

Unconstitutional Constitutional Amendments in South Asia: A Study of Constitutional Limits on Parliaments' Amending Power

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Abstract

Against the backdrop of the landscape of Parliamentary Supremacy of south asian countries, members of parliament often cross their limit by thinking parliament as a sovereign body to make unnecessary constitutional amendments which are ultimately questioned by the courts. As a member of the legislative department, I unmasked the reasons behind this unauthorized exercise of power to stop the mockery of parliamentary democracy. Supreme Courts in south Asia are often asked to judge constitutionality of constitutional amendments which provides them with the opportunity to engage with the noble issue of 'constitutional limits on parliamentary amending power'. Constitutional courts and commentators have always recognized some short of constitutional limits on parliament's power to amend the constitution, though the nature and scope of such limits have been a matter of controversy. Courts in South Asia are divided in their opinion. While Court in Bangladesh and India invoked implied substantive constitution limits in parliamentary amending power and declared constitutional amendment unconstitutional in number of occasions, Courts in Srilanka and Pakistan have refused to do so. This study aims to examine the extent and nature of constitutional limits on parliamentary amending power with reference to the constitutional amendments, if any, so far declared by the constitutional courts in South Asia. However, for space constraint and other limits, we will confine ourselves to considering only the constitutional amendments, if any, so far declared unconstitutional in India Pakistan and Bangladesh. For the purpose this study, we will rely heavily on the jurisprudence developed by the Supreme Courts of Pakistan, India and Bangladesh in amendment cases, and on some fascinating academic literatures written by various constitutional commentators which directly address the position of the courts in these cases. Instead of discussing all the constitutional amendment cases in fragment, this paper will concentrate on studying various constitutional limits invoked by the courts on parliamentary amending power and opinions of the courts in those amendment cases will be referred in cases they are necessary in theoretical discussion of various constitutional limits. However, we will not go to see the procedural limits on amending power prescribed by the constitution itself, in that such limits being expressed in the provisions of the constitution are less controversial and does not merit much theoretical discussion. An attempt will be made to conceptualize the very concept of 'unconstitutional constitutional amendment'. In this section we will look how the concept emerged in the jurisdictions beyond South Asia. Then will turn to see how South Asian courts in constitutional amendment cases have understood the concept. Conceptualizing unconstitutional constitutional amendment, we will turn to see the constitutional limits which are generally imposed on parliamentary amending power. In this regard, our focus will be to see various substantive constitutional limits invoked by the courts in India, Pakistan and Bangladesh. However details of such limits will be discussed in other appropriate sections dedicated for that purpose. Will have a short discussion on the definition of the term 'amendment' and examine if there is any limitation inherent in the term. It will be shown examination of the meaning of the term has greater importance in determining the scope of parliamentary amending power, as the court relied heavily in amendment cases on definition of the term to reach their conclusion. Examination of the positions of the courts in this regard will show that there are some inherent limits in the term 'amendment' which will considerably limit the power of parliament to amend the constitution. In next section, limit on amending the basic features of the constitution will be discussed. The doctrine of basic structure doctrine will be examined as it is invoked by the courts in India, Bangladesh and Pakistan. A part will be dedicated to address some core criticisms which basic structure doctrine is often to face. At last part of the section, we will turn to see to what extent basic structure provisions are immuned form amendment. We will examine the level of entrenchment enjoyed by fundamental rights against constitutional amendment. Firstly, position of the courts regarding the question- whether fundamental rights are law for the purpose of fundamental rights review- will be examined. Then attempt will be made to see what extent fundamental rights provisions are immured from amendment as one of the basic features of the constitution. In later section we will consider the limit, invoked by the courts in basic structure cases, on radical change of the constitution so that constitutional identity and purpose are not lost. A brief discussion of the concept of constitutional identity with its components will be given in this section. Legitimacy of the constitutional limits on amending power will be considered in the light of various constitutional theories such as constitutionalism, democracy, sovereignty, parliamentary sovereignty and popular sovereignty. While the limits will be judged in the lights of some fundamental constitutional and political concepts, focus will be placed to see how the constitutional limits on constitutional amendment challenged theses theories and to what extent we are forced to rethink those principle or

concepts. We then will turn to see ‘what the constitution is’ and how scope of amendment invariably depends on how one take the constitution to be. It will be seen that difference in views of the judges regarding nature of constitution ultimately leads them to vary in their positions as to constitutional limits on parliamentary amending power. In the last section we will turn into the interpretative attitudes adopted by the court to support their position as regard constitutional limits. It is because, without examining the mode of interpretation which helps to base the limitations and the theories which support and contradict such limitation, nature and extent of the limits cannot be understood properly.

Keywords: Parliament, Unconstitutional, Amendment, Supreme Court

1. Introduction

Frequent amendments to the constitution provide Supreme Courts in South Asia with the unique opportunity to engage with the noble issue of ‘constitutional limits on parliamentary amending power’. While Supreme Courts in both India and Bangladesh invoke the ‘doctrine of basic structure’ which sets some general principle of constitution as limits on parliamentary amending power, Court in Bangladesh would not be unhappy to declare a constitutional amendment unconstitutional on some other grounds also. As regards Pakistan, it would be shown that despite its consistent reluctance to impose any substantive limits on amending power, a close scrutiny of court’s position in a recent amendment case reveals that invocation of some substantive implied limits is not impossible altogether. This paper will also show that the constitutional limits imposed by South Asian courts on parliamentary amending power have been quite innovative and novel: firstly, they are focused on particular political and constitutional culture of the society where they are invoked; secondly, they would have strong appeal to rethink some of the fundamental constitutional and political theories or concepts like democracy, constitutionalism, parliamentary sovereignty, constitutional supremacy and judicial review.

2. Conceptualizing ‘Unconstitutional Constitutional Amendment’ and ‘Constitutional Limits on Parliamentary Amending Power’

2.1 Unconstitutional Constitutional Amendment

Can constitutional amendment be unconstitutional even though it is done following all the procedure prescribed the constitution itself? If it is, what makes then a constitution constitutional? ‘Nothing’, Frederick Schauer answered, ‘nor does or can anything makes a constitution unconstitutional.’ It is argued that once the amendment is made following the procedure prescribed by the constitution it is part of the constitution, and there is no higher law to its validity.

However, Supreme Court of Bangladesh observes that for being part of constitution, an amendment must pass some tests. Thus declaring a constitutional amendment is not to declare a constitution to be unconstitutional rather it is to judge an amendment’s constitutionality before it become part of constitution.

The analogy drawn by German Court is considered the guiding principle in this regard:

“That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the constitution. There are constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene those principles. ”

Supreme Court of India and Bangladesh take the argument more forward that: the constitution stands on certain fundamental principles which are structural pillars and if those pillars or structures are demolished or damaged the whole constitutional edifice will fall down.

Thus the court will have the authority to declare a constitutional amendment unconstitutional if the amendment destroy or damage any of the basic features of the constitution or the constitution is radically changed to damage the very identity or purpose of the constitution. Court in India and Bangladesh struck down a number of constitutional amendments on the ground that they violated basic structure of the constitution.

Position of the constitutional courts in India and Bangladesh get support from the view of Peruvian Supreme Court which must guarantee the Constitution’s principles (*principios juridicos*) and basic democratic values (*valores democraticos basicos*). Very recently South African constitutional Court has also confirmed that its hands are not off to strike down a constitutional amendment on certain grounds.

However, Supreme Court of Pakistan is of the view that a constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections. It refused to declare any constitutional amendment unconstitutional on any substantive ground.

2.2 Constitutional Limits on Parliamentary Amending Power

In constitutional democracy parliament’s power to amend the constitution is often limited in its scope. It is argued that if “by constitutional amendment, Parliament was granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it.”

Limits are often classified in two broad categories: procedural and substantive. Procedural limits are often directly prescribed in the express provisions of the constitution, while substantive limits in most cases are inferred by the courts and thus implied in nature. Thus procedural limits are often express limits in nature. However sometimes constitution itself provides for some substantive limits. It is, in most cases that constitution entrenches certain provision against amendment. A classic example is the constitution of Germany. Recently by 15th amendment to the Bangladesh constitution a wide catalogue of provisions in the constitution are entrenched against amendment by parliament.

Constitutional limits are not necessarily prescribed by the constitution in express provisions. Many times constitutional limits are taken by the Courts to be implied in the constitution. In that sense constitutional limits are implied and express. Distinction between implied and express limitation is used by the court in two senses. Firstly, to see whether the limitation the court seek to impose on parliamentary amending power are expressed in particular provisions of the constitution or are inferred from the constitution as a whole. The express-implied limitation is used in another sense to distinguish between limits that may be traced to the structure and origin of the constitution at its founding moment- historically implied limits- and express limits which may be traced to the constitutional text.

While constitution of Bangladesh imposes express substantive limits on amending power, Constitutions of India and Pakistan provides for no such express substantive limits. Supreme Court in Bangladesh and India has imposed some implied substantive limits on amending power by invoking the 'basic structure doctrine'. Under the doctrine power to amend the constitution does not extend to alter the basic feature of the constitution. Concept of unamendable basic features of constitution proposes 'a set of general constitutional principles as the limit on the amendment power in the constitution' where text emergent but unwritten principles constrain the exercise of power under the Constitution.

Idea of 'immutable basic features' restrains amending power in the sense that the power to amend the constitution does not extend to radically change the constitution so as to alter the very identify and purpose of the constitution. Preservation of identify suggests that the constitution under which amending power is exercised must exist and can be amended in way that destroy its coherence.

The 'basic structure doctrine', as it is addressed by D. Conard who is thought to be the father of the doctrine, is said to emerge from the concept of implied constitutional limits. However, Sudhir argues that the doctrine could better be understood as is based on structural interpretation of the constitution where court, for imposing limits on amending power, draws multi-provisional implications by taking the constitution as a whole.

Constitutional Court in Bangladesh imposes some constitutional limits on amending power which are based on some broader constitutional principle such as constitutionalism, supremacy of constitution, democracy. In 5th and 7th Amendment Cases the court struck down two amendments of the constitution which validated the actions taken during martial law regime including some amendments made to the constitution by martial law proclamation. It was argued that martial law is 'unknown to the constitutional law' and 'a fraud upon the people and the constitution'. Martial law is undemocratic in character and it has no authority amend the constitution. Further it suspends or subordinates the constitution for which it has no constitutional mandate. A constitution can be amended only in the process and manner which are prescribed and authorized by the constitution.

As regards constitutional limits on parliamentary amending power, Pakistan Supreme court took the position that: 'a constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.' It refuses to subject the parliamentary amending power to any substantive constitutional limits. In other words, the court would only allow *procedural* challenges against the constitutional amendment and not *substantive* challenges. As to the basic structure doctrine, it consistently denied the application of the doctrine on ground it unique constitutional scheme and judicial history. Though in *Zafar Ali Shah v. Gen Pervez Musharraf* the court recognized that 'there is a basic structure of the Constitution which may not be amended by Parliament', the court in *17th Amendment Case*, making a difference between 'identification of basic features' and 'judicial review on that ground' holds that: 'the theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features and 'no constitutional amendment could be struck down by the superior judiciary as being violative of those features'.

However, very recently the 18th Amendment to the Constitution was challenged in the Supreme Court on the ground that it destroyed 'the independence of judiciary' which is one of the basic features of Pakistan constitution. The courts without going directly to the merit of the issue order the Parliament to review the impugned amendment and formed a commission to see the motion in the parliament. Though the court refrained itself from declaring the amendment unconstitutional, it signaled that substantive limit on parliamentary amending power in Pakistan is no more impossible now.

3. An Overview of the Constitutional Limits on Parliamentary Amending Power in South Asia

3.1 What does 'to Amend' Mean? Built in Limitations in the term 'Amendment'

Studying constitutional limits on parliamentary amending power necessarily suggests investigating into the meaning and character of amendment. Is there any inherent limit in the 'term amend'. Both the majority and minority judges in constitutional amendment cases made attempt to define the term 'amendment' for the purpose of either to defend or reject a particular limit on parliamentary amending power. Some of the Judges in *Kesavananda* comprehensively examine the meaning of the word 'amend' and one judge, Khanna, J depends almost exclusively on interpretation of the term 'amendment' in reaching the conclusion that parliamentary amending power is limited.

Other majority judges also went to see what 'to amend' means. Ray, J observes that 'the 'crux of the matter is the meaning of the word "amendment"'. He was the view that constitution uses the word "amendment" in an unambiguous and clear manner' to 'mean any kind of change'

In 8th Amendment Case, the minority judge ATM Afzal, J though rejected the doctrine of basic structure views that there is a limitation inherent in the word "amend" or "amendment" which may be said to be built-in limitation'. He then concludes: 'there could be no objection to exercise of amending power to fulfill the need of time and of generation. But the power cannot be so construed as to turn the constitution which is the scripture of the hope of a living society and for its unfolding future, into a scripture of doom'.

To conclude that constitution cannot be amended to loss its original identity and character, the court in 8th Amendment Case holds that 'the term amendment is a change or alteration, for the purpose of bringing improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation or destruction or a change resulting in the loss of its original identity and character. 'As to implied limitation on the amending power', the same judge observes, 'it is inherent in the word 'amendment' in Art. 142.' 'The term amendment', in the eye of another majority judge, B. H. Chowdhuri J, 'implies such an addition or change within the line of the original instrument as will effect an improvement or better carryout the purpose for which it was framed.'

Justice H.R. Khanna, the author of the decision's most important opinion in *Kesavananda* wrote: '*The word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.*' In *Minnera Mills*, the court asserts in the same line that 'the power to destroy is not a power to amend.' Exclusion of damage or destroy from the term 'amendment' can better be understood from the distinction between "amendment" and "revision", the latter intended to apply to pervasive changes in constitutional arrangements.

In determining the meaning of the term 'amendment' for invoking constitutional limits on parliamentary amending power, Mathew J. proposes that 'although the word "amendment" has variety of meanings, we have to ascribe to it in the article a meaning which is appropriate to the function to be played by it in an instrument apparently intended to endure for ages to come and meet the various crises to which the body politic will be subject'.

3.2 Immutable Basic Features: How Far Parliament's Hands are off?

The constitution is said stand on certain fundamental principles which are structural pillars and if those pillars or structures are demolished or damaged the whole constitutional edifice will fall down. *Dietrich Conard* proposes that: 'any amendment body organized within statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority'.

Concept of such enrichment of certain constitutional principle against parliament's amending power is said to emerge in Germany. Where the Court goes to conclude that 'there are constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene those principles.'

South Asian courts accepted this concept through invocation of 'basic structure doctrine' which 'imposes a set of general principles as limits on parliamentary amending power' in which text emergent but unwritten principles constrain the exercise of power under the Constitution.

Supreme Courts of Bnagladesh and India successfully adopted such idea with the invocation of the 'basic structure doctrine', though the courts in both jurisdictions were quite innovative in some sense. 'According the basic structure doctrine, power to amend does not extend to destroying the constitution in any of its structural pillars or basic structures.'

In *Goloknath* it was unequivocally held that parliamentary amending power does not extend to damage or destroy any of the basic features of the constitution. The bar on amending the basic features of the constitution is inferred from entire scheme of the constitution. Pointing out that implied limitation on amending power is 'deducible from the entire scheme of the Constitution', *Shahabuddin J* in goes to conclude that 'there is no dispute that the constitution stands on certain fundamental principles which are structural pillars and if those

pillars or structures are demolished or damaged the whole constitutional edifice will fall down.’

By innovating basic structure review, as Sudir argues, the courts has given the amendment process an opportunity to express democratic conceptions of basic constitutional values without derogating from the fundamental constitutional principles protected by basic structure review. Parliament now cannot amend the constitutions to derogate from fundamental constitutional values and principles – e.g. rule of law, democracy, and supremacy of constitution, separation of power, fundamental rights, and independence of judiciary.

As regards the constitutional limits on amending the basic features of the constitution, Pakistan Supreme Court is quite different in its approach. Though the court in *Zafar Ali Shah v. Gen Pervez Musharraf* observed that ‘there is a basic structure of the Constitution which may not be amended by Parliament.’ However, in 17th amendment Case the Court held that ‘there is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments.’ The court then goes to observe that “there is a basic structure of the Constitution which may not be amended by Parliament” does not mean that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. The theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features.’

However, very recently in 18th Amendment Case it was argued before the court that by the impugned amendment one of the basic features of the constitution- independence of judiciary- has been destroyed. They took an interesting stand; it kept the case for further consideration and without directly striking down the amendment issued an interim order to review the amendment. It can be inferred that though the amendment was not struck down, it signaled that an amendment can be struck down on ground of destroying basic structure of the constitution.

3.3 Critics of Basic Structure Doctrine

Here we will address only the minor arguments against basic structure doctrine which do not attract much theoretical discussion. Major objections like its undemocratic nature or establishing judicial supremacy will be addressed in the later in details.

Taking basic structure bar as an implied limit on amending power, it is argued that if amendment process is made more rigid by implied limitation then there will be no scope of peaceful change and this may lead to a violent and unconstitutional means such as revolution. ‘If the positive power of amendment of the constitution is restricted by raising the wall of basic features’, ATM Afzal justice assumes, ‘that would lead to destruction of the constitution by paving the way for extra constitutional or revolutionary changes.

Acceptance of this argument needs prior acceptance of the fact that ‘*revolution is per se unconstitutional menas*’. Again Shahabuddin, J points out that: ‘if a revolution comes it cannot be prevented by a Constitution however flexible it might be’

Another criticism is advanced that in the absence of full catalogue of the basic structures neither the citizen nor the Parliament will know what is the limit of the power of amendment of the Constitution. This argument does not sustain in the sense that ‘there are many concepts which are not capable of precise definition, never the less they exist and play important part in law’

If the framers of the constitution wanted the so-called basic features to be permanent features of the Constitution, there was nothing to prevent them from making such a provision in the Constitution itself. Mathew J said: ‘it is difficult to understand why the constitution makers did not specifically provide for an exception to Article 368 if they wanted that fundamental rights should not be amended in such way as to take away or abridge them’

It suggest higher authority of framers intention in interpretation of constitution which is yet undetermined. Sikri Justice- it is not possible that ever thing will be expressly said a in a written constitution. ‘All the provisions are essentials’ does not prevent some provision from being more essential. Further it is not about essential and non essential provisions of the constitution it is about essential features without which constitution will lost its identity.

It is inconceivable that the makers of the Constitution had decided on all the matters for all the ages without leaving any option to the future generation. It needs more theoretical discussion of popular sovereignty and its relation with amending process which is lacked in this regard.

As regard application of the basic structure doctrine in Bangladesh, ATM Afzal, J points out that: ‘In our context the basic features have indigenus and special difficulties for acceptance. The ‘basic features’ have been varied in such abandon and with such quick succession that the credibility in the viability of theory of fundamentality is bound to erode’. However, he could learn otherwise that such experience of frequent changes makes it inevitable to impose some permanent limit on amending some basic features of the constitution. Further, he seems to take a particular form of government to be a basic feature e.g. Presidential form of Government, if republican form of government taken as basic feature then it does not matter whether it is changed into

parliamentary form of government.

All the provisions of constitution are essential and distinction can be made between essential and non-essential feature, unless the makers of the constitution makes it expressly clear in the Constitution itself. It can be argued that basic structure doctrine is about essential features of the constitution which are often clear in the entire scheme of the constitution not about essential provisions. Further it is not possible that everything is expressly mentioned in a written constitution.

“As a provision is not incorporated into a Constitution unless it is regarded as of fundamental importance, the distinction between Articles of primary and secondary importance is difficult to maintain.” In face of the argument it is said that basic structure doctrine tests validity of amendment before it being part of constitution.

Basic structure review is said to complement or supplement existing models of constitutional judicial review which in itself is not controversial, controversy around basic structure review is not about such extension rather circle around whether court can use such review in regulating the scope of parliaments amending power.

It is argued that by creating basic structure doctrine, Supreme Court is amending not interpreting the constitution. This criticism however does not subsist unless it makes its own definition of amendment and interpretation and says why such definition is correct and superior to other definitions.

Finally legitimacy of basic structure doctrine would better be understood in the light of particular historical setting of the country where the doctrine is invoked. ‘Some doctrines may be virtuous as they are elegantly crafted and applied with clarity’, Sudhir proposes, ‘while others may be practically useful in a particular historical setting’.

‘Basic structure doctrine’ was “developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the constitution passed without Green Paper or White paper, without eliciting any public opinion, without sending the Bill to any Select Committee and without giving sufficient time to members of the parliament for deliberation on the Bill for amendment”. Though failed to receive much welcome during the first decade of its invocation, due to subsequent autocratic government and emergency the doctrine receive warm acceptance among political elites including lawyers, politicians and constitutional commentators.

Focusing Bangladesh experience with constitutional amendment, Eqramul Hoque concludes that:

‘The Country where even a democratic government by its majority in the parliament did establish one party political system, curbed the independence of judiciary, banned the newspapers and so one, this doctrine undoubtedly will remain there as an effective check to such drastic autocratic steps to be taken through constitutional process in the future’

3.4 Are Features Really Unalterable?

Are Parliament’s hands totally off to change the basic features of the constitution? Cannot parliament amend any of the provisions touching the basic features even though such amendment does not destroy the features in essence? No clear cut answers to these questions can be given in yes or no form.

As regard amendments of basic features of the constitution, a proposition can be drawn that ‘basic structure review’ as a softer model of judicial review ‘promotes a democratic dialogue between the branches of government’ where ‘a judicial decision in a basic structure case is open to reversal, modification, or avoidance’.

In *Indra Sawhney v. Union of India* the court declared that equality was a basic feature of the constitution and the 50 percent lit on reservation quotas, the ban on quota based promotions in public employment, and the exclusion of creamy layer in the identification of ‘Other Backward Caste, beneficiaries are binding legal propositions. The constitution was later changed to overcome this restriction and in face of a challenge, the court upheld the amendment.

In Bangladesh, though one of the judges in 8th Amendment Case declared presidential form of government to be one of the basic features of the Bangladesh Constitution, by a later amendment a amendment was made to the constitution to change presidential form of government to west-minister system of government which was never challenged and prevailing system of government in Bangladesh.

It can be further drawn from the *Indira Sawhney* that contents of a particular right or feature may be changed though the essence cannot be, and compatibility with contents of a particular fundamental right is subject matter of fundamental rights review which deals with other form of state actions not parliamentary amending power.

Analogy drawn by the court in Privacy of Communications Case (Klass Case) can be another proposal as regards change of basic features: ‘Fundamental constitutional alteration is not prohibited as long as it meets the criterion of coherence. “Restrictions on the legislator’s amending the Constitution . . . must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner.

The variability of changing conditions may necessitate modifications in the structure and design of particular institutions, as well as in the manner in which these institutions interact with one another and with other agents, but the transient character of formal arrangements must reflect the larger purposes and principles that are the continuous and unalterable thread of constitutional identity.

If a particular feature or principle is not taken to be rigid and concrete and as configured in particular provision, then a specific provision intended to configure a particular principle/feature in a particular way may be changed within the constraints of the broader principle.

Thus the principle of secularism may be understood as an element of the basic structure of the Constitution, and, as such, may not be subject to amendment, although a specific provision intended to configure secular relations in a particular way may be changed within the constraints of the broader principle.

3.5 Identity and Integrity of a Constitution: the Inferred Limits on Radical Constitutional Change

The Constitution is considered to be a precious heritage and therefore its identity cannot be destroyed using the power of amendment. "A Constitution is an ever growing thing and is perpetually continuous as it embodies the spirit of the nation. It is enriched at present by the past influence and it makes the future richer than the present." It is a "contingent part of the moral order and for that very reason imposes an obligation that overrides the alleged right of each successive generation to scrap the existing constitution and frame a new one for itself." The constitution is open to change so far it does not destroy the identity or very purpose of the constitution.

A 'continued uninterrupted existence is . . . necessarily implied in identity.' Herbert Rice says that: "It is 'This Constitution' that may be amended. 'This constitution is not a code of transient laws but a framework of government and an embodiment of fundamental principles. By an amendment, the identity or purpose of the constitution is not to be changed; its defect may be cured, but 'This Constitution' must be remained."

Justice Khanna, the author of the *Kesavananda's* most important opinion, wrote: *'The word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.'*

Seervi referring to the provision of Article 368 of Indian constitution –'the constitution shall stand amended' concludes that 'constitution which is replaced does not stand at all; much less does it stand amended. It is necessary implication of the constitution standing amended, that all its provision cannot be replaced, and the word 'any' does not mean 'all'. Article 142 of Bangladesh Constitution provides for amending power almost in the same words.

The power to amend the constitution is not the power to destroy it. Amendment is to reform the constitution, and it is not, as Walter F. Murphy has pointed out, re-forming a constitution. "Change should be gradual rather than sudden, and (at least in some respects) there should not be too much change overall." Amendment should be taken to mean "a moderate and temperate reform," that is to do "as little good as possible."

Lastly, identity of the constitution concerns about the idea of preserving the 'inner unity' or 'coherence' of the Constitution or what Ronald Dworkin refers to as "integrity." Thus a constitutional amendment could be subject to nullification if it transforms the document into something fundamentally incoherent. It must be emphasized, however, that it is not the introduction of significant and far-reaching change that is per se objectionable; rather, it is the content of this change insofar as it implicates the question of constitutional identity.

To enable us to correct the constitution, the whole constitution must be viewed together; and it must be compared with the actual state of the people, and the circumstances of the time. While constitutional will be updated to cope with the present circumstances and state of the governed, it is crucial that integrity or coherence of the constitution as whole is not lost by such change or modification. Shahabuddin justice while sets the tests to be passed by an amendment before being part of the constitution, he does not forget include that the amendment is 'not so repugnant to the exiting provision of the Constitution unworkable'.

3.6 Fundamental Rights and Entrenchment Enjoyed: the Compatibility Bar

How far fundamental rights are entrenched against parliamentary amending power? Will the compatibility requirements of state action or law made by parliament be extended to include constitutional amendment?

The Supreme Court of India in *Golaknath* that constitutional amendment inconsistent fundamental rights guaranteed in the constitution would be unconstitutional. The forwards two major argument in support of its finding: first, amendment is 'legislative' in character and special requirements such as enhanced majority in some cases does not alter the 'legislative character' of amendments, second, amendments are law for the purpose of fundamental rights review under Article 13 of the Indian constitution.

The position of the Court in *Golaknath* received severe criticism on the ground that designating amending power as plenary legislative power of parliament it embraced British constitutional model of parliamentary sovereignty which is not sound to apply in autochthonous constitutional traditions. Again it blurred the difference between ordinary law and constitutional law which is defamatory to the status of the

constitution itself. It is also argued that mere resemblance between law making procedures is not enough to conclude that 'amendment' are ordinary law for the purposes of fundamental rights. Lastly, constitution itself containing derogative provisions and allowing suspension of those rights at will of executive in some cases reveals that these rights are not essentially non-derogative natural rights.

Position of the Court in *Goloknath* is criticized on the further grounds of highly based on historic evidence without clearing why historic evidence merits such value, overlooking the historical change in the status of legislature under local constitutional tradition and determining the scope of amending power on the whole basis of precedent of Privy Council which is no more sound, drawing implied limits on amending power with reference the jurisprudence of Privy Council regarding the limits on the power of amendment enjoyed by colonial legislature and by giving undue importance to difference between constituent and constituted body European jurisprudence.

However, the decision was overturned by the Supreme Court of India in *Kesavananda* which invoked the basic structure doctrine. It was found that amendments are not law for the purpose of fundamental rights review. Supreme Court of Bangladesh takes the same position in *Annower Hossain*. two of the three majority judges give the view that amendment are not law for the purpose of fundamental rights review under Article 26 of the constitution.

Though seven of thirteenth judges in *Kesavanand* subjected fundamental rights to the amending power of Parliament, fundamental rights still remains entrenched as it has been recognized that fundamental rights are one of the basic features of the constitution which cannot be abridged. Supreme Court in 8th Amendment Case clearly mentions that fundamental rights are one of the basic features of the constitution and thereby cannot be taken away.

It is argued that after *Kesavanand* and *Annower Hossain*, parliament is now free to amend any specific provision of fundamental rights though it cannot abrogate all. Another plausible argument is that Parliaments are now not restrained to amend any specific provision of fundamental rights so far essence of the rights remains guaranteed.

A *Indra Sawhney v. Union of India* the court declared that equality was a basic feature of the constitution and the 50 percent limit on reservation quotas, the ban on quota based promotions in public employment, and the exclusion of creamy layer in the identification of 'Other Backward Caste, beneficiaries are binding legal propositions. The constitution was later changed to overcome this restriction and in face of a challenge, the court upheld the amendment.

Thus the analogy can be drawn from the *Indira Sawhney* that contents of a particular right or feature may be changed though the essence cannot be, and compatibility with contents of a particular fundamental right is subject matter of fundamental rights review which deals with other form of state actions not parliamentary amending power.

3.7 No Amendment without Constitutional Mandate: Constitution cannot be a 'Suicide Pact'

On the backdrop of a long legacy of validating martial law with reference to the 'doctrine of state necessity' and 'theory of revolutionary legality', Supreme Court of Bangladesh in 5th Amendment Case declares that martial law is unconstitutional. It further goes to conclude that 'martial law was unknown to constitutional law' and 'is fraud upon people and their constitution'.

While the court struck down 5th amendment to the Bangladesh constitution in the said case it took the view that martial law administrators usurped the power which was undemocratic and not mandated by the constitution. Thus martial law is extra-constitutional in character which cannot be rectified by using the amendment power. Another argument was forwarded that during the martial law the constitution was abrogated and suspended what is unconstitutional.

It was further argued that during the martial law constitution was amended in the manner otherwise than provided by the constitution and it had no authority to amend the constitution. As constitution cannot be amended in any way other than that is provided by the constitution itself, the amendment was unconstitutional. As 5th amendment confirmed and rectified those amendments it is also unconstitutional.

The Court while outlaws all extra-constitutional means of amending constitution, it has been equally successful in addressing the issue of abuse of amendatory process. If the amending process prescribed by the constitution itself is used to assault the constitution, the constitution then will turn out to be a 'suicide pact'. If parliament by using the amending power is allowed to legalize anything at its will, it may use its amending power provided by the constitution itself to legalize something unconstitutional in nature. This will ultimately turn the constitution into a 'suicide pact' which itself provides for its death.

According to broader constitutional principles like constitutional supremacy, constitutionalism, rule of law, constitutional identity, a constitution can never be a 'suicide pact'.

4. Legitimacy Concern of various Constitutional Limits on Amending Power: Re-thinking Some Constitutional and Political Concepts

4.1 Popular Sovereignty and Constituent Power: Limits on Radical Constitutional Change

‘If there is one thing more than any other that is clear and shining through the Constitution it is the fact that the people are the masters.’ The Court is not competent to review or nullify a decision of the people. As amendment is made by the parliament which exercise power on behalf of the people there should be no limits on parliamentary amending power. Limitation on radical constitutional change is also contested in the same way.

Supreme Court of India in *Goloknath* distinguished between constituent power and constituted power. Power of a constituted body – Parliament- is not unlimited in its mandate and power to alter the constitution ‘does not follow from the amendatory processes. It further held that rights are once declared to be fundamental by the People, to abridge them Parliament must ‘convoke another Constituent Assembly’ because it itself cannot abridge them by using ordinary amending process.

The court in *Kesavavnda* actually made a distinction between two modes of changing the text of constitution: amending power and constituent power. Invocation of ‘basic structure doctrine’ suggests that both the powers are exercised by people but through different mechanisms. While the amending power is exercised indirectly through representative democracy by parliament, the second one constituent power is exercised directly by people. Ordinary amending power does not extend to radically change the constitution, though it possible by another constituent body.

Supreme court in Bangladesh, adopted slightly different sort of interpretation, it says that constituent power belongs to the people only and if it is vested in parliament, that is derivative power, and amendment of constitution relying on such derivative power does not per oust such amendment beyond judicial review of its legality.

Thus basic structure doctrine upon rejecting the monist and foundational democratic model and endorses the dualist democratic model whereby courts scrutinize proposals for radical constitutional change to ensure that they comply with the deep deliberative requirements necessary for radical constitutional change.

4.2 Democracy, Constitutionalism and immutable Basic Features

Constitutional limits on parliamentary amending power are often justified as reconciliation between constitutionalism and democracy. In contrast it is argued that as constitution itself prescribes somehow different process and majority, reconciliation between constitutionalism and democracy is reconciled by the constitution itself to the extent it is needed for functioning of the constitutional scheme, any further limits on amending power does appear to unreasonable in the context. In other words, provisions authorizing amendment exhaust the legal and political avenues for legitimate constitutional change.

Firstly, by proposing limits to the scope of amending power, the court entrenches certain constitutional principles permanently beyond the reach of the people and this is undemocratic. Secondly, even if limitations on amending power are defensible, there is no reason a court exercising its judicial review power should police those limits.

In this section we will consider the first argument; the second argument against judicial review of constitutional amendment will be addressed in the next section. As to the first it can be argued that by entrenchment of some constitutional values against conventional constitutional amendments it retains the option of radical constitutional change by the people. In other words the doctrine envisages a dualist model of democracy which distinguishes a decision by Parliament and a decision by the People. As power of the Parliament is ‘mere amending power’ or ‘derivative’ in nature, radical change to constitutional should be made directly by the people using their constituent power.

Finally, arguments to contradict limits on amending power suggest that laws derive authority from their institution merely and independent of the quality of the subject-matter which is an impossible position to Edmund Burke.

4.3 Democracy and Judicial (Basic Structure) Review of Constitutional Amendment

Judicial review of constitutional amendment is often contested on the ground of its being undemocratic. “True democracy and true republicanism”, as P.B. Gajendragadkar J observes, are incompatible with judicial review of constitutional amendments.

The core of the arguments against judicial review is that it is illegitimate and undemocratic in the sense that as it allows non-representative judges to override legislative or executive choices thereby defeating cherished political principles like political equality of different governmental institutions and representation.

Such general argument against judicial review does not merit much in constitutional arrangement of India and Bangladesh for two reasons: firstly, this argument is developed in the jurisdiction where judicial review is used to ensure compatibility with fundamental rights, courts here have declared some basic features to be unamendable and basic are not fundamental rights only, rather are “general rules of a substantive character”.

Secondly, the argument was raised in the context where the constitution like India or Bangladesh does not provide for strong form judicial review.

Again most general arguments against judicial review tend to propose that Majoritarian decision making is equivalent to democracy. Again, such argument cannot subsist unless it is proved undisputedly that the existing voting system for electing executives and legislatures ensures mandate of at least majority people of the society.

Assessing legitimacy of governmental institutions by non-instrumental concern- good governance, accountability- may allow us to choose between political decision-making processes and institutions.

It can be further argued that general criticism is not unconditional but ‘depends on certain institutional and political features of modern liberal democracies’. Young democracies like India or Bangladesh may fail to meet those back ground condition. Political traditions and culture in this jurisdiction may allow such institutional question to be decided differently.

Thus, as ‘basic structure review’ is said to complement extension of the existing models of constitutional judicial review which in itself is not controversial under the constitution of India, Bangladesh or Pakistan, more specific argument addressing why such extension is illegitimate advanced for contesting the ‘basic structure review of constitutional amendment’ where court judges constitutionality of a amendment in the light of some core constitutional principles

4.4 Parliamentary Sovereignty and the Basic Structure Doctrine

Critics of basic structure doctrine argue that by introducing basic structure doctrine Supreme Court has usurped the sovereignty of Parliament. It is argued that ‘no supreme court and no judiciary will sit in judgment over the sovereign will of the Parliament. Ultimately, the whole of the Constitution is a creature of parliament.’ Sovereignty of parliament is justified as Parliament ‘represented the most authoritative expression of the will of the people’.

Invoking Dicey’s formulation of ‘doctrine of parliamentary sovereignty’ in public law of Bangladesh and India has two apparent failures: *firstly*, it misunderstands the nature of sovereignty under the constitutional law of Bangladesh or India which has a written constitution, *secondly*, proponents of such idea fail to understand the character and nature of the doctrine of basic structure.

If sovereignty is taken to be a phenomenon of “supreme authority in a territory”, then it can be rightly argued that such concept of sovereignty of parliament is unknown to the constitutional law of Bangladesh or India. The question of sovereignty was well settled long before *Kesavanand* in *Re special Reference 1964* where Chief Justice Gajendragadkar noted that:

“In a democratic country governed by a written Constitution, it is Constitution which is supreme and sovereign Therefore, there can be no doubt that the sovereignty which can be claimed by parliament in England cannot be claimed by any Legislature in India in the literal absolute sense”

Courts in India or Bangladesh have unequivocally declared that sovereignty lies to people and such is clear from the text of the constitution. Further, even if parliament is sovereign, it does not necessarily claim that parliament should enjoy the same sovereign and constituent power of Constituent Assembly in amending constitution.

Fifthly, we have already seen that the Court in invoking basic structure doctrine does not declare itself to be sovereign, and basic structure doctrine adopting ‘dualist model of democracy’ resolved the problem of representative authority.

4.5 What is the Constitution? What Amendment can do with Constitution?

A particular view of the constitution plays a great role in Judges’ final conclusion regarding limits on amending power in constitutional amendment cases.

Justice Khanna in *Kesavananda* referring to Carl J. Friedrich on the constitution as a ‘living, organic system’ holds that: ‘the word ‘amendment’ postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.’ Thus power to amend can be exercised within the broader arena but does not extend to abrogation of the Constitution itself

“At bottom,” wrote one dissenting judge in *Kesavananda*, “the controversy in these cases is as to whether the meaning of the Constitution consists in its being or in its becoming.” Proposing that the Constitution is “a becoming, a moving equilibrium”, he then concludes that there should be no limit on change of the constitution.

Justice Ray in *Kesavananda* referring the constitution as an organic instrument concludes that: ‘amending power was unlimited ‘so long as the result is an organic instrument which provides for the making, interpretation, and implementation of law’.

Justice Chandrachud looking constitution as a heritage articulates that ‘amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your

generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity’

Though ATM Afzal, J rejected the concept of unamendable basic features of Constitution, he was happy to point out that ‘there could be no objection to exercise of amending power to fulfill the need of time and of generation. But the power cannot be so construed as to turn the constitution which is the scripture of the hope of a living society and for its unfolding future, into a scripture of doom’.

4.6 Interpretation of Constitution and Invocation of Constitutional Limits

Some of the arguments against constitutional limit on amendment of basic features of the constitution rely on particular understanding of the nature of interpretation. It is argued that the court had no textual basis for its conclusion that basic features are unamendable. Secondly, the doctrine is not supported by the constitutional text and establishes implied limitations divined by the judges unaided by the constitution. The court has no authority to read implied limitation into the constitution. Thirdly, it is argued that if the objections above are valid then it follows that the court effectively amended the constitution in guise of interpreting it, an action it has no authority to do”

Basic structure doctrine is not expressly set out in any particular provision of the constitution is not any surprising feature of any constitutional doctrine. Many doctrines such as doctrine of separation of power, rule of law are not also spelt out in any constitutional provision.

A close scrutiny of the interpretation adopted by the court will reveal that the doctrine has strong constitutional basis and interpretation adopted by the courts in basic structure cases, though innovative in some respect, is quite sound constitutionally.

In basic structure cases, the courts has abandoned pure literal approach and adopted a highly viable structuralist approach. “In structuralism [...] the constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it [...]. Structuralist interpretation can also be teleological, meaning that it understands the constitution to be intended to achieve certain purposes. It is, in that sense, result oriented.”

In basic structure cases which adopt structural interpretation of the constitution, certain implication is drawn to reach a particular conclusion and such implication is multi-provisional in character. The multi-provisional implications allow court to interpret the constitutional document in totality so that integrity of the document is maintained. Further such implications allow the court to reconcile various provisions which apparently conflict with each other in a principled fashion.

Structural interpretation like the other interpretative mode often adopted by court in interpreting the constitution reflects the framers intention to some extent. The argument of the courts in the basic structure cases that the constitution was not designed to be play thing of the majority reflects an ‘implicit assumption’ about the limitation inherent in the constitutional project .

Structural interpretation adopted by the courts is also purposive and teleological in character. Courts in basic structure cases have abandoned a common law inspired ‘literal approach’ to constitutional interpretation and adopted a ‘teleological theory of interpretation which saw statutes and constitutions in their teleological context and purpose’.

The abovementioned arguments against basic structure doctrine raise an expectation that “every proposition or doctrine of constitutional law will have an express constitutional basis” which rests on “incorrect literalist understanding of constitutional law adjudication.” Constitutional law is a body of both constitutional law and constitutional common law which is developed by the courts through constitutional adjudication.

Further it is not possible that everything will be expressly said in a written constitution and powers are often limited from the necessary implication or limitation implied in the overall scheme of the constitution. It is no sure that express meanings are always important or significant than implied meanings. The relative importance of express and implied meaning is contingent on the context they are applied.

Lastly, the argument that by creating basic structure doctrine Supreme Court is amending not interpreting the constitution does not subsist unless it makes its own definition of amendment and interpretation and says why such definition is correct and superior to other definitions.

5. Directions for Future Research

As with many innovative idea approaches, however, there are still many unanswered questions about the constitutional limits and judicial intervention of parliamentary amending power e.g. how long the parliament extend its hand for making amendments without challenging the legitimacy by the judiciary ? Many of untold questions are issues for an ongoing and broad research agenda which can call for additional research.

6. Conclusion

Aim of this paper has been to study the constitutional limits on parliamentary amending power with reference to the amendments so far declared unconstitutional by courts in South Asia. To fulfill the aim, we have studied

various constitutional limits so far invoked by the Supreme Courts in Bangladesh, Pakistan and India.

Study of the concept of ‘unconstitutional constitutional amendment’ and ‘constitutional limits on parliamentary amending power’ as conceived by the South Asian Courts reveals that supreme courts of Bangladesh and India have imposed implied substantive limit on parliamentary amending power by invoking the ‘basic structure doctrine. While Supreme Court of Pakistan refused to impose any substantive limits on parliamentary amending power. It has further been shown that Supreme Court of Bangladesh has been more innovative in the sense that it has outlawed all extra-constitutional means of amending the constitution.

It is said that the ‘basic structure doctrine’ sets some general principle of constitution as limits on amending power. It is further argued that while these basic features cannot be destroyed or abridged by amendment, any specific provisions can be amended so long as it does not destroy the essence of the features or principles.

As regards entrenchment enjoyed by fundamental rights against constitutional amendment, it has been shown that parliament cannot take away the fundamental rights by amendment. However, position of the courts reveals that contents of a particular fundamental right can be amended as long as the essence of the rights remains guaranteed.

It is shown that the constitutional limits on amending power and the role played by the courts in South Asia in this regard are quite legitimate and have strong constitutional basis. Constitutional limits imposed on the parliaments’ amending power in Bangladesh or India successfully reflect the particular constitutional history and political culture. A close look into the constitutional limits invoked by the constitutional courts in South Asia forces to re-think some normative constitutional theories and concepts like democracy, sovereignty, constitutionalism, and popular sovereignty.

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