

**The "Basic Structure" of the Constitution of Pakistan and
Judicial Review of Legislative Actions: A Historical and
Analytical Review**

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Abstract

The exercise of judicial review is a well-recognised phenomenon around the globe. The parliaments with absolute majority can pass laws in contravention of human rights or against the parameters of the constitution. In this situation the courts work as custodian of the constitution and the authority of judicial review of legislative actions provides a counterbalance to the excessive powers of the parliament. The courts can also interpret the laws to elucidate their meanings and scope and to make them compatible with new challenges. In Pakistan, after independence, initially the high courts were given power of judicial review only against executive actions and the Supreme Court of Pakistan did not have original jurisdiction to review the executive or legislative actions. Under the 1973 Constitution the Supreme Court has power to review the executive and legislative actions. However, it is still under debate that whether the Court can adjudge validity of the Constitutional amendments or not. This paper discusses the importance of the mechanism of judicial review of legislative actions and its historical evolution in Pakistan. Then the possibility and limitations of the mechanism of judicial examination of legislative actions, in the context of "basic structure" of the constitution and the sovereignty of parliament, is discussed.

Key Words: Judicial Review, Legislative Actions, Supreme Court, Historical, Constitution, "Basic Structure"

1. Introduction

Since its independence, Pakistan has empowered its judicial institution to review the administrative actions of the executive. With the passage of time the judiciary was also empowered to review its legislative actions. The mechanism of judicial review necessitates that an independent judge should be impartial in his judicial conduct; otherwise, the tool of judicial review in the hands of a biased or partial judge can be self-destructive for the public confidence in the judiciary and its independence. The judiciary in Pakistan has frequently been invited by various political players to play a mediating role in their political disputes, and each military dictator has asked the Supreme Court of Pakistan to grant legitimacy to his unconstitutional regime. In this context, the evolution of judicial review and the room for and limits of the mechanism of judicial review of legislative actions in Pakistan is discussed and critically analysed. In the federal system of government, the courts can address the issues of federal legislations against the rights of the units of the federation.

2. Importance of Judicial Review of Legislative Actions

The mechanism of judicial review in any society has a multidimensional importance. Firstly, in some legal structures it is a valuable instrument in the hands of courts which is able to invalidate any extraconstitutional acts and policies of the executive and the parliament.¹ The mechanism of judicial examination of legislative action is based on the fundamental belief that people can refuse to obey unjust laws.² Therefore, this power is entrusted to the higher courts in any jurisdiction to adjudge the constitutionality of the laws, any constitutional provision or amendment passed by the legislature, and the acts of the executive.³ According to Hamilton a limited constitution contains some defined restrictions on the legislative power of the parliament; for instance it will not pass "bills of attainder" or "ex post facto laws".⁴ The observance of these types of restrictions can only be ensured through courts of law. The courts are supposed to declare any law which is in violations of these limits to be null and void. In the absence of this protection, the security of rights and privileges cannot be guaranteed.⁵ Therefore, judicial review of acts of parliament is

a tool which is used to put a check on the legislative power of the parliament so that it may not disregard the constitution, cross limits or ignore the values it contains.⁶ Many Commonwealth countries have adopted a federal structure. Hence, the judicial review is also used to settle issues around the interpretation and meanings of certain provisions of federal constitutions, which sometimes arise between central and state governments. Indeed, that is the reason why the judiciary has been empowered with the tool of judicial review in the constitutions of the majority of these countries.⁷ In countries with written constitutions, such as Pakistan, India and the USA, the judiciaries are considered to be the custodian of the constitution. To perform this duty while exercising their supervisory jurisdiction they can adjudge the validity of any constitutional provision and have the option to declare it extra-constitutional and invalid.⁸ Even in common law jurisdictions, like England which has with an unwritten constitution, the courts now have the power to adjudge the compatibility of acts of parliament.⁹

Secondly, there is always the possibility that a country's laws may not be able to maintain pace with its changing circumstances and might not be applicable to every situation. In this type of situation, the courts play a role by filling the gap between the existing law and the changing circumstances.¹⁰ Furthermore, if the laws made by the legislatures favour one class of litigants then the perception that the courts are there to grant independent justice is challenged; hence, Shapiro argues that judges should make their own legal rules for the establishment of public confidence on the neutrality of laws.¹¹ However, Davis has argued that law making by courts is not appreciated, as this is the job of the legislature. Numerous case laws remain unimplemented because they have been superseded by another case law, whilst statutes produced by parliaments remain in force for longer periods until they are repealed or amended by a majority of the parliament.¹² Nevertheless, if some laws pertaining to a particular state of affairs are not clear then the courts may consider using other legal sources to interpret the laws through the mechanism of

judicial review in order to bring them into conformity with the existing situation.¹³

3. Evolution of the Mechanism of Judicial review of Legislative Actions

Initially, only the High Courts were granted direct powers of judicial review of executive or legislative actions, and the Supreme Court of Pakistan did not have direct supervisory jurisdiction. The Supreme Court could, however, use its supervisory jurisdiction in hearing appeals against High Court judgments. The Supreme Court had only the original jurisdiction to adjudicate upon and could pass a declaratory judgment on any constitutional controversy between any unit of the federation and the federal government, or between any two units of the federation.¹⁴ In the Constitution of Pakistan of 1956, the president was also authorised to send a reference to the Supreme Court to seek its opinion on any question of law. Therefore, after the 1956 Constitution, the Supreme Court could use its supervisory jurisdiction under these two provisions or in an appeal against a judgment by the High Court. In *Bashir Ali Khan v Muhammad Ali Khan Chowdhury etc.* the Supreme Court held that the question of interpretation of "Police (Regulation of Seniority) Rules", 1936, had been troubling the government for the last six years, and being a question of law, it would have been proper for the government to send a reference to the Supreme Court under Article 162 of the 1956 Constitution. The Court ruled that:

The question raised in the petition was one which had been agitating the mind of the Central Government for a number of years, and was of such importance that, being question of interpretation of statutory rules and therefore a question of law, it would have been a proper subject for a reference to this Court under Article 162 of the Constitution of 1956, had the Central Government thought fit to make such a reference.¹⁵

By the virtue of this judgment, the Supreme Court ostensibly clarified that it had the power to look into the interpretation of a statute even though a reference by the president had not been sent to do so. On this, account the court ruled that it was appropriate for the Supreme Court to interfere in the interpretation of statutory rules. This can be seen as a first step for the Supreme Court towards gaining the direct power of judicial review.

4. Judicial Review of Legislative Actions Under the 1973 Constitution

Article 8 of the 1973 Constitution clearly dictates that:

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

The language of this Article makes it very clear that the Pakistani Parliament, unlike its English counterpart, does not possess unfettered powers of legislation. The powers of the parliament are limited by the provisions of a written Constitution.¹⁶ This Article, coupled with Articles 199 and 184, empowers the High Courts and the Supreme Court to adjudge the legality of Acts of Parliament. Another difference between the judicial review of legislative actions in English courts and in Pakistani courts is that the English courts can pass a compatibility judgment but they cannot invalidate the incompatible law and it remains valid unless amended or repealed by the Parliament.¹⁷ In contrast, courts in Pakistan do not need to declare any law void or invalid, as they are only required to declare that the impugned law is in derogation of the fundamental rights set out in the Constitution of Pakistan, and the rest of the job is done by the Constitution itself, which

declares that any law in derogation of its fundamental rights will be void.¹⁸

However, the limits of the judicial review of legislative actions have been the subject of controversy, leading towards different judicial opinions being issued on different occasions.¹⁹ The controversy has arisen from the two-tier system of legislation in Pakistan. The Constitution itself is the supreme law and the other laws are ordinary laws which derive their legitimacy from the Constitution.²⁰ Mahmood argues that legislative power and constituent power are two distinct phrases; therefore, the words law and Constitution are used in contradistinction.²¹ As discussed earlier, the power of judicial review of ordinary laws is clear from the constitutional provisions, however the judicial review of constitutional amendments is a highly controversial issue.²² The main question is whether the Parliament of Pakistan has powers to amend the constitution as it likes or whether, instead, this authority is restricted by some principles. The answer to this question also determines the power of the courts in relation to the judicial review of a constitutional amendment. If the power of the Parliament to amend the constitution is unrestricted then the courts cannot review a constitutional amendment. Conversely, if the power of constitutional amendment is qualified then the courts have power to review it. In answer to this question, "Article 239 of the Constitution of Pakistan of 1973" articulates that:

(5) No amendment of the Constitution shall be called in question in any court on any ground whatsoever.

(6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

It is submitted here that despite this clear and straightforward language, controversy still exists. The root cause of this controversy is the decontextualized reading of the above provisions.²³ As an established principle of constitutional

interpretation, any provision of the Constitution has to be interpreted in the context of the whole Constitution and not in isolation. The Preamble (objectives resolution) of the Constitution has been a part of all the three Constitutions of Pakistan without any amendment and was thereafter converted into a substantive part of the 1973 Constitution under Article 2(A).²⁴ In "*Asma Jilani v Government of Punjab*", the Supreme Court declared the objectives resolution a "*grundnorm*" of the Constitution of Pakistan.²⁵ However, the "basic structure" of the Constitution was first identified in *Mr Fazlul Quader Chowdhry and others v Mr Muhammad Abdul Haque*.²⁶ The Indian Supreme Court also quoted this judgment in "*Sajjan Singh v The State of Rajasthan*".²⁷ Similarly, the Supreme Court in considering the "*Mahmood Khan Achakzai and Others v Federation Of Pakistan and Others*" identified four salient features of the Constitution; "Islamic provisions, federalism and parliamentary form of Government and fully securing independence of judiciary."²⁸ The court was of the opinion that these features entailed paramount importance in the Constitution, therefore even a parliament did not have legitimate right to alter, amend or remove these features from the constitution through constitutional amendment. The first provision of the Preamble states: "[w]hereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust...". Apart from the other principles enumerated in the Preamble, the aforementioned provision clearly articulates that Allah Almighty is the ultimate sovereign and that the Parliament is bound to use its authority within the limits prescribed by Allah. If the Parliament makes an amendment in the Constitution which clearly violates these limits, then the validity of that amendment will be under question. "Article 2" states that "Islam shall be the State religion of Pakistan." Whereas "Article 228" establishes an Islamic Ideological Council to advise the Federal and Provincial Legislatures on the conformity of the country's laws with Islamic principles. Similarly, "Article 227" states that: "(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam,

and no law shall be enacted which is repugnant to such Injunctions." Though the phrase "basic structure" is not mentioned in the Constitution, if Article 239 is read in the context of Articles 2, 227, 228, and the aforementioned provision of the Preamble, it may be concluded that the Parliament can make any amendment or make any law as long as the law or amendment stays within the limits prescribed by Allah in the Holy Quran and Sunnah.²⁹

Siddiquee argues that in general the Supreme Court has constantly been adopting the view that it cannot challenge the validity of a constitutional amendment.³⁰ Ahmad argues that a belief regarding the basic salient principles of the Constitution has allowed some activist judges to expand the boundaries of the judicial review of legislative actions.³¹ The Supreme Court borrowed the doctrine of "basic structure" from its Indian counterpart and claimed that the Constitution of Pakistan has various fundamental features which could not be amended.³² However, in its subsequent judgment the Court clarified that although it had declared that the Parliament cannot amend the Constitution in violation of its "basic structure", that does not mean that if the Parliament does so, the court is permitted to strike down that amendment.³³ The court held that "[t]he remedy lay in the political and not the judicial process". Just five years after this judgment the Supreme Court led by Ch. Iftikhar, an activist Chief Justice, declared that the Constitution had a "basic structure" and that the Court had powers to challenge a constitutional amendment passed in violation of this "basic structure" and declare it null and void.³⁴ However, in its recent judgment in response to a challenge to the 21st Constitutional Amendment, the 17 member full bench of the Supreme Court of Pakistan reversed this stance by a majority of 11 judges, and declared that there were no limits on the power of Parliament to amend the Constitution, and that the courts have no authority to strike down any constitutional amendment.³⁵ The six dissenting judges contrastingly declared that Pakistan's Parliament does not possess unfettered powers of constitutional amendment and an amendment passed in derogation of the "basic structure" can be invalidated by the Supreme Court. The recent judgment of the Supreme Court,

denying the Court's authority to adjudge the validity of a constitutional amendment, was obsessed with the English concept of the absolute sovereignty of parliament. This principle has been applied as a supra-constitutional principle which states that Pakistan's Parliament has unfettered powers even in the presence of the aforementioned provisions limiting its powers. Justice Khawaja has expressed his reservations about the Supreme Court's unusual reliance on foreign theories of political philosophy which were developed in specifically western historical, social, cultural and normative contexts, and giving them preference over indigenous constitutional principles.³⁶

The Supreme Court declared that the 18th and 19th Amendments do not undermine judicial independence. The Court further declared that a constitutional amendment could not be challenged in the Court and the Court can strike it down. One may agree with the judgement of the Supreme Court that these amendments do not undermine judicial independence. However, the question arises here that if there is no "basic structure" of the Constitution and the constitutional amendment cannot be challenged in the Supreme Court then how in future the Supreme Court will react in case of curtailment of judicial independence by the Parliament through some constitutional amendment. No one can guarantee that the fundamental rights and judicial independence guaranteed by Pakistan's Constitution will not be jeopardised in the future by the tyranny of majority in Pakistan's fragile democracy.³⁷ There should be some check on the powerful majority otherwise it must be remembered that Hitler was elected in Germany through a democratic process.³⁸ It is further submitted that these divergent opinions of the Supreme Court judges in different cases suggest that issues of "basic structure" and the Court's power of review of constitutional amendments are still under debate and require a more concrete resolution.

Conclusion

The Constitution of Pakistan empowers the higher courts of the country in clear terms with ample powers of judicial review of both executive and legislative actions. The only ambiguity,

which exists, relates to the mechanism of judicial review over constitutional amendments.

The concept of sovereignty of parliament in Pakistan is different from the English concept of the sovereignty of parliament. Pakistan has a written constitution which clearly allows the Supreme Court to check whether the legislation passed by the parliament is in consonance with the fundamental rights and Islamic provision provided in the Constitution of Pakistan. It clearly suggests that the Parliament in Pakistan unlike its British counterpart does not possess unfettered powers. So far as regards the issue of constitutional amendments, no doubt that the constitutional provision empowers the parliament to amend the constitution and no one can challenge it. However, this provision cannot be read in isolation, rather it has to be interpreted keeping in mind the other provisions of the constitution. Where the constitution provides that parliament can make any amendment, at the same time the constitution provides that the parliament cannot pass any law in derogation of fundamental rights set out in the Constitution and Islamic injunctions. If all these provisions are read together it can be interpreted that the parliament can amend the constitution but not beyond the scope of the fundamental rights and Islamic injunctions. The preamble previously called objectives resolution was drafted by the forefathers of the country who settled the parameters within which the new constitution has to be framed. Therefore, a "basic structure" of the Constitution does exist, and the courts should play their role of guardian of the constitution to ensure that that no amendment is passed in derogation of the parameters of the objectives resolution/preamble of the Constitution.

Though the critical analysis conducted in this paper suggests that Parliament does not have unfettered powers to amend the Constitution and that the courts could declare an amendment unconstitutional, this issue should be addressed in parliament and clarified in the Constitution. Therefore, this paper suggests

that a constitutional amendment should be passed and it must be clearly mentioned in the Constitution that the Parliament cannot pass any amendment in violation of the "basic structure" of the constitution as presented in the objectives resolution and if it happens the Supreme Court is competent to review and challenge it.

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