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Judicial Observations over the Doctrine of Unconstitutional Constitutional Amendment in Pakistan: A Critical Appraisal

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Abstract *The legal fraternity and some political parties around the country challenged the twenty-first constitutional amendment, enacted by the Parliament of Pakistan. The petitioners contended that the Legislature amended the basic features of the Pakistan Constitution beyond its scope of amending power and liable to be declared unconstitutional. However, some of the judges of the apex Court of Pakistan adopted the former judicial approach. They ruled that the apex court had no authority to annul any amendment when it became a formal part of 1973's Constitution. The apex court further stated that the impugned amendment might be taken under consideration if it was found that the required constitutional procedure for amendment did not comply with it. This research aims to critically analyze observations of the apex court about examining the constitutional amendment on the yardstick of repugnancy with the basic features of the Constitution of Pakistan. For achieving the proposed objective, this study adopts a doctrinal research method. It carries out an in-depth analysis from the perspective of modern Constitutionalism, juristic literature, and judgments of the superior courts of various States to support the study.*

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Introduction

In contemporary debates of modern Constitutionalism, a question has been arisen by the significant scholars of the Constitutional law, which now has become attention in modern periods. Can an amendment of the Constitution be reviewed and invalidated accordingly (Albert, 2009)? As a normative matter, it remains contentious in the conventional period whether an amendment that is enacted following the Constitutional procedure should ever be declared *ultra vires* by exercising the power of judicial review. However, this controversial issue has attracted more attention in the mid of the twentieth century around the world. Therefore, in modern politics and Constitutionalism, this is not a new phenomenon that an amendment may be found unconstitutional. The political debate of the doctrine of the unconstitutional constitutional amendment was evolved from the United States and France, but its doctrinal origins belong to Germany. Further, it has traveled progressively to the democratic countries having modern constitutions in every part of the entire world (Roznai, 2013). In the view of this modern concept, some countries have inserted unamendable provisions in their Constitutional text (i.e., supra-Constitutional provision, which implies express limitation upon the Parliament in respect of amending the Constitution), which cannot be amended even by the subsequent Parliaments (Abeyratne & Bui, 2021). In this context, Parliament impliedly awarded judicial competence to the Constitutional courts rather than expressly that it can invalidate any

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amendment even enacted under the required procedure of the Constitution if contradicted with unamendable provisions. Whereas, in some countries, in the absence of any entrenchment clauses in their Constitutional text, the Constitutional court itself invalidated the Constitutional amendment on the yardstick of Constitutional Replacement Doctrine, Doctrine of Basic Structure, i.e., called implied substantive limitation upon the Parliament (Abebe, 2019). The court itself examines amendment and nullifies it if found contradicted with the fundamental part of the Constitution.

By exercising judicial competence, the courts distinguish the word 'amendment' with revision in a very critical way of understanding how the concept of informal unnameability arises. As quoted by Richard Albert in his Article that Carl Schmitt explained that Constitution is a living document, an amendment could be made by keeping in mind that the identity of the Constitution as a whole remained protected and could not be altered drastically. Any amendment in its effect should remain consistent with the existing provisions of the Constitution and do not strike the spirit of the Constitution on which it is based (Albert, 2016).

Whenever any amendment in the Constitutional text incongruous to the Constitution or goes against its spirit, such transformation is being dealt with as a revision. Indeed, such a type of transformation breaks the coherence with the Constitution and its operational function (Cooley, 1893).

Amending Powers of the Parliament and its Limitation

Is the Constitutional amending power granted to the Parliament unfettered, which even infringes the basic spirit of the Constitution? It is a contentious issue that has caught scholarly attention increasingly in contemporary periods (Halmai, 2012; Bezemek, 2011). Indeed, examining the scope of Parliament about amending the Constitution is one of the most crucial issues in the law of the Constitution and certainly not merely academic or theoretical (Klein, 1978). Still, over the entire world, it has become a most relevant issue on a practical level because of the enactment of amendments in their respective Constitutions. Therefore, the issue has already been discussed in various States and continued to be debated and is likely to be rising its significance, sooner or later, in numerous other States (Roznai, 2013). Resultantly, the doctrine of limited sovereignty of the Constituted Parliament has been acknowledged in an imposing manner across the globe.

Undoubtedly, the Parliament has jurisdiction to alter a Constitution, but it does not contain revising the Constitution (Alejandro, 1996). The purpose behind the limiting authority to amend the Constitution is preserving the sovereignty of citizens and their rights, especially where the amending process of the Constitution is comparatively easy. In other words, the provisions which speak about the rights and liberties of the individuals should be given hermetic protection and must remain a part of the Constitution, and may not be detached by the name of the amendment, and these are beyond the powers of the secondary Parliament (Kelbley, 2017). Further, he argues that every Constitution contains a certain part that has become more fundamental than the rest of the Constitution, and any amendment which inconsistent with that essential part would be tantamount to an act of abrogation of the Constitution as a whole (Halmai, 2015). Therefore, to preserve the supra constitutional provisions, the scope of amending authority of Parliament is being constrained by the Constitution either expressly or impliedly. However, this research has focused over implicit limitations only.

Implied Restrictions over the Amending Authority of Parliament (A Juristic Approach)

The limited scope of amendment is not only related to the explicit limitation but it is also linked with implicit limitation as well. The doctrine of implicit substantive limitation has derived from the court's observation under the power of interpretation of the Constitution. It has been debated across the world among Constitutional scholars. Thomas Jefferson stated that there was a distinction between authorities on which the Constitution was based and on which amendments were based. The Constitution might be called the product of the public, while the amendment belonged to the government. Therefore, its essence would remain entire. Indeed, the authority which was exercised was given by the product of people. The instrument provided by the people could not

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be destroyed by way of amending process (1st Congress, 1st Session, 1789).

However, this approach was not maintained further (Dillon v. Gloss, 1921) however; Edward Everett delivered his speech in the session of the House of Representatives in favour of implied limitation and stated that there were two types of provisions Constitution, either ordinary or extraordinary. However, the amendment made in the Constitution would be harmonized with the extraordinary provisions. Otherwise, the act of Parliament with regard to amending would go beyond the scope of amending power (Everett, 1826). Moreover, John Calhoun argued in favour of implied restriction on the power of amendment by stating that if any amendment was in contradiction with the essentials of the Constitution, then the act of the legislative body would be treated ultra vires (Calhoun, 1833). Furthermore, these limitations are not only implied but inherited as well. The changes in the Constitution should be harmonized and consistent with the scheme and structure of the Constitution as stated by Thomas Cooley (1893). Additionally, the same approach was expressed by George Curtis (1896), who stated that the insertion of the provision regarding amending the Constitution was to modify its provision for smooth application of the spirit of the Constitution rather than demolish it by a ¾ majority.

The German Scholar Carl Schmitt, a famous proponent of implicit limitation upon the amending authority, stated that there were supra constitutional provisions. It was not only over the ordinary laws but also above the written constitution. It excluded the act of replacement which is tantamount to Constitutional revision, and it was not the intention of the framers of the Constitution that the Constitution be destroyed by way of revision under the amending powers (Schmitt, 2004). Schmitt further stated that various fundamental substantive principles could not be repealed even in the absence of explicit limitation through secondary constituted Parliament, which was framed in fact to preserve the essence and identity of the Constitution (Schmitt, 2008). Furthermore, it has become a global trend that Constitutional courts being a custodian of the Constitution, determine the Constitutional principles and cores, which are regarded as identity and scheme of the Constitution, which cannot be amended via amending procedure. In other words, the Constitution itself provides certain provisions for its internal protection. In case of any alteration, the amended provision must be compatible with the self-preserving provisions.

The theory of implicit limitation is deduced from the touchstone of delegation theory. Thus, the Constitution is a living document, and an authority to amend the Constitution cannot be exercised in a drastic way that destroys the Constitution itself. Because destroying the Constitution is beyond the jurisdiction of delegated powers, and resultantly, it subverts its *raison d'être* and achieves nothing (Child, 1926). Additionally, it was also argued by Schmitt that the amendment process was not inserted to modify the fundamental structure of the Constitution, which resulted in a brand-new Constitution. Because such kind of mandate vested only to the primary Constituent power rather than delegated empowered organs (Schmitt, 2008), however, these norms and cores have been recognized and accepted even in the absence of any explicit substantive limits with multiple names in various counties by their respective Constitutional courts to preserve the Constitution in true spirit (Sathe, 1978). Most importantly, the theory of implicit limitations over the power of amendment is a mode of protection of the Constitution from an infliction or torture through legislative caprice and popular levity (Guha & Tundawala, 2008). The act of hijacking the Constitution by showing the majority is not a mere theoretical presupposition. There is historical and practical evidence of India and Bangladesh, the neighbour countries of Pakistan.

Implicit Limitations and the Constitution of Pakistan: A Judicial Approach

Indeed, there is no explicit limitation provided in terms of an unamendable provision in the Constitution of Pakistan. However, it is worth stating that before enacting the first Constitution of Pakistan in 1956, the first Constituent Assembly took a significant step in 1949, commonly known as the Objectives Resolution. This resolution provided the basis of the Constitution and a broad sketch of its structure (Khan, 2009), and it has been regarded as a grundnorm in the constitutional history of Pakistan. Accordingly, it has also been observed by the apex court of Pakistan in multiple leading cases (Asma Jillani, 1972; Zia ur Rehman, 1973;

Nusrat Bhutto, 1977; etc.) that the Objectives Resolution provides the directive principles for the interpretation of the Constitution. But the same document was not taken up as the benchmark for striking down any constitutional amendment on the touchstone of repugnancy. It is pertinent to mention here that since Pakistan became independent, it has been administered under the Constitution of 1956 and 1962 respectively until the beginning of 1973, and consequently, both Constitutions were abrogated. In 1973, the second Constituent Assembly was constituted which enacted the third Constitution, namely, The Constitution of Pakistan, 1973, which is currently in force (Hussain, 2013). However, the Objectives Resolution remained intact in all the Constitutions in the form of Preamble. In other words, it has not been repealed, deviated, or departed by any regime, including military and civil. Additionally, after very slight changes, now the same landmark document has become a substantial part of the Constitution (Article 2-A).

On the other side, Pakistan Constitution, expressly claims popular sovereignty and specifically prohibits judicial organ from examining the Constitutional validity of any amendment (Article 239). However, prohibitory clauses were incorporated subsequently through the Eighth Constitutional Amendment in a dictator regime (Ibid.). Meanwhile, the Basic Structure Doctrine (originated in Indian jurisprudence) migrated to Pakistan. The same idea of implicit limitation has also been debated and addressed during the proceedings before the superior courts of Pakistan in the name of Salient Features Doctrine and rejected (Newberg, 2002). But, the first time in Darwesh case (1980), it was held that the authority to amend Constitution U/A 238 didn't mean that the Constitution itself could be abrogated/replaced with an entirely new Constitution. The court further observed that the power of amendment allowed only those changes which did not demolish the real structure or essential features of the Constitution. If the essential or basic features did not survive on account of amendment in Constitution, the amendment would be ultra vires (Lau, 2005).

However, the supreme court of Pakistan reversed the observation of Justice Shamim in another case by stating that amendment power could not be limited unless restricted expressly. Therefore, Parliament can amend, repeal or modify any provision of the Constitution (Fouji Foundation, 1983). Later on, in 1996, the apex court partially recognized essential features in a veiled manner by way of interpreting the Constitutional provision only. It was observed that in case of any confliction created between Constitutional provisions and enacted amendment, then the Constitution would be interpreted by considering the whole and its essential features (Al-Jehad Trust, 1996). Further, in 1997, the apex court moved one step ahead towards the salient feature doctrine in another case wherein it was observed that there were salient features such as parliamentary form of government and federalism blended with Islamic Injunctions. However, the court declined to accept the implicit limitation over the Parliament and stated that salient features theory could not be used authoritatively as a yardstick to strike down any Constitutional amendment, even if it found repugnant (Mahmood Khan Achakzai, 1997).

Similarly, another Constitutional petition was filed against the 14th Constitutional of 1997. The court held that if there was a clash between two provisions of the Constitution being incapable of reconciled, then the provision covering lesser rights would yield in favour of a provision that covered higher rights. However, the apex court did not resolve the contention about the recognition of implicit limitation doctrine in the Constitution and ultimately observed that even if the doctrine was judicially recognized, the impugned amendment did not violate any salient feature of the Constitution. However, it is worth mentioning here that in his contra judgment, Justice Afrasiab held that there was a basic structure of the Constitution that could not be abrogated by the Legislature in the purview of amending authority. Further, in his dissenting observation, Justice Mamoon ruled if it was found that amendment contradicted with salient features, then being a guardian of the Constitution, the apex court had ultimate Constitutional jurisdiction to nullify that very amendment (Wukala Mahaz, 1998).

In addition, the development moved forward to some extent in a Constitutional petition filed against the Constitution (Seventeenth Amendment) Act, 2003, which allowed the Chief of Army Staff-cum-President to hold both offices at the same time and exempt from the explicit Constitutional ban on holding more than one office at the same time.

Ultimately, the apex court held that it had jurisdiction to examine the validity of any Constitutional amendment in the name of judicial review. Still, a judicial review was limited by its scope. It could only be invoked on the violation of procedural grounds prescribed for the amendment in the Constitution rather than substantive grounds (Pakistan Lawyers Forum, 2005).

Later on, the Constitutional 21st Amendment of 2015, was challenged on the touchstone of violation of salient features doctrine before the apex court. The 21st amendment empowered military courts to try alleged civilian terrorists who were allegedly involved in specified terrorism offences. It was argued that empowering military courts, a part of the executive, to try the suspect terrorists was a negation of independence of judiciary, a basic component of separation of power, as well as infringement of their fundamental rights, ensured in Objectives Resolution of 1949. Therefore, it was pleaded that the Supreme Court had jurisdiction in terms of judicial review to examine the amendments on the touchstone of basic features or Constitutional spirit and strike them down on the touchstone of repugnant. In response, ultimately, some member of the Bench rejected the plea and observed that Parliament had unlimited jurisdiction in terms of amending the Constitution. Further, it was also ruled that Objectives Resolution, even being a substantial part U/A 2-A of the Constitution, could not be considered as the touchstone of repugnancy. Although Objectives Resolution contained guiding principles for the courts while interpreting the provisions of the Constitution, but it did not mean, it got a higher status than the other provisions. Each provision had its own worth and could not be superior to the others but to be read separately. The apex court also held that the basic structure doctrine could only be used to identify silent features of the Constitution but could not be considered as a yardstick to strike down the Constitutional amendment. Therefore, the apex court was not empowered to strike down any constitutional amendment which become part of the Constitution. However, the judges could look into the matter if found that the required procedure of amendment was not followed. In a contra judgment, the minority observed that this was a violation of salient features, and the then Parliament was not exclusive sovereign to amend, abrogate or repeal the basic features of the Constitution (Rawalpindi Bar Association, 2015).

Jurisdiction of Judicial Review over the Constitutional Amendment: A Comparative Approach

Whether the Constitutional court has jurisdiction to review any Constitutional amendment on the yardstick of unamendable provisions? Indeed, judicial review of the Constitutional amendment has become an existing practice in the Constitutional history of various countries (Gözler, 2008). The practice has changed the traditional approach about the supremacy of Parliament in contemporary debates about amending any part of the Constitution. There are multiple ways which expressly or impliedly authorize the court in terms of judicial review to examine the Constitutional amendment, which may be on substantive or procedural grounds. There are certain State Constitutions which expressly empower the Constitutional courts to examine the legitimacy of any Constitutional amendment based on substantive grounds either before or after enactment of the amendment, such as Ukraine, Romania, Kyrgyzstan, Kosovo and many other countries. In this situation, where the Constitution itself empowers the court, then no question arises about the courts' jurisdiction over the Constitutional amendment (Ibid.), and this jurisdiction is exclusive and justified.

Whereas some State Constitutions contain unamendable provisions, but they expressly grant the power to the courts with the capability to formally review amendments but solely on procedural grounds rather than substantive grounds. Furthermore, if Constitutions become silent on the authority of judicial review about reviewing the Constitutional amendment on substantive grounds or simply, they don't cover this issue, this is not the way that court itself remains silent on this stance by arguing that it is not clear, and no space of judicial review has been provided in the Constitution with regard to examining the Constitutional amendment (Rabello, 2001). Being a guardian of the Constitution, it has to fill up the lacuna and positively interpret this silence. When the Constitution itself remains unclear or silent with respect to awarding, the authority of reviewing the amendments, it is not merely "end of story" but "beginning of inquiry" (Lau, 2005).

Moreover, there is the third category of the State Constitutions like Pakistan, which expressly forbids and negates the jurisdiction of Constitutional court from exercising the authority of judicial review about examining the Constitutionality of any Constitutional amendment. The Constitution of Pakistan expressly proscribes the Constitutional court from exercising the power of judicial review to evaluating the Constitutional amendment (Article 239 (5)(6)). However, it is pertinent to recall the historical background for the inclusion of sub-clauses (5)(6) of Article 239. Initially, these two sub-clauses were not included in the Constitution when it was originally framed in 1973 by the primary Constituent Assembly. These alleged clauses were inserted in 1985 by general Zia-ul-Haq, a military dictator in the name of 'Revival of Constitutional Order' (1985) without following any Constitutional procedure. Subsequently, they were given Constitutional cover by (Eighth Amendment Act 1985). Indeed, it was an undemocratic and dictatorial intervention, made in 1985. The process did not possess the same credibility as a process that was adopted while framing the original Constitution (Achakzai case, 1997). Indeed, Article 239, in its original form, laid down the procedure for amendment, and there were no open-ended powers granted to the Parliament in the same sense as given by the first Constituent Assembly in Indian Constitution under Article 368. However, particularly after the insertion of clauses 5 & 6, which were substituted by fresh provision, it would be enough to say that unlimited powers bestowed upon the Parliament in terms of these above clauses do not include to amend the salient features of the Constitution. These clauses cannot be interpreted so copiously that they become open-ended provisions having no limits.

Although, the apex court of Pakistan acknowledged Constitutional essentials in the name of salient features of the Constitution in its various judgments, which cannot be changed. However, it emphasizes in the purview of implicit limitation that it has a lack of judicial competence to examine any Constitutional amendment and undermine it, if found contradicted with salient features of the Constitution. It also ruled that this is the jurisdiction of the Parliament to make the amending powers limited through the democratic of parliamentary process, rather than by the judicial organ of the State (Pakistan Lawyers Forum, 2005). But in contra judgments, the minority benches ruled in various judgments that the supreme court had judicial competence to determine any Constitutional amendment on the yardstick of salient features and declared it null and void if found contradicted with salient features of the Constitution (Rawalpindi Bar Association, 2015).

Conclusion

The idea of implicit limitation states that even the non-existence of any explicit limitation in the Constitution does not give unlimited authority to any Parliament; there is a certain part of the Constitution, which is called supra-constitutional or basic features, which cannot be changed by the derivative authorities. It is also a fact that previously there were certain Constitutions in the world wherein courts did not acknowledge the theory of explicit or implicit limitation regarding the Parliament's amending power. However, it seems that the courts around the globe are recognising the significance of Constitutional spirit progressively and moving towards accepting the basic structure doctrine with multiple names. Being a guardian of the Constitution, the courts have observed that they have jurisdiction to examine the amendment/s to the Constitution on the yardstick of basic features of the Constitution and strike it down if proved contradicted with to save the identity of Constitution or constitutional spirit. Moreover, the Parliament's power to amend the Constitution is a delegated one, hence it must act as a trustee of 'the people.' As a trustee, the Parliament possesses only a fiduciary authority, thus, it must intrinsically be limited. Further, the implicit theory is not a creature of the judiciary but reflects from the scheme of the written Constitution.

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