

Basic Structure Theory or Doctrine of Necessity? Parliament’s Power to Amend the Constitution in India and Pakistan

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ABSTRACT

India and Pakistan both have written Constitutions of 1950 and of 1973 respectively. The authority to make alterations through amendments in the Constitutions has been entrusted to the Legislature under Art. 368 of Constitution of India and Articles 238-239 in case of Constitution of Pakistan, 1973 aiming that the problems could be sorted out and needs be fulfilled if they would arise in future in the functioning of Constitutions. Similarly, the degree of suppleness embraced by a Constitution has to be well-adjusted by a desire to safeguard its essential features as a superior commandment that restricts acting parliamentarians of the state. There is no limit explicitly enshrined in Art. 368 of the Constitution of India upon power of Legislature for amending the Constitution nor does in Pakistan Constitution under the above mentioned articles of the Constitution of Pakistan, yet the Superior Judiciary in both the Countries upheld that power of Parliament for amending the Constitution is not unrestricted or may be extended to change the fundamental scheme of the Constitution. In this way, the Doctrine of Basic Structure of the Constitution was developed in these two countries, so that the position of the Constitution, as the Supreme Lex of the land, could be maintained. It took bit long in the case of Pakistan to adhere to Basic Structure Theory, rather adherence have been given to the Doctrine of Necessity that led to abrogation and suspension of Constitution many a times. This article identifies the development of the ‘Doctrine of Basic Structure’ as a Constitutional safeguard in both countries, i.e., India and Pakistan and the role of superior Judiciary in these two countries in its development.

Key words: Constitution, Law, Supreme lex, Rule of Law, India, Pakistan, Parliament, Parliament Powers, Parliamentary Sovereignty, Legislature, Judiciary, Judicial Review, Basic Structure Theory, Features, Amendment

Introduction

The expression ‘Constitution’, is used to indicate, a bunch of those premier rules and principles which are normally provided in a legal document in written form (or a set of alike documents), which create and control state’s basic institutional arrangements, sketches and practices and expresses a nation’s most enduring

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values.ⁱ It can also be described as a basic law of a country that contains certain rules by the help of which the legal regime is founded. On the one hand, it regulates the separation and division of the powers while on the other hand, also directs that how and by whom the power is to be exercised.ⁱⁱ It is regarded as the highest law in terms of *grundnorm*, where by all laws take their origin or legitimacy. However, it is not necessary that a state that has adopted a constitution is ruled necessarily by the constitution or is termed a constitutional state. There are a number of countries that have constitutions but their constitutions that can be name as sham constitutionsⁱⁱⁱ, this is because they have “cosmetic persistence” as they do not possess any authority in practice. A few of them have association with the political pragmatism but these are not promulgated to implement mandatory orders upon it but to build up executive control.^{iv} “Constitution is a living document that had been perceived in a style that may apply to the situations and circumstances which are likely to take place in times to come, consequently, the language and the terminology used in drafting the Constitutions, in such sense, had no permanent connotation and ought to accept interpretation based on experiences of people during the course of working of the Constitution”^v. They are construed by keeping in view the future, as it may throw up the problems that necessitate legislative involvement.^{vi} It caters future development and progress.^{vii} Constitution depicts the aim and intellect of the people and targets endeavors at creating evolution, tranquility, wellbeing and harmony among the citizens and inhabitants overseas. It is the fundamental arrangement on which the whole state’s structure is put together and for that reason it has to be construed in such a manner so as to keep it lively and flourish in every ambiance and in every state of affairs.^{viii} The most exceptional attribute of the Constitution is that it can be changed according to the societal demands. In Indo-Pak it is taken as the supreme *lex* of the land as it holds the topmost status in the legal order. It is helpful in controlling and maintaining a system of check on the governmental authority as it ask for adherence to the ‘rule of law’ and deference for essential rights of the individuals given in the Constitution.^{ix}

Importance of the constitution in modern states and societies

Society is the assortment of the inhabitants for the objective of living in a specific region. The people living in a society observe some standards of life for maintaining peace in a society. Law and Regulations are compulsory for a society and if a society does not have any regulations it will fall down soon. Constitution is well thought-out as an elementary basis of the independence of the inhabitants of a society.^x It provides an arrangement for the social structure to be dealt with in accordance with those standards. These values assist the government in construction of rules and regulations in obtaining the notion of the ‘good governance’ and of ‘rule of Law’. The Constitution specifies the establishment of the government. It is well considered to be a backbone for the regime in a state. The two types of the Constitutions i.e., written and unwritten constitutions

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contribute their distinctive significance in a specific nation. The primary test of the Constitution is the management of a country. The subsequent mentioned are worth mentioning purposes of the Constitution;

- i. The composition and division of power between different organs of state.
- ii. It proves helpful in providing a system for the wellbeing of the country.

The Supreme Court (SC) of Pakistan observed that the Constitution is not a cluster of unsystematic provisions composed with each other but with an inborn scheme and reliability which is supported by definite essential provisions, known as its major and significant features.^{xi} Laws and Regulations in a particular regime should be construed in accordance with the Constitution. If any incongruity is found between Constitution and other legislation, only the Constitution shall hold sway. There are various attributes that will elucidate the significance of the Constitution for a society, they are as followed:

- i. A constitution is considered as the reflection of its people's desires.
- ii. It is need of the society to have some sort of the code of the permanent nature in order to maintain the decorum of the Society.
- iii. It provides protection of the freedom of the persons.
- iv. It gives protection of rights of minority class of a state.
- v. It works for the regulation of the legal system.
- vi. It helps to avoid the despotism
- vii. It contains some guidelines for the policy making.
- viii. It is meant to describe the form of the democracy e.g. direct or indirect.
- ix. It lays down certain qualifications of the ruling authority and also describes the terms of his offices.
- x. Without a Constitution, the individuals may not be lasting to follow these guiding principles and resultantly, it may create diversified problems, for example, the territorial dissimilarity in a definite issue which may be transformed into a foul play. To resolve such issues, an administrative body is required to control. Being a supreme law of the land, it must be implemented with permanency and is not likely to be nullified at any stage.^{xii}

Amending the constitutions and extent of constitutional amendments

In case titled, "*Raghunathrao Ganpatrao v. Union of India*"^{xiii}, the apex Court of India held that the word 'Amendment' has been derived from word "*Emendere*" which is a Latin word and it gives meaning as "to correct". In context of a constitution, an amendment is a method to alter or rectify the mistakes with no alteration in its basic structure. The word 'Amendment' can also be explicated^{xiv} as an addition or revision formal in nature and is made or proposed in a constitution,

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order, pleading, statute, or in alike document; specially, it is a change made by addition, deletion or through correction etc.; it may be a specific alteration in wording.” The SC of Pakistan in the case titled, “*Abdul Mukhtar and another vs. District & Sessions Judge*”^{xv} was of the view that ‘it is a process of adding up, removal, inclusion or replacement’. Amendment can also be interpreted^{xvi} as a change or alteration, a change of something or an alteration for the betterment; a persistence in a changed form; a perfection of a thing without linking the idea of any change in the crux or stuff; it may be a rectification of a fact which may not result in damage, rejection, or exclusion of the original.

The society is always found in a constant state of change and consequently the rules made for a particular society must be changed or altered so that it could be able to encounter the varying desires of the civilization. Thus, a constitution made a long time ago may prove to be derisory later on. Therefore, to make it best fitting to the societal demands, the process of amendments was assimilated by the constitution-makers in the constitution by the help of which constitutional provisions are altered by means of adding up, removal or amendment in an attempt to cope with the desires of the present.^{xvii} The method of amendment to the constitution is regarded as a “*healing principle*” with the objective of helping the constitution to tolerate the torment of the existing epoch. The founding fathers of the constitution had endeavored to uphold stability and suppleness by formulating the Constitutional amendment system for certain constitutional provisions. Constitutions, all around the world, although sanction changes in it but they should not be easily changeable because, first of all, it ought to be sufficiently constant. Exceptionally variable constitution that allows various changes might generate indecision that will debilitate people trust in the legislative constancy.^{xviii} Moreover, a simply variable Constitution is likely to give rise to fundamental morals and institute at a risk of obliterate by subjects transiently rapt with a new notion.^{xix} A simply and hastily variable constitution can possibly be not able to get its ‘authority’ and its ‘importance’ as a supreme law of the land.^{xx} Finally, an extreme constitutional flexibility is actually linked with huge threat of constitutional breakdown.^{xxi}

The Indian Superior Court declared that if the Constitution grants the Parliament an unrestricted authority to amend the Constitution then it would no more be an authority under the Constitution, other than it would turn out to be superior than the Constitution, for the reason that it will have the authority for amending the whole Constitution together with its indispensable structure.^{xxii} The Judge of Indian Supreme Court held that the theme song of the case titled, ‘*Kesavananda Bharati*’ declaring that you may amend even the well-founded document which the founding fathers have put to your care with a hard commitment, keeping in view the best the needs of your generation, however, it must be kept in mind that the Constitution is a valuable heritage; therefore, its identity must not be damaged.^{xxiii}

Constitutional amendments in India and Pakistan: making a comparison

For the governance of a federal system, normally a rigid Constitution is required. Indian Constitution is neither rigid nor a flexible one. However, in the last 70 years, there have been 103 amendments in the Indian Constitution that owe much to its features of flexible nature. Indian Constitution-makers were fully conscious of the reality that if the Constitution is made rigid in that case it will be risk to the democratic system. Also, if it is made flexible, it might work as per the wishes and impulses of the political parties^{xxiv}. Therefore, a method was acquired by making a blend of rigid and flexible Constitution. If, we compare it with the Pakistani Constitution, it is a rigid one.

The process of amendment to the Constitution of India, has been incorporated under Art. 368^{xxv}. As far as the powers to amend Constitution are concerned, the Indian Parliament is empowered by the Constitution itself that Parliament can exercise its constituent powers for amending the Constitution either, through addition or variation of any provision, or through repeal in any provision of the Constitution by following proper procedure of amendment.^{xxvi} Some amendments, like altering boundaries of states or creation of new states can be made by way of simple majority of both legislative bodies of the state. Amendments which relate to fundamental rights, fundamental duties and directive principles etc. may be amended through simple majority of both the houses but 2/3rd majority of present members of both the houses voting in any respective session.^{xxvii} There is another third type of Constitutional amendment whereby with 2/3rd majority of both houses, the rectification of half of total state legislatures is also required, for example, in the case of selection of President. Further for removal of doubts, the Constitution of India makes it clear that there are no limitations of any kind over the powers of these legislative bodies for making amendments in the Constitution by way of repeal, variation or addition of provisions.^{xxviii} So, the Parliament of India has unlimited powers for amending the Indian Constitution under Art. 368 of the said Constitution. A bill for amendment may be introduced in either of the houses of the Parliament and if the same is passed by a 2/3rd majority of the present members and vote of each house. Once, the bill is passed by the Parliament, the same is then placed before the President for seeking his assent. If, the President assents, the Constitution shall be deemed to be amended. But, if seen otherwise, the powers of Indian Parliament are not blind in respect of amending Constitution. The apex judiciary has set certain boundaries and limits, which cannot be touched by the Parliament by exercising its constituent powers to amend the Constitution, which are discussed in later part of this article.

As discussed earlier, the Constitution of Islamic Republic of Pakistan is a rigid Constitution. An amendment to the Pakistani Constitution is dealt with u/Articles 238 and 239 of the Constitution.^{xxix} Under afore-said Articles, the power to amend the Constitution could only be exercised in conformity to the wishes of

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the people and as per the authority as has been enshrined in the Preamble to the Constitution. It is fiduciary responsibilities which function as a constriction on legislature.^{xxx} Unlike Indian Constitution, to amend Constitution of Pakistan, a special two-third majority of the total membership of both houses of the Parliament (Majlis-e-Shoora) is required.^{xxxii} If, the bill is passed by both the houses of Majlis-e-Shoora, it is then placed before the President for his approval. Similarly, to the Constitution of India, where the amendment relates to the boundaries of the provinces, after having passed by the 2/3 majority of the both houses, it must be passed by the Assembly of the respective Province with 2/3rd majority of its total members, whose boundaries are being amended.^{xxxii}

Concerning the powers of the Parliament for amending the Constitution, a similar provision has been adopted by the Pakistani Constitution which removes the doubts about the limitations of the Parliament about its powers for amending the Constitution. Similar to the provision present in Indian Constitution, this provision provides that the Parliament by adopting proper procedure of amendment can have unlimited powers to amend the Constitution in either way, such as, repeal, variation or addition. However, after long time of persistence and subsistence of doctrine of necessity, under which the Constitution of Pakistan have been abrogated or suspended not by the Parliament, but by military rulers, that too on one pretext or the other and that have been endorsed all the times by the apex Court of Pakistan in the name of above mentioned principle of *doctrine of necessity*. Further, another safeguard has been provided by the Pakistani Constitution itself that if it's legislative body makes any amendment to the Constitution, it will not be subject to interference by any court of law on any ground, whatsoever.

So, the Constitutions of both the countries, i.e. India and Pakistan bestow upon respective Parliaments the maximum powers to amend the constitutions of their countries and there are as much no limitations on the powers of the Parliaments which restrict the amending of the Constitution. However, in case of Pakistan, there is further safeguard that any amendment made to the Constitution cannot be invoked for interference by any court of law on whatsoever ground.

Development & Evolution of the Basic Structure Theory (BST) in India and Pakistan

Constitution is an organic document,^{xxxiii} so that it can withstand with the flows of changing period and to tackle the changing requirements of the people. However, there are some basic principles and basic structure on which the whole system of the constitution circulates. This arrangement^{xxxiv} is of prime importance for the system on which the whole Constitutional text is based and it is duty of the courts of law to protect it on the basis of several doctrines and verdicts. In fact, the Basic Structure doctrine is a result of the efforts of the Supreme Court of India over the past few years.^{xxxv} It brought in that essential characteristic of constitutionalism, that was anxious to preserve the spirit of the constitutional text, to maintain,

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preserve and defend the copious concept^{xxxvi} of rule of law, deprived of the same, the constitution is but a dead letter law. The Judges while resorting to the Constitution for defending the constitutional rights of the people when declare any law in violation of the constitution, they do not legislate from the bench, rather they purely fulfill vow of their office and follow the concept known as Rule of Law.

Development of doctrine of basic structure in India

The doctrine of basic structure theory is basically of Indian origin. Pakistan and some other countries of the world, later on, developed or borrowed this theory from India. If we peep into the history of development of Basic Structure Theory in the Indian Constitution, the phenomenon can be found in the jurisprudence of Indian Supreme Court and at the same time, High Courts of the said country. Following are the leading cases which played pivotal role in the establishment, development and evolution of Basic Structure Theory in India.

In *Sankari Prasad Case*^{xxxvii}, the SC of India upheld that Art. 368 of the Indian Constitution gives an authority to make changes in the document known as Constitution that also includes the Fundamental Rights. The term “Law” used in Art. 13 of the said Constitution only embrace an ordinary law; it does not take in “Constitutional Amendment” that is made in employment of its constituent authority. The Court accordingly highlighted the difference among the regular law-making power and constituent power. In *Sajjan Singh Case*^{xxxviii}, the SC held that the expression used as ‘Amendment to the Constitution’ signifies alteration in all the Constitutional provisions.

In *Golak Nath case*^{xxxix}, the August Court of India decided against the ruling in Sankari Prasad and Sajjan Singh cases declaring that the legislature is not vested with the authority to make changes in the Fundamental Rights, as these are the rights which are inalienable and are enshrined in the Constitution. The CJ of the apex court upheld that only the legislature exercises authority for amending the Constitution and it is Art: 368 which incorporates the method of amendment to the Constitution. Art: 13(2) declare amendment as law and if it is made in violation of any rights known as Fundamental Rights enshrined in the Constitution, it will be declared invalid.

After the verdict given in *Golak Nath's case*, the parliament approved “24th Amendment Act, 1971” which re-established the parliament’s authority to amend the Constitution and also enhanced its scope by the addition in the wording of Art: 368, “to amend by way of the addition or variation or repeal any provision of the constitution in accordance with the procedure laid down in this Article”. In Art: 13 a new Clause was also added that states “Nothing in this Article shall apply to any amendment of this Constitution made under Article 368”^{xl}.

Finally, In *Kesavananda Bharati*^{xli} Case that is also familiar with the name of “Fundamental Rights case”, there was a question under issue that to what extent

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Art: 368 confers the power for amendment in the Constitution. A special bench comprising of 13 judges heard this case and with 7 to 6 majority votes, gave their judgment. **Sikri, CJ** held that the expression “amendment” should generate its power from Art. 368 and other provisions of the Constitution. After a glance of various provisions of the Indian Constitution, an inference is deduced that the founding-fathers of the Constitution never intended to use the word “Amendment” in broader terms. The phrase “Amendment of the Constitution” used in Art. 368 signifies “any change or addition in the provisions of the Constitution within broader outlines of the Preamble and of other provisions of the Constitution for carrying out the objectives given in the Preamble and under Directive Principles”. Consequently, it is meant that in no case fundamental rights can be invalidated but rational annulment can be achieved in the communal welfare.

Khanna J. declared that the expression "amendment" does not mean abrogating the Basic Structure of the Constitution rather it means that the former Constitution should survive in an amended form without losing its identity. He further opined that there is a “Basic Structure” of the Constitution that has been upheld from time to time on indispensable basis that is the independence and self-respect of individuals. The term ‘basic structure of the constitution’ is based on the following features:

- (i) Federal character of the Constitution;
- (ii) Republican and Democratic forms of Government;
- (iii) Supremacy of the Constitution;
- (iv) Secular character of the Constitution; and
- (v) Separation of powers between the Legislature, the executive and the judiciary

The minority view in this case was that no express or implied limitations can be imposed on the amending power provided in the Constitution. Here, the word ‘amendment’ does not include the power to abrogate the Constitution at one stroke and held it in complete abeyance. The term is so wider that it amounts to erode the complete Constitution step by step replacing it by another constitution”. Hence, according to them, Fundamental Rights can be annulled.

In **Indira Gandhi Case**^{xiii}, Supreme Court mentioned some more features as “basic features” in the list of basic features as declared in above referred case of Kesavananda Bharati:

- i. Democracy through fair and free elections;
- ii. Judicial review;
- iii. Jurisdiction of SC under Article 32.
- iv. Rule of law;

Finally, the basic structure feature of the Indian Constitution can be summed up as:

- i. Judicial Review;
- ii. Rule of law;
- iii. Jurisdiction of SC under Article 32;
- iv. Democracy, through fair and free elections;

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- v. A balance and harmony between Directive Principles and Fundamental Rights;
- vi. Limited power of parliament to amend the Constitution;
- vii. Power of Judicial Review in certain cases; and
- viii. Fundamental Rights

Development of doctrine of basic structure in Pakistan

As stated earlier, India is premier in the establishment of development of doctrine of basic structure theory, however like many other countries, Pakistan too borrowed this concept from India but much later in time and that too for its fourth Constitution i.e. the Constitution of Islamic Republic of Pakistan of 1973.

Unlike India, Pakistan have adopted many Constitutions i.e. the Constitution of 1956, the Constitution of 1962, Interim Constitution of 1972 and the Constitution of 1973 that later on is in force. The Pakistani Constitution, 1973 was amended so frequently and radically that it is not possible to note with confidence what essentials had it been retaining all the way.^{xliii} Pakistani judiciary has never accepted Basic Structure Theory in its true sense but what has been accepted and upheld repeatedly in the '*doctrine of necessity*' under Kelson's Theory of Revolution. The Pakistani courts were of the view that it is the need of the time that is more important rather than certain static and basic structure of the state and of the Constitution. The Courts were validating all almost all the *coups d'états* in the name of doctrine of necessity and have allowed to set aside, suspend or abrogate the constitutions. So Pakistan's adherence has been more to *doctrine of necessity* than to *doctrine of basic structure*.

Due to this kind of background, the doctrine of Basic Structure Theory did not remain applicable in Pakistan on the same footing as in India^{xliv} where doctrine of necessity has never been able to override or abrogate the Constitution. There are contradictory and conflicting decisions present in the subject of Basic Structure Theory in Pakistan. This theory firstly appeared in *Mahmood Khan Achakzai*^{xlv} Case, wherein the apex court held that Parliament has the power to amend any of the provisions of the Constitution but it cannot alter its basic features that are parliamentary democracy, federalism and Islamic provisions. These are envisaged in the Objectives Resolution which now forms part of the Preamble to the current Constitution of Pakistan. Now, in the shape of Article 2-A, it stands as a substantive part of the Constitution and the same was never touched. The Supreme Court, to some extent, restricted the amending power of the Parliament and subjected this power to the provisions of Objectives Resolution. It states that an amendment in the Constitution can never be made in contradiction of any of the provision of the Objectives Resolution that is an essential part and a *grundnorm* of the Constitution. It was also upheld that as an alternative of the Basic Structure Theory or pronouncing any Constitutional provision against the fundamental rights, the Court deduced the rule of interpretation that inconsistency if comes

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between two provisions of the Constitution and is not reconcilable, the lesser right entailing provision should give way in favor of higher rights entailing provision. To sum up, the Court concluded in this case that some rights are essential as compared to the others and therefore these would prevail.

In *Zafar Ali Shah Case*^{xlvi} the SC did not curb the Parliamentary power but it only imposed restriction on the military ruler for altering the basic structure of the Constitution. In the same way, the Apex Court in *Nadeem Ahmed Case*^{xlvi} did not declare the 18th Amendment to the Constitution as invalid but it just referred the issue to the Parliament for reconsideration after highlighting the points for the appointment method of Higher Courts' Judges. In *Pakistan Lawyers Forum Case*^{xlvi}, the SC of Pakistan has meaningfully put an effort to suspend the discussion on basic structure in the country. It upheld that, undeniably the Pakistani Constitution has some indispensable features, but the judiciary is not entitled to defend them. The amendment to the Constitution amounts to a political question and it must be resolved by a political platform proper in this context. Moreover, it was held that the "Kesavananda Bharati" has no relevancy in Pakistan so it cannot be blindly applied here because Pakistan has a unique political and judicial history.

Earlier, in *Asma Jilani case*^{xlix} the SC held that Pakistan has its own Legal Doctrine which has been enshrined in the Objectives Resolution 1949 which is known as the *grundnorm* of the Constitution of Pakistan. The basic features of Constitution of Pakistan, 1973 properly reflects in the Objectives Resolution, 1949 and the same is now considered a substantive part of the Constitution via Presidential Order No. 14 of 1984 that led to an amendment to the Constitution". In the Objectives Resolution,¹ the following features of the Constitution are declared as essential;

- a) Parliamentary form of government blended with Islamic Provisions;
- b) Independence of Judiciary, and the most important is
- c) Federalism;

In the 21st Amendment case^{li}, the issue was whether the Basic Structure Theory is applicable in Pakistan or not. The majority view was that it has no relevancy in the Pakistan legal system but the Supreme Court accepted some features as essential that cannot be changed. J. Jawad S. Khawaja^{lii} upheld that there are nine guiding principles in the "Objectives Resolution of 1949" which can be termed as 'Salient Features' of Pakistani Constitution and the same are beneficial to make basis for Judicial Review. They are;

- i. Islamic Provisions according to which the Muslims of the country shall have right to live their lives in accordance with the teachings of Islam.
- ii. Fundamental Rights
- iii. Integrity of the Territories of the Pakistan
- iv. Government of the Chosen representatives
- v. The Islamic norms of democratic liberty & social justice should be obeyed

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- vi. Satisfactory norms would be made to secure the interest of the Minorities, backward classes
- vii. Rights of the Minorities would be secured
- viii. Federal State with the Provincial Autonomy
- ix. Independence of the Judiciary

The “Basic Features Theory” was also recognized in *Wukula Mahaz^{liii} Case*. In “18th and 21st Amendment into the Constitution of Pakistan” case^{liv} the Supreme Court has abandoned the Basic Structure Theory as present in India. This doctrine is only acceptable to the extent of certain essentials of the constitution in Pakistan.^{lv}

The concept of basic structure includes, separation of powers between the legislature, executive and the judiciary, republican and democratic form of government, secular character of the Constitution, supremacy of the Constitution, unity of the country, federal character of the Constitution, essential features of the individual freedoms secured to the citizens and mandate to build a welfare state and democratic character of the polity.^{lvi} If parliament makes changes in the Constitution and disturbs the basic norms of the Constitution it will be struck down as such amendment is clear violation of Basic Structure Theory.

To cut the story short, In India, the scope of the Basic Structure Theory can be summed up in the following points.

1. Fundamental rights
2. Limited power of parliament to amend the constitution
3. Power of judicial review in certain cases
4. Balance and harmony between directive principles and fundamental rights

Conclusion

The superior judiciary interpretations have developed a doctrine of basic structure of the Constitution and it is now considered one of the most important Constitutional theories. This doctrine is properly founded that keeps a harmony in the rigidity and flexibility of the Constitution. This is the only doctrine that has made the endurance of the Constitution in its pure form. It keeps a check on the parliament from exercising unbridled or uncontrolled authority and considering itself as the master of law itself. The legality of the Constitutional amendments is also determined by the help of this doctrine. It is undoubted that this doctrine has always proved helpful in defending the Constitution in the chaotic time when the parliament in both the countries was in the doldrums to resort to Art. 368 of the Indian Constitution and Articles 238 and 239 of the Constitution of Islamic Republic of Pakistan, 1973 haphazardly.

The theory although established and developed by Indian Supreme Court, came to Pakistan legal system as well although bit later, because firstly the Constitutions themselves have been abrogated and last Constitution was amended in the name of doctrine of necessity. The Superior Judiciary of both India and

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Pakistan have done a great job to their countries by upholding that certain essentials of the Constitution were declared unaltered. The Constitution is considered as the *grundnorm* of the particular society and is a national document; it is and can never be any particular party's proposal that can be altered as per their wishes but, it is a public document that can only be changed when public at large consents to do so. Therefore, this doctrine is permitted to function as exceptionally supervisory body of the Constitutional governance.

ⁱ Zachary Elkins, et. al., *The Endurance of National Constitutions*, Cambridge University Press, 2009, p.38

ⁱⁱ Thomas M. Cooley, *A Treatise on the Constitutional Limitations*, Boston Little Brown & Co, 1868, p.2

ⁱⁱⁱ David S. Law and Mila Versteeg, *Sham Constitutions*, *California Law Review*, Vol.101, Issue:4, 2013, pg.880

^{iv} Yaniv Roznai, *Unconstitutional Constitutional Amendments: The limits of amendment power*, Oxford University Press, Edi. 1st, 2017, p.22

^v PLD 2013 SC 279

^{vi} *Lahore Development Authority Vs. Ms. Imrana Tiwana* 2015 SCMR 1739

^{vii} *Federation of Pakistan through Secretary M/o Petroleum and Natural Resources Vs. Durani Ceramics PTD* 2014 SC 2016

^{viii} *Government of Balochistan vs. Azizullah Memon* PLD 1993 SC 341

^{ix} Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, 2014, p. 52.

^x Iftikhar Hussain Bhat, *Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in Jurisprudence of Other Countries*, *International Journal of Research in Humanities and Social Sciences*, Vol. 1, Issue: 3, 2013, pg. 27

^{xi} *District Bar Association, Rawalpindi and others Vs. Federation of Pakistan and others* (PLD 2015 SC 401)

^{xii} Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, Edi. 5th, Wolters Kluwer, 1997, p. 97

^{xiii} *Raghunathrao Ganpatrao v. Union of India*, AIR 1993 SC 1267

^{xiv} *Black's Law Dictionary*, Ed. 9th.

^{xv} *Abdul Muktadar and another Vs. District and Sessions Judge, Jhang and 2 others* (2010 SCMR 194)

^{xvi} *Corpus Juris Secundum, A Complete Restatement of the Entire American Law*, Vol. 3A.

^{xvii} Melissa Schwartzberg, *Democracy and Legal Change*, Columbia University, New York, 2007, p. 34

^{xviii} Edward A. Purcell Jr, *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, *Florida Law Review*, Volume 66, Issue 4, UF Law Scholarship Repository, 2015.

^{xix} Conrad, Dietrich, *Limitation of Amendment Procedures and the Constituent Power*, 1970, p.347

^{xx} Elkins, et.al., p.82

^{xxi} Elkins, et.al., p.31

^{xxii} AIR 1980 SC 1789

^{xxiii} Ibid.

^{xxiv} AIR 1973 SC 1461

^{xxv} **368. Power of Parliament to amend the Constitution and procedure therefore.**—(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it, shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in- (a) Article 54, article 55, article 73, article 162 or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent. (3) Nothing in article 13 shall apply to any amendment made under this article. (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground. (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.”

^{xxvi} Constitution of India 1950, Art. 368(1)

^{xxvii} Constitution of India 1950, Art. 368(2)

^{xxviii} Constitution of India 1950, Art. 368(5)

^{xxix} The Constitution of the Islamic Republic of Pakistan, 1973; **Art. 238. Amendment of Constitution**—Subject to this part the Constitution may be amended by the act of Majlis-Shoora (parliament). **Art. 239. Constitution, Amendment Bill.**—(1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House. (2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent. (3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions of clause (4), be presented to the President for assent. (4) A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership. (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.”

^{xxx} Muhammad Azhar Siddique Vs. Federation of Pakistan PLD 2012 SC 774

^{xxxi} Id., Article 239(6)

^{xxxii} The Constitution of Islamic Republic of Pakistan, Art. 239(4)

^{xxxiii} David A. Strauss, Do we have a Living Constitution, 59 Drake L. Rev. 973, 2011.

^{xxxiv} Jack M. Balkin, Framework Originalism and the Living Constitution, 103 Northwstn. Univ. Law Rev. 550, 2009

^{xxxv} Iftikhar Hussain Bhat, Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in Jurisprudence of Other Countries, International Journal of Research in Humanities and Social Sciences, Vol. 1, Issue: 3, 2013, pg. 27

^{xxxvi} Brian Z. Tamanaha, On the Rule of Law, History, Politics, Theory, 32 Journal of Law and Society 657, 2005.

^{xxxvii} Sankari Prasad v. Union of India AIR 1952 SCR 89

^{xxxviii} Sajjan Singh v. State of Rajasthan AIR (1965) 1 SCR 933

^{xxxix} I.C. Golak Nath v. State of Punjab AIR (1967) 2 SCR 762

^{xl} Ins. by the Constitution (Twenty-fourth Amendment) Act, 1971, s. 2.

^{xli} Keshvananda Bharati Vs. State of Kerala, (1973) 4 SCC 225

^{xlii} Indira Gandhi v. Raj Narain (AIR 1975 SC 2299)

^{xliii} Rawalpindi District Bar Association Vs. Federation of Pakistan PLD 2015 SC 401

^{xliv} Id., PLD 2015 SC 401

^{xliv} Mehmood Khan Achakzai Vs. Federation of Pakistan P L D 1997 SC 426 “The Constitutions are always made and promulgated keeping in view objective conditions and socio-economic requirements and sometimes in such constitutions is provided specifically as to what the basic structure is and what is allowed to be amended or not amended on the ground that it would be contrary to the Basic structure.”

^{xlvi} P L D 2000 SC 869

^{xlvii} Nadeem Ahmed v Federation of Pakistan PLD 2010 SC 789

^{xlviii} Pakistan Lawyers Forum v Federation of Pakistan PLD 2005 SC 719

^{xliv} Asma Jelani v. Government of the Punjab, PLD 1972 SC 139

^l Syed Zafar Ali Shah v. Pervaiz Musharraf Chief Executive of Pakistan, PLD 2000 SC 869

^{li} Id., PLD 2015 SC 401 “Basic structure doctrine which took root in an Indian soil (Indian Jurisdiction) under a distinctly different constitution, needed serious critical examination before being pressed into use in aid of constitutional interpretation in Pakistan. Any grafting of an alien concept onto our body politics was as likely to be rejected as an alien organ transplanted in a human body.”

^{lii} Id., District Bar Association Rawalpindi and others

^{liii} Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263

^{liv} District Bar Association Rawalpindi and others Vs Federation of Pakistan and others, PLD 2015 SC 401

^{lv} Id., PLD 2015 SC 401 “Said doctrine is not a part of constitutional law in Pakistan, hence it could not be used to strike down a constitutional amendment.”

^{lvi} JUSTICE (r) FAZAL KARIM (2006), “Judicial Review of Public Actions” Universal Law Publishing Co. Pvt. Ltd. 2006, p.66