultimately, in October 1958, President Iskander Mirza proclaimed a state of emergency, dissolved the national and provincial parliaments, and revoked the 1956 Constitution.[26] The application of martial law[27] prevented the threat posed by elections to the political order at the time by "regionalists and Islamists". Like the 1956 Constitution, its predecessor, the 1962 Constitution,[28] marred by, inter alia, political instability and violations of fundamental human rights, failed to meet the expectations of the people and therefore also had a short lifespan.[29]

These governance issues spurred a series of constitutional amendments to the current 1973 Constitution. This constitution is one of the most amended constitutions in the world after its recent twenty-seven amendments in fifty-two years, compared to the United States Constitution, with the same number of

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[25] Imran Ahmed, "'Strategic Constitutions': Constitutional Change and Politics in Pakistan," *South Asia: Journal of South Asian Studies* 40, no. 3 (July 2017): 481–99, https://doi.org/10.1080/00856401.2017.1332712.
[26] Mendy and Nurhartanto, "Federal Constitutional Court of Pakistan: Prospects and Lessons From Indonesia's Constitutional Court."
[27] David Dyzenhaus, "The Puzzle Of Martial Law," *University of Toronto Law Journal* 59, no. 1 (January 2009): 1–64, https://doi.org/10.3138/utlj.59.1.1.
[28] Katharine Adeney and Filippo Boni, "Federalism and Regime Change: De/Centralization in Pakistan – 1956–2020," *Regional & Federal Studies* 33, no. 5 (October 2023): 725–53, https://doi.org/10.1080/13597566.2022.2126456.
[29] Muwaffiq Jufri et al., "Non-Penal Conflict Resolution and Islamic Legal Culture: Evidence from Sunni–Shia in Indonesia," *Unnes Law Journal* 12, no. 1 (May 15, 2026): 41–82, https://doi.org/10.15294/ulj.v12i1.48337.

amendments in 237 years. The current constitution is comparatively the most successful among the three, but has been suspended under martial law.[30] This took place in 1977 and was reintroduced in 1985 with the 8th amendment and suspended for the second and third time in 1999 and 2007 until its restoration the same year after a six-week suspension. But have all these amendments secured social cohesion, the rule of law, constitutional supremacy, and human rights protection in practice? Or are they designed to protect the elites and politicians? These are questions that bother constitutional amendments in a society that is lethargic about the protection of its citizens and their rights. There is never satisfaction with the outcomes of the first twenty-six amendments, and scholars had already speculated on the 27th amendment before it happened.[31] A recurring conflict between democratic goals and authoritarian legacies, influenced by political dynamics and legal uncertainties, is reflected in the historical development of Pakistan's constitutional abrogation and amendments.

The 1973 constitutional amendments alternate between strengthening authoritarianism (such as Zia's 8th Amendment) and empowering democracy (such as the federalism of the 18th Amendment).[32] For example, a two-thirds legislative majority is required for modifications under Articles 238–239, but this process has often been undermined by military regimes and elite discussions. This complicates the balance between parliamentary sovereignty and the judiciary's constitutional supremacy through its application of India's Basic Structure Doctrine, as seen in

[30] Muhaddisa Zehra et al., "The Role of the Judiciary in Constitutional Interpretation in Pakistan," *Inverge Journal of Social Sciences* 4, no. 3 (July 2025): 20–35, https://doi.org/10.63544/ijss.v4i3.140.
[31] Mehreen Yaseen et al., "The 27th Amendment and Its Impact on the Strength of Democracy and Federalism in Pakistan," *Indus Journal of Social Sciences* 3, no. 4 (October 2025): 301–10, https://doi.org/10.59075/ijss.v3i4.1985.
[32] Jahanzeb Waseh and Munazza Mubarak, "The Amendment Process of the Constitution of Pakistan: Political Dynamics & Legal Implications," *Advance Social Science Archive Journal* 3, no. 2 (April 2025): 965–73, https://doi.org/10.55966/assaj.2025.3.2.017.

decisions such as the *NRO case*[33] and the *District Bar Association case*.[34] With the introduction of the Constitutional Court to determine the constitutionality of institutions, and with changes to the military-civilian balance, among others, will there be a revamp of Pakistan's constitutional order?

A New Dawn for Pakistan? Comparing its Constitutional Court with Indonesia's

The structural and functional systems of the two constitutional courts are different, and these influence the Indonesian court and what this new Pakistani court can deliver. These differences affect the substantive roles of these courts. The Indonesian court is greatly influenced by a civil law system with its Pancasila democracy,[35] While Pakistan embraces a common law system with a lot of military interventions in its governance system, these form the basis for their differences analysed in the table below.

Table 1. The two specialised courts, their structures and functions

Indonesia's Specialised Constitutional Court[36]	Pakistan's Specialised Constitutional Court[37]
It comprises nine justices. The chief justice is part of the nine justices and is elected internally by the justices themselves. They now serve until they	It comprises seven justices: the Chief Justice and an equal number of justices from each of the federated provinces. They have a fixed term of three years.

[33]*Sindh High Court Bar Association v. Federation of Pakistan (2009),* which led to the striking down of the National Reconciliation Ordinance (NRO) of 2007. The NRO had granted immunity to politicians and bureaucrats from corruption and other charges. The Supreme Court's decision was a major instance of judicial independence and played a role in the restoration of deposed judges, confirming the judiciary's role in upholding the constitutional order and constraining executive authority.

[34]*District Bar Association, Rawalpindi v. Federation of Pakistan (2015).* In this case, the court considered the constitutionality of the 18th and 21st constitutional amendments, which, among other things, established military courts for the trial of certain terrorism suspects. The ruling further explored the balance between parliamentary sovereignty and constitutional supremacy, with the Supreme Court asserting that it could strike down constitutional amendments if they violate the "salient features" or "basic structure" of the Constitution.

[35] Imam Asmarudin et al., "Initiating the Reform of Principle Norms in the Formation of Laws in Indonesia," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 2 (August 2024): 208–26, https://doi.org/10.29303/ius.v12i2.1390.

[36] Saldi Isra and Pan Mohamad Faiz, "The Indonesian Constitutional Court: An Overview," in *Courts and Diversity* (Brill | Nijhoff, 2024), 55–94, https://doi.org/10.1163/9789004691698_004.

[37] Zohaib Jamali et al., "The Twenty-Sixth Constitutional Amendment and the Erosion of Judicial Independence in Pakistan: A Critical Analysis," *Social Science Review Archives* 3, no. 4 (October 2025): 630–38, https://doi.org/10.70670/sra.v3i4.1152.

Indonesia's Specialised Constitutional Court[36]	Pakistan's Specialised Constitutional Court[37]
reach the mandatory retirement age of 70, provided their tenure does not exceed 15 years.	
The president, legislature and judiciary each nominate three justices to the court – a demonstration of shared responsibility for justice.	The appointment and removal process heavily favours the political establishment. Justices are nominated by a parliamentary committee. This undermines the independence of the judiciary.
It has a clear mandate to conduct judicial review of laws, resolve disputes between state institutions, make determinations on the dissolution of political parties, and preside over disputes on regional and national elections.	The powers to validate and review bans on political parties imposed by the central government – under Article 17, which guarantees the right to freedom of association – have been transferred from the Supreme Court to the Constitutional Court.
It is a coequal apex court with the Supreme Court (Mahkamah Agung) but deals exclusively with constitutional questions.	It holds supremacy over all courts in Pakistan, including the Supreme Court, and decides on issues of law and constitutional interpretation.

***Source**: Compiled by the author based on several references*

Since the establishment of Austria's Constitutional Court in the early 20th century as the first specialised constitutional court, its influence on politics in many democracies cannot be ignored. However, how they manage to do so is puzzling: judges have few resources at their disposal and no direct enforcement authority, so they must rely on lawmakers and executives to respect judicial authority and abide by their rulings. In democratic societies all across the world, courts that exercise the power of constitutional review – that is, the authority to overturn legislative and executive actions because they violate constitutional norms – play a significant and influential role.[38] Constitutional courts have a big impact on politics. They define people's personal liberties, control how political competition is financed, resolve

[38] Georg Vanberg, "Constitutional Courts in Comparative Perspective: A Theoretical Assessment," *Annual Review of Political Science* 18, no. 1 (May 2015): 167–85, https://doi.org/10.1146/annurev-polisci-040113-161150.

election disputes, and even remove elected heads of state from office.[39] But are strong constitutional courts always good for governance?

In this section, we assess the impact of a constitutional court by examining the Constitutional Court of Indonesia, particularly during its first ten years, from 2003 to 2013. We will delve further into the influence of Indonesia's first chief justice and suggest lessons to Pakistan's new court. Theories of judicial authority will be explored to assess their applicability to the creation and maintenance of constitutional supremacy in a fragile democracy.

Theories of Judicial Authority and Their Applicability to Pakistan's New Court

1) Legal Formalism

For legal formalism, judges must make decisions based solely on the facts and established legal standards, without regard to their personal or political beliefs. This theory restricts judicial discretion to uphold the separation of powers by requiring a constitutional court to strictly conform to the original public understanding of the constitution. It holds judges accountable to the laws and regulations of the courts in cases without allowing external influences like personal beliefs. Legal formalism is both a normative and descriptive theory in that it provides how judges decide cases and how they ought to decide cases. So, it is a two-pronged theory. There are already precedents on challenges in adherence to this theory due to a hybrid legal system, as it is in Pakistan. Legal formalism is applied in constitutional interpretation through textualism and originalism.[40] Here, in interpreting the Constitution, the original intent or the mischief the designers of the Constitution sought to address must be adhered to. The duty is to declare the constitution as enacted.[41] While

[39] Wiwit Pratiwi et al., "Implications of Constitutional Defiance of Constitutional Court Decisions by Lawmakers," *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 3 (December 2025): 734–59, https://doi.org/10.29303/ius.v13i3.1837.
[40] Ousu Mendy, "The Gambia at Crossroads: Presidential Pardon a Constitutional Fiat," *International Journal of Humanities, Management and Social Science (IJ-HuMaSS)* 7, no. 1 (June 2024): 23–31, https://doi.org/10.36079/lamintang.ij-humass-0701.661.
[41] Jeffrey Goldsworthy, "Originalism in Constitutional Interpretation," *Federal Law Review* 25, no. 1 (March 1997): 1–50, https://doi.org/10.22145/flr.25.1.1.

originalism can be messy in interpretation, a court must be able to foresee the result of its approach to interpretation.[42] This is the pragmatic aspect of the theory.

Without prejudice to the generality of originalism, states undergo social change; therefore, a constitution must be an evolving one to address new issues that emerge over time.[43] One of the peculiar features of constitutions around the world is that they lack text instructing future generations on how to interpret them, despite originalists basing their arguments on the nature of a written constitution.[44]

2) Judicial Review

Judicial review is a sine qua non for constitutional courts, and its strength is key to constitutional supremacy, especially in Indonesia and Pakistan, where there is strong judicial review that limits parliamentary intervention on the outcome of such processes. It is the fundamental process that allows a constitutional court to carry out its main function. As a crucial check and balance in a democracy, judicial review gives the court the power to assess and declare unconstitutional any legislation, executive actions, or lower court rulings. Courts ostensibly apply this institutional formality when they assess the activities of other governmental entities. This formalism entails seeing the relevant governmental organisation as essentially a formal black box to which certain legal powers and functions are assigned by the Constitution. In his seminal work, *Judicial Review in the Contemporary World,* published in the early 1970s, Mauro Cappelletti charted the global expansion of judicial review-centered constitutionalism, demonstrating the start of its relentless global expansion alongside and as a component of the post-

[42] Jeffrey Goldsworthy, "Constitutional Interpretation: Originalism," *Philosophy Compass* 4, no. 4 (July 2009): 682–702, https://doi.org/10.1111/j.1747-9991.2009.00207.x.
[43] Mitchell N. Berman, "Constitutional Interpretation: Non-originalism," *Philosophy Compass* 6, no. 6 (June 2011): 408–20, https://doi.org/10.1111/j.1747-9991.2011.00406.x.
[44] James Melton et al., "On the Interpretability of Law: Lessons from the Decoding of National Constitutions," *British Journal of Political Science* 43, no. 2 (April 2013): 399–423, https://doi.org/10.1017/S0007123412000361.

World War II expansion of democracy.[45] By shielding politicians from the repercussions of foolish actions, judicial review might worsen posturing. However, it can also deter posturing by warning citizens about unwarranted government action.[46] Furthermore, unless posturing is sufficiently likely, judges will respect elected leaders' decisions.

Higher courts in Pakistan are in charge of using the judicial review procedure to assess legislative and executive decisions. The 1973 Constitution's Article 199 gives Pakistan's High Courts the exclusive authority to determine whether acts taken by people or organisations connected to the operations of the federal, provincial, or municipal government inside their respective regions are lawful. In order to defend the fundamental rights guaranteed by the Constitution, the courts have the power to issue any necessary orders.[47] The Supreme Court of Pakistan was relevant to judicial review before the 27th Amendment because it carried out judicial review to ascertain if laws and government actions were constitutional.

However, an overabundance of judicial action may lead to conflicts with other governmental branches. All branches of government must demonstrate an unwavering commitment to the separation of powers and the independence of the judiciary in order to guarantee the proper operation of judicial review in Pakistan. Furthermore, it is crucial for citizens to keep their leaders responsible through intergovernmental coordination by asking questions if they have grievances or concerns about misconduct by the government. Pakistan will progressively construct more robust governance institutions if everyone fulfills their obligations and complies with established constitutional provisions and the laws in general.

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[45] Doreen Lustig and J H H Weiler, "Judicial Review in the Contemporary World—Retrospective and Prospective," *International Journal of Constitutional Law* 16, no. 2 (June 2018): 315–72, https://doi.org/10.1093/icon/moy057.

[46] justin Fox and Matthew C. Stephenson, "Judicial Review as a Response to Political Posturing," *American Political Science Review* 105, no. 2 (May 27, 2011): 397–414, https://doi.org/10.1017/S0003055411000116.

[47] Khurram Baig et al., "Analysis of Judicial Review: The Role of Higher Courts in Assessing Legislative and Executive Actions in the Context of Pakistan," *Bulletin of Business and Economics (BBE)* 12, no. 3 (September 2023): 888–94, https://doi.org/10.61506/01.00244.

The First Chief Justices: Constitutional Politics and Judicial Leadership

At the intersection of constitutional politics and judicial leadership are the chief justices of the constitutional courts and their fellow justices. Indonesia's Constitutional Court, founded in 2003, has subject-matter jurisdiction clearly stated in Article 24C of the Constitution.[48] It comprises nine judges, and each judge serves a five-year term and may be reappointed for a second term.[49] The authority to appoint the judges is shared among the executive (President), the National Parliament (DPR) and the Supreme Court (Mahkamah Agung) – with each responsible for selecting three judges. The Court has several constitutionally defined powers, such as constitutional review, which entails determining whether laws passed by Indonesia's parliament are constitutional; resolving legislative, presidential, and regional election disputes; resolving jurisdictional disputes between state institutions established under the Constitution; hearing government-brought motions for dissolution of political parties; and taking into consideration parliamentary accusations of presidential misconduct as a component of the impeachment procedure.

The role of a chief justice in shaping the constitutional jurisprudence of a state is as important as that of the parliament and the executive. When Indonesia established its Constitutional Court in 2003 through Law No. 24 of 2003, empowered by the fourth constitutional amendment, the appointment of a chief justice and other justices of the court began. Article 24C (5) of the Constitution provides the requirements for constitutional justice, including a good understanding of the Constitution and constitutionalism, unapproachable integrity, being a

[48] Dewi Sulastri and Abu Sanmas, "The Constitutional Court as a Positive Legislator: Implications of Decisions on the Principle of Checks and Balances in Indonesia," *LITIGASI* 26, no. 2 (October 2025), https://doi.org/10.23969/litigasi.v26i2.21999.

[49] Adithiya Diar and Beny Saputra, "Judicial Activism in Indonesia Constitutional Court: The Adjudication of Regional Election Disputes," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 25, no. 2 (December 2025): 37–57, https://doi.org/10.30631/alrisalah.v25i2.1920.

statesperson, and holding no public office at the time.[50] These are regulated in Articles 15, 16(1), and 17 of Law No. 24 of 2003. The recent amendment of this Act by Law No. 7 of 2020 provides in Article 15(1) that an appointment to the position of a justice of the Constitutional Court shall be guided by the above requirements.

Furthermore, Article 15(2) of this Act gives more detailed qualifications for the position. The judges must be Indonesian citizens and hold a doctoral degree based on a bachelor's degree in law. They must be pious and of impeccable character, with a minimum age of 55 years. Aside from these, they must be mentally and physically capable of carrying out their duties and obligations, and must never have been convicted or imprisoned based on a court's final decision. Also, they must not have been declared bankrupt based on a court decision and must have at least 15 years of work experience in the legal field, and/or, for prospective judges from the Supreme Court environment, currently serving as a high-level justice or as a Supreme Justice.

Looking at the biography of the first Chief Justice, Jimly Asshiddiqie, and his five-year tenure (2003–2008) as a founding Chief Justice of the court and a participant in the constitutional amendment debates in the aftermath of Suharto's authoritarian rule, the court played a crucial role in this transitioning phase.

1) Cases During the Tenure of Jimly Asshiddiqie

The rulings in Cases No. 011–017/PUU-I/2003 and 011–017/PUU-I/2003, decided by the Constitutional Court of Indonesia, are not anomalies in the context of other constitutional courts that have dealt with transitional justice issues; rather, they are in line with the conclusions and methods used by comparable courts. The Indonesian court conducted comparative analyses of case law from other post-conflict constitutional courts that were asked to rule on the constitutionality of laws

[50] Dinda Rambe, "The Absence of Constitutional Complaints in the Authority of the Constitutional Court Regarding the Protection of Public Benefit Rights in Indonesia," *Nusantara: Journal of Law Studies* 2, no. 2 (2023): 147–55, https://doi.org/https://doi.org/10.5281/zenodo.17388677.

and regulations about lustration and amnesties,[51] in addition to performing constitutional analysis and appropriately restricting standing.[52] Through comparable analysis, the dissent in Case No. 011–017/PUU-I/2003 gained authority. The constitutionality of Article 60(g) of the Election Law, which prohibited former Indonesian Communist Party members from seeking legislative office, was at issue in this case.[53] According to the general view, the law contained subtleties of political punishment directed against former Communist Party members and was solely motivated by political concerns.[54] The court ruled that Article 60(g) violated the Constitution's guarantees of human rights and had no binding legal force since it represented an unlawful denial of rights and discrimination based on political belief.

In contrast, the opposition contended that post-war Germany offered a similar situation with a different result. The dissenting justice claimed that various steps were taken to carry out de-Nazification at the start of the Federal Republic of Germany (1949–1953), including prohibiting former Nazi Party members from holding specific government positions, citing expert testimony given during hearings in the Indonesian case. The minority opinion contended that these limitations were gradually relaxed over time and ultimately lifted in 1956. Case No. 011–017/PUU-I/2003 served as another illustration of how constitutional courts could be called to handle matters that combine state security concerns with individual and political rights. According to Mietzner, the ruling in this case was of great symbolic significance and demonstrated the court's defence of individual

[51] Novendri Mohamad Nggilu et al., "Indonesia's Constitutional Identity: A Comparative Study of Islamic Constitutionalism," *De Jure: Jurnal Hukum Dan Syar'iah* 16, no. 2 (December 30, 2024): 480–500, https://doi.org/10.18860/j-fsh.v16i2.29851.
[52] Muwaffiq Jufri et al., "Standardisation of the Legislation as a Follow-Up to the Constitutional Court's Decision on Judicial Review of Omnibus Law," *Jurnal Konstitusi* 21, no. 3 (September 2024): 366–91, https://doi.org/10.31078/jk2132.
[53] Ousu Mendy and Ebrima Sarr, "The Judiciary in Governance: Understanding the Juridical Nature and Function of the Constitutional Court of Indonesia," *Journal of Indonesian Constitutional Law* 2, no. 1 (March 2025): 1–22, https://doi.org/10.71239/jicl.v2i1.45.
[54] Amiruddin Amiruddin and Rizki Ramadani, "Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court," *Substantive Justice International Journal of Law* 6, no. 1 (June 20, 2023): 56, https://doi.org/10.56087/substantivejustice.v6i1.230.

rights despite harsh criticism from the armed forces and the possibility of alienating sizeable portions of the populace who remained steadfastly opposed to the Communist Party.[55]

The Court examined the applicants' standing in Case No. 006/PUU-IV/2006 and rendered a thoughtful, nuanced decision stating that petitioners must show that (1) their rights are protected by the Constitution; (2) their rights have been impaired; (3) impingement on their rights is specific and actual, or at least potential; (4) there is a causal relationship between the alleged action and harm; and (5) the Court's action will remedy any ongoing harm. The court decided that people and organisations affected by the Truth and Reconciliation Law had standing to bring their petitions against the objections of two justices.

After carefully examining reparations plans in South Africa, Argentina, Colombia, and Timor-Leste, as well as provisions of the International Covenant on Civil and Political Rights, the Court concluded that the principles and objectives of the challenged law could not be carried out because the law failed to provide legal certainty concerning remedies for victims, both in the formulation and implementation of norms. In its ruling, the court recognised that this case encompassed both political and legal considerations, in line with other post-conflict constitutional courts' stances. Article 45 of the South Korean Constitutional Court Law states that if an entire statute cannot be enforced when one of its provisions is found to be unconstitutional, the entire statute may be ruled unconstitutional, provided the Court finds persuasive authority to declare the *Truth and Reconciliation Law* unconstitutional. The conclusion of this case has drawn criticism that it denied victims of human rights abuses a legal remedy.[56] Since Case No. 006/PUU-IV/2006 was determined, the Constitutional Court ordered the government to develop a new

[55] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (December 2010): 397–424, https://doi.org/10.1017/S1598240800003672.
[56] Ledja Burnazi Mitllari, "Legal Remedies for Victims of Corporate Human Rights Abuses: A Comparative Analysis," 2024, 691–99, https://doi.org/10.31410/ERAZ.2024.691.

law within two years and suggested alternative ways to resolve past human rights violations by legal or political means, but none of these acts have been carried out.

Finally, among contemporary constitutional bodies, the Indonesian Constitutional Court has cemented its standing. It has shown that it is capable of conducting thorough worldwide comparative analysis, citing cases from other constitutional and international courts to assist in forming its jurisprudence, rather than depending solely on its own rulings or those of the Supreme Court. In this regard, the Indonesian Court's readiness to examine constitutional matters from a global perspective puts it ahead of several other high courts.

A Prospect for the Constitutional Court of Pakistan: Balancing Religion and Constitutional Norms

What does the future hold for the new Constitutional Court of Pakistan? Will it survive religion and social vices that may arise? How about scandals and the compromise of justice? These are some of the questions that preoccupy critics as the establishment of a new government institution approaches. While these questions may be asked to assess the fundamentals that form the "staple diet" of a state institution, Pakistan's adherence to constitutions and constitutionalism should be understood through the lens of its post-independence history.

Since Pakistan's founding in 1947, the country's constitutionalism has undergone alternating periods of democratic and authoritarian governance. At the core of democratic governance is the concept of constitutionalism, which is defined as adherence to constitutional principles to limit governmental power and defend citizens' rights.[57] Another crucial point is that the contrast between modernity and tradition highlights Pakistan's distinct social formation. The former is characterized by a secular legal-institutional framework of authority that was adopted from British India. This mechanism aims to accommodate the latter's Islamic agenda through legal formalism, ideological symbolism, and, under their martial law, the cultivation

[57] Abbas, Ahmed, and Mustafa, "Development of Constitutionalism in Pakistan: An Appraisal."

of a divine source of legitimacy to counter the constitutional source of legitimacy in the form of mass mandate.[58] According to traditional constitutionalists, constitutions are tools meant to restrict the authority of the state. In Pakistan, this idea is seldom ever used. Rather, the state has been constituted by empowering the state first, and its citizens only indirectly.[59] The Constitution's Fundamental Rights section is the primary source of limits on authority, with protections for impartial tribunals and fair trials coming in second.[60]

Judges and lawmakers in Pakistan can directly benefit from the issues that have baffled political scientists and constitutional theorists on the democratic credentials of judicial review. The creation of a constitutional framework in which relations among the three branches of government do not threaten the stability or disintegration of the democratic system is a fundamental political issue facing Pakistan. This problem has a lengthy history. Legislative and judicial independence were stifled throughout periods of military rule in Pakistan due to the supremacy of the executive. Constitutional revision was frequently used by these authoritarian rulers as a pretext to subvert parliaments and exert control over the legal system.[61]

In this age of constitutionalism, there is a need for a renewed social contract to address Pakistan's constitutional dilemmas.[62] Such a contract must reconcile traditional values with modern governance imperatives, empower marginalized communities, and strengthen the rule of law. This must be at the center of the new

[58] Mohammad Waseem, "Islamic Constitutionalism in Pakistan," *Arab Law Quarterly* 38, no. 4 (June 2024): 446–65, https://doi.org/10.1163/15730255-bja10165.
[59] Paula R. Newberg, "Pakistan's Constitutionalism in an Age of Terror," *Asian Affairs: An American Review* 43, no. 1 (January 2016): 1–15, https://doi.org/10.1080/00927678.2016.1131083.
[60] Karem Aboelazm, "The Effects of Supreme Constitutional Court Decision of Unconstitutionality Legislative Omission: A Comparative Study," *Lex Scientia Law Review* 9, no. 2 (November 17, 2025): 1446–83, https://doi.org/10.15294/lslr.v9i2.8801.
[61] Imran Ahmed, "Review Essay: Designing Democracy: Judges, Judicial Review and Constitutionalism in Pakistan," *South Asia: Journal of South Asian Studies* 43, no. 2 (March 2020): 369–74, https://doi.org/10.1080/00856401.2020.1723042.
[62] Muhammad Dawood Pervez, "Establishing New Social Contract Across Territorial Boundaries of Pakistan Is the Need of Time," *SSRN Electronic Journal*, 2015, https://doi.org/10.2139/ssrn.2684755.

Constitutional Court's agenda. The Constitutional Court should be the “saviour” of Pakistan’s constitutionalism.

The role of the Constitutional Court in this system is crucial to the ideology of constitutionalism. To ensure that those in charge of state governance do not violate citizens' individual rights, an independent court system is required. Effective judicial review must be held as a crucial constitutional mechanism that gives the judiciary control over the other two branches of government. However, it would be an error to believe that constitutionalism grants the court unrestricted authority. The court must function within the ambit of its constitutional mandate by taking a leading role in matters of political significance.

Conclusion

The Constitutional Court of Pakistan can be viewed as a timely decision of the state. Yet, it must be acknowledged that the establishment of a state institution is not tantamount to solving the problem it is created to address. Activism must be the institution's mantra. Like its sister court in Indonesia, this new court must establish its independence and credibility by making landmark decisions that protect the Constitution. In a fragile democratic state, the new court must be effective and efficient in managing election cases. The existence of a constitutional court is an essential institution for bolstering democracy and safeguarding human rights. However, the establishment of this court is the crescendo of a concerted and sustained attack on the independence of the judiciary, the right to a fair trial, and the rule of law in Pakistan. The amendment violates international human rights law, particularly undermining the independence of the judiciary, the right to a fair trial, and justice and accountability.

Therefore, this court should endeavor to use the International Bill of Rights to strengthen its interpretation of issues that are germane to the constitutional rights of the people. This bill assumes a peremptory norm in international law when it attains universal application. Equality and the ban on discrimination are

fundamental constitutional principles that serve not only as the fundamental norm but also, more significantly, as the source of morality for the Constitution and Pakistani political, socioeconomic, and legal practices.

This indicates that the 27th constitutional amendment needs to be reviewed immediately in order to make sure that all of its contents fully conform with Pakistan's commitments and duties under international human rights law. The Pakistani government must immediately take all necessary steps to protect judges' independence, impartiality, and safety. This will ensure that judges can perform their duties without any unwarranted or inappropriate interference, restrictions, improper influences, pressures, or threats – direct or indirect – from any source or for any reason.

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