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## Balancing and Rebalancing of Judicial Autonomy: a Critical Analysis of Basic Structure Theory

**Abstract** *‘With its restoration in March 2009, the judiciary exceptionally emerged as an independent state organ and sought autonomy from parliament, which embarked on another avenue of confrontation between these two organs. Considering past experience, parliament was committed to imposing modest restraints on the judiciary and ensured its representation in the process of judicial appointments to the Superior Courts in the form of the 18th Constitutional Amendment, which the court considered as an attack on its autonomy. With the help of qualitative research methodology, this research aimed to investigate the post-2009 judicial-legislative transition, which apparently started up with their confrontation and imbalance between these organs. Both state organs are striving to identify their constitutional bounds, which will ultimately lead to equilibrium between these organs.*

**Key Words:** Judicial Autonomy, 18th Amendment, 19th Amendment, Constitution, Basic Structure Theory.

### Introduction

With the successful elimination of Musharraf’s extraconstitutional regime and restoration of judiciary, judicial activism and its autonomy transformed into a new conflict of judicial independence with the representative institutions. Shortly, this clash dramatically escalated, which created an apprehension of the military’s and its affiliates’ involvement in the ongoing confrontation to undermine fragile democratic transition (Kalhan, 2013). The implications of these conflicts are vulnerable to institutional disequilibrium, leaving adverse impacts on the democratic transition. Nonetheless, this institutional imbalance is not a constant phenomenon, and the state organs would ultimately authenticate their jurisdictional bounds, creating prospects of institutional-equilibrium, which would be more productive to the democratic consolidation and constitutionalism in Pakistan.

In the constitutional and democratic transition, the judiciary plays a very significant role. The legal scholarship in Pakistan has been convinced that the superior courts’ jurisprudence has two-pronged outcomes: firstly, the courts have not only validated extraconstitutional actions and military takeovers but also supported the regime’s transformative preservation in the civilian rule at the expense of the democratic governments and compromised its own integrity as well as autonomy. Secondly, the judiciary reinforced the democratic process, invalidated extra-legal actions, upheld the rule of law, and ensured its autonomy and institutional integrity. Judiciary, while seeking autonomy from the regime’s influence, also sought independence from the civilian government even more meticulously. Despite the fact that the judiciary significantly contributed to shaping and advancing the democratic process, there are a number of precedents where the judiciary had not been able to direct the state for upholding the rule of law and democratic norms. This anti-democratic approach had been motivated by various factors: a fragile approach towards constitutionalism, the courts’ dependence on other branches of the government for capacity building, institutional development and enforcement of its judgments, and lack of autonomy from the other institutions.

Unlike its previous traditional narratives of imminent failure and permanent crises, Pakistan’s recent shift to civilian government recorded exceptional institutional and political development, having the potential for an enduring democratic consolidation and constitutionalism. However, the

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ongoing democratic shift brings about more challenges than ever before, which dependent on challenging the deep-rooted military and its associated interests. The military has been backed by a range of actors, including the judiciary, for validation of its extraconstitutional acts and intervention in the civilian governments. In the prevalent transition, the institutional identity of the judiciary claims maximum autonomy, which could be a potential threat to democratic consolidation. Keeping in view previous experience, a balance between judicial autonomy and its restraints is a viable phenomenon. Assertion of maximum judicial autonomy, without any control to counter potential exploitation of absolute authority, can further strengthen the status quo at the expense of representative institutions. The current democratic transition entails representative institutions with strong governing capacities in order to restraint deep-rooted status quo interests. Considering its broader applicability, this regime shift can help realize other countries living in the same grey zone with identical challenges can follow this theoretical framework of Pakistan regime shift for a more successful democratic consolidation.

For its conceptual clarity and operational framework, the research at hand has been divided into the following segments: in the first segment of the paper, an overview of the research article along with underlying objectives of the research has been highlighted. In the second segment, the debate regarding the transplantation of basic structure theory has been given. This segment divided legal scholarship into two broad groups: one group supported Parliamentary authority to amend the constitution. The other group opposed the notion of unlimited legislative authority for constitutional amendments and suggested that some basic features of the constitution, which includes judicial autonomy, cannot be altered by the legislature. In the third segment, with the help of leading cases, judicial autonomy and unfettered legislative authority has been examined. This segment critically investigated the mechanism for the appointment of judges to the Superior Courts and judicial response thereto. In the last segment, the research has been concluded with suggestions on how to balance judicial autonomy and judicial constraints for long term democratic consolidation and constitutionalism in Pakistan.

### **Transplantation of Basic Structure Theory: an Indian Pattern**

Soon after the 18<sup>th</sup> amendment, the Bar Associations, along with individual lawyers, challenged the new mechanism of judges' appointment. The amendment was challenged on the alleged ground of its inconsistency, with judicial autonomy being a salient feature of the constitution. The petitioners contended that the impugned procedure for judges' appointment is beyond the legislature's constitutional mandate and their power to the amendment. The petitioners insisted that in the ongoing institutional controversy, the judiciary should hold the Indian concept of basic structure theory ([Ramachandran, 2000](#); [Mehta, 2002](#); [Krishnaswamy, 2010](#); [Bast, 2011](#)). This principle circumscribed the parliament's authority to adopt a constitutional amendment, which aims to strike down the Indian Constitution's essential feature or otherwise modify its basic structure. The court, in like circumstances, can invoke its power of judicial review to invalidate such anti-basic structural constitutional arrangements ([Kesavananda Bharati v State of Kerala, 1973](#); [Gandhi v Narain, 1973](#); [Minerva Mills Ltd. v India, 1979](#)). In India, this doctrine was first originated in a case ([I.C. Golaknath and Others v State of Punjab, 1967](#)) where the court held that any constitutional provision could be amended subject to the condition that it is not making any change to the salient feature of the constitution. In another case ([Kesavananda Bharati v State of Kerala, 1973](#)), the court held that even the amending authority must neither destroy nor otherwise damage essential constitutional features.

Even though the doctrine of basic structure is a settled principle of Indian constitutional law, the Indian Supreme Court has, at least five times, invoked this doctrine to strike down constitutional amendments ([Bast, 2011](#)). However, the application of doctrine remained subject to substantial controversies. These controversies developed into two competing arguments: the opponents argue that this doctrine has its foundation on the distrust of the democratic process- a process which itself is a necessary ingredient of this doctrine. The opponents further argue that judicial review of legislative action, achieved through a democratic process by obtaining parliament's assent, is no more than the usurpation of parliamentary sovereignty by the judiciary ([Ramachandran, 2000](#)). Considering the inconsistent manner in which the Indian courts have elucidated the basic structure, this doctrine seems to have been supplicated for expanding the scope of judicial review ([Mehta, 2002](#)). However,

the proponents argue that parliament may easily bring about constitutional amendments as envisaged by the Constitution (Article 239 of [the Constitution of Pakistan, 1973](#); Article 368 of [the Constitution of India, 1950](#)) in pursuit of some political ends which can adversely impact constitutionalism. So this principle of judicial review, to invalidate constitutional amendment repugnant to the basic structure doctrine, is a legal tool in order to safeguard and preserve democratic constitutionalism and helps protect the constitution from radical changes. Moreover, the Supreme Court of India, while expanding its power of judicial review, has considerably constrained itself in the exercise of that power ([Shankar, 2009](#)).

Unlike India, the Supreme Court of Pakistan's approach towards basic structure doctrine has been more uncertain. On the one hand, the court has expressly declined to embrace the doctrine. In this regard, precedents of thirty years have been summarized where the courts uninterruptedly rejected this doctrine ([Nagvi, 2010](#)). In the most recently reported case (*Pakistan Lawyers Forum v Federation of Pakistan*, 2005), the court rejected the doctrine. Furthermore, parliament has been expressly empowered to amend the constitution, which cannot be challenged (Article 239 (5) - (6) of the Constitution of Pakistan, 1973). The court manifested basic structure doctrine as an essential feature, which includes judicial autonomy. The court has never invoked its authority to remedy an alleged amendment violating the basic feature of the constitution. Rather, asserted that the remedy lies in the political process ([Pakistan Lawyers Forum v Federation of Pakistan, 2005](#)).

Conversely, the court, while relying on the principle of constitutional interpretation between conflicting provisions, held that constitutional provisions endorsing lesser rights necessarily give way to those having higher rights ([Khan, 2005](#)). In Pakistan, the proponents of basic structure theory argue that the court had established the existence of this doctrine in the 1990s (*Al-Jehad Trust v Federation of Pakistan*, 1996; *Muhammad Khan Achakzai v Federation of Pakistan*, 1998; *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan*, 1998). Nonetheless, Pakistan's legal fraternity expressed little concern towards the resolution to openly recognize basic structure doctrine, considering its historical role in the validation of extra-constitutional actions, which has facilitated military intervention at the expense of civilian government and constitutionalism ([Khan, 2005](#); [Siddique, 2013](#)). Considering implications of the doctrine, frequent regime shifts, and interrupted constitutional developments in Pakistan, it is more challenging for the judiciary to differentiate what constitutional elements should be and what should not be deemed legal ingredients of the doctrine ([Khan, 2005](#)).

The 18<sup>th</sup> amendment to the constitution itself elaborates that in view of the prevalent challenges, certain changes to the settled constitutional principles are inevitable, which may deviate from the basic structure ([Kalhan, 2013](#)). It is also observed that constitutional protection to basic structure doctrine might result in elevation of the Objectives Resolution, incorporated by *Zia* through Article 2A as a substantive part of the constitution, which is embedded with the Islamic principles and used by the judiciary as a tool in the 1990s. Judicial appreciation of the doctrine and constitutionality of the Objectives Resolution potentially create a risk of the over-authoritative and inexplicable judiciary.

### Judicial Autonomy: Supreme Court's Viewpoint

After the conclusion of the arguments in the 18<sup>th</sup> Amendment cases, judges responded passionately to the implementation of the basic structure doctrine in order to link judicial autonomy with the amendment ([Nadeem Ahmad v Federation of Pakistan, 2010](#)). As depicted by *Justice Ramday*, the judiciary in Pakistan is passing through an evolution where it has started taking account of the basic structure doctrine ([Nasir Iqbal, 2010](#)). Judges directly contested the notion regarding the unfettered authority of the legislature to amend constitutional provisions. Despite the fact, parliament has the constitutional authority to amend the Constitution, the Chief Justice of Pakistan raised a question regarding the constitutionality of Article 239, which was adopted during *Zia's* regime. The court observed that parliament lacked unfettered authority regarding the constitutional amendment.

The court was expected to accept a particular description of the doctrine so as to invalidate provisions regarding judges' appointment from the 18<sup>th</sup> amendment through judicial review by applying the principle of severability ([Almeida, 2010](#)). Even with the acceptance of the notion that judicial autonomy is integral to basic structure doctrine, the judiciary barely provides any standards that what independence specifically entails; it either refers to the appointment process or anything

else ([FerejohnJ & Kramer, 2002](#)). Nonetheless, the Supreme Court, after the restoration of judiciary, increasingly asserted the inevitability of judicial autonomy as a valid constitutional requirement. The court, in the PCO judges' case, invalidated the law increasing number of judges for its inconsistency with judicial autonomy ([Sindh High Court Bar Association v Federation of Pakistan, 2009](#)). The court observed that the President has no discretion to suspend judges. Further, judicial autonomy is an essential constitutional feature, which required security to both office and tenure of the judges ([Iftikhar Muhammad Chaudhry v President of Pakistan, 2010](#)).

Similarly, the court declared that the withdrawal of criminal cases without judicial consent amounts to the transgression of judicial independence. The court, in the NRO case, observed that delegation of authority to a non-judicial entity for vacating criminal cases without the court's approval is usurpation and infringement upon judicial autonomy ([Mubashir Hussain v Federation of Pakistan, 2010](#)). During the arguments of the 18<sup>th</sup> Amendment case, judges not only passed critical comments about the appointment provisions but also despised parliament. Despite the fact that the adoption of the Eighteenth Amendment is considered a remarkable achievement in the Constitutional history of Pakistan, the court criticized and depreciated parliament for not having a debate over the amendment prior to its incorporation ([Khan, 2010](#)).

The court also condemned parliament for not taking confidence in lawyers and Bar Associations, who were the petitioners and main stockholders ([Khan, 2010](#)). The court also criticized the parliament for not recording reasons that led to the replacement of the existing process of appointments. The court even challenged the legitimacy of parliament in terms of representation of the will of the people and asserted that the amendment is not a reflection of the public will. Further, the court challenged the configuration of the Committee, which lacked democratic credentials for its members were not directly elected by people, rather nominated by parliament. The court stressed that judicial autonomy is a core value of the Constitution ([Nadeem Ahmed v Federation of Pakistan, 2010](#)).

In light of the court's reservations and suggestions, the amendment was sent back to parliament for reconsideration. The court provided two main suggestions to parliament: firstly, the court explicitly intimated that Article 175A of the Constitution of Pakistan, 1973 is inconsistent with judicial autonomy and lacked proper judicial representation. The numbers of judges in the Commission should be increased from two to four. Secondly, if the Committee disregarded the Commission's recommendations, then the former should refer back the same to the latter for reconsideration coupled with sound reasons for rejection. Where the latter reiterated the same recommendations, the nomination would be considered absolute and binding. The court ordered the implementation of Article 175A with proposed modifications in order to ensure its consonance with judicial autonomy.

The court observed that both judiciary and parliament are indispensable, and they are not rivals rather complement each other in order to avoid apprehension of institutional clashes and to ensure a society where people can live with peace and where the rule of law prevails. Apparently, the decision embodied restraint, avoided direct determination to the recognition of basic structure doctrine, rather contemplated a Parliamentary discourse ([Katzmann, 2010](#)). Nevertheless, considering its approach to the doctrine and the court's consent to hearing the petitions barely gave an impression that the judiciary will confirm any such restraint. The court directed parliament to revise the amendment according to its expectations, and in case of default, the former will annul the relevant provisions. Generally speaking, the court's tendency of treating judicial autonomy as an abstract but as a justifiable judicial guarantee, which augmented concerns regarding recognition of the basic structure doctrine.

Generally speaking, the court and other actors considered the independence of the judiciary to be a distinguished concept. Judicial autonomy, however, encompasses an evolving equilibrium between independence of judiciary and restraints through a number of relationships and aspects. In the conceptualization of judicial autonomy, the courts adjudicated abstract principles, which remained blurred for their varying nature and case-by-case adjudication of discrete issues. The courts, while elucidating independence of the judiciary, demonstrates complexity. In each case, the court, while considering different issues, asserts that the issues are against the abstract conception of judicial independence without considering the balance of judicial autonomy and its constraints ([Kalhan, 2013](#)).

Such an approach does not necessarily give attention to various dynamics and growing procedures in which overall equilibrium should be examined. These apprehensions are sufficient

while considering the constitutionality of laws and administrative actions. Certainly, the stakes are much higher while examining any constitutional amendment: the court's invalidation of an amendment and exclusion of any response from government results in a perpetual modification to wider institutional balance (Khan, 2010). On the appointment process, there was a unidirectional discourse between Court and Parliament. By adopting the 19<sup>th</sup> Constitutional Amendment, Parliament has partially complied with the court's directions: enhanced the number of judges on the Committee from two to four. Nevertheless, parliament disregarded the court's directions regarding the Commission's ability to overrule the Committee, where it rejects the Commission's nominations ([Constitution \(19<sup>th</sup> Amendment\) Act, 2010](#)).

Afterwards, the court on its own ensured the Commission's superiority over the Committee in the appointment matters. In another case ([Munir Hussain Bhatti v Federation of Pakistan, 2011](#)), the Commission's nominations regarding the extension of judges were rejected. The court overruled the decision of the Committee and directed for the judges' extension. The court, while circumscribing the authority of the Committee, observed that the latter lacks legal and institutional expertise in order to challenge the Commission's recommendations concerning nominees' professional calibre and judicial skills. The court also observed that judicial autonomy is a constitutional criterion for upholding judicial primacy over appointments. The outcome of the verdict in two appointment cases was no more than dictation for the application of reconfigured appointment process in a manner not different from that of the pre-Eighteenth Amendment appointment process (Almeida, 2010). The court aggressively asserted its autonomy despite parliament's modest constraints, which was unanimously adopted in the form of the Eighteenth Constitutional Amendment (Kalhan, 2013).

## Conclusion

To conclude, the judiciary significantly contributed to shaping and reshaping the constitutional developments and democratization of the institutions. For various reasons, the judiciary remained influenced by the military and its affiliates. However, after its restoration in 2009, another avenue of confrontation between parliament and judiciary has been started. Both organs strived to secure absolute autonomy. Keeping in view its past experience with the judiciary, parliament was interested in imposing some modest control on the judiciary in the appointment process and thereby initiated a new mechanism for judicial appointments, which the judiciary considered an attack on its autonomy. This legislative effort divided legal scholarship into two discourses: one group believed and justified ultimate legislative authority to bring about institutional reforms in the form of a constitutional amendment, and the other group considered that even legislature could not alter with the basic structure and salient features on which the constitution lays its foundation. The process of judicial appointments is directly associated with judicial autonomy, which is one of the basic features of the constitution.

The attributes linked with judicial autonomy are not constant, rather change with various contexts: in the context of Pakistan, a strong civilian government with judicial accountability, creating equilibrium between the judiciary and its constraints, is a better alternative than isolated judicial autonomy. The proposed balanced concept of judicial autonomy can be influenced by various means: appointment and removal of judges, judicial administration, judges' code of conduct, and composition of benches. Considering the disaggregated concept of military influence, which has created an imbalance between parliament, judiciary, and military, it is imperative to determine an overall balance between judicial independence and its restraints.

After 2009, the judiciary emerged exceptionally, invalidated its previously validated extraconstitutional acts and military interventions. Parliament also sought to impose a modest control on the judiciary in order to draw a rational compromise between judicial independence and its constraints. Parliament introduced the 18<sup>th</sup> constitutional amendment and devised a new institutional mechanism for judges' appointment, which the latter considered an attack on its autonomy and referred to the basic structure doctrine prevalent in India. The government unanimously adopted the

18<sup>th</sup> Constitutional Amendment for ensuring the supremacy of parliament. This amendment had three main objectives: rolling back extraconstitutional actions and precautions against potential intervention, modest judicial constraints for maintaining a balance between judicial autonomy and its constraints, and safeguards against the judiciary for not validating extraconstitutional actions. Parliament initiated a novel method for judges' appointment whereby the individual capacity of the Chief Justice and the President was substituted with the Judicial Commission and the Parliamentary Committee, respectively, which the court declared an attack on its autonomy. The institutionalization of judges' appointment was meant to keep a modest constitutional constraint on the judiciary. Nevertheless, the court referred back the amendment for reconsideration in the light of its recommendations. While complying with the court's directions, parliament adopted the 19<sup>th</sup> Constitutional Amendment.

Apparently, this whole transition embarked on another avenue of confrontation between these two organs; in fact, both state organs are striving to identify their constitutional bounds, which creates prospects for long-term democratic consolidation and constitutionalism in Pakistan. The new democratic shift inevitably requires exceptional institutional development, which has a great potential to reinforce democracy and constitutionalism in Pakistan. Despite the fact that maximum judicial autonomy helps secure institutional adherence to the constitution, taking into account past experience with the judiciary, the assertion of maximum autonomy can be used in favour of the status quo at the cost of the civilian government. For a successful shift of democratic consolidation in Pakistan, enduring representative institutions with strong governing faculties is highly recommended. A balance between judicial autonomy and its constraints is highly advisable, which could be ensured by self-realization of judicial restraints of being passive virtues.



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