Iftikhar Chaudhry’s Options: Can the Courts Remake Pakistani Democracy?

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BY SHUBHANKAR DAM

NEARLY FOUR DECADES after it found a place in India’s Constitutional jurisprudence, the question of “basic structure” is soon going to be settled in Pakistan. For months, Pakistan’s Chief Justice Iftikhar Chaudhry and the Supreme Court have wrestled with the issue while hearing petitions against the 18th Amendment, which, some have argued, violates the basic structure of the Constitution—and is, therefore, illegal. In the crosshairs is the new law pertaining to the appointment of judges through a judicial commission and parliamentary committee. Pakistani lawyers like Aitzaz Ahsan think that Pakistan’s court could follow the precedent of its Indian counterpart: upholding Parliament’s right to amend, not abrogate, the Constitution. What is the Indian precedent?

In India, the question over Parliament’s right to amend the Constitution began at a time of political turmoil. It was 1973, and Indian Parliament’s power to abrogate fundamental rights, specifically the right to property, came under challenge in Kesavananda Bharti v. The State of Kerala and Others. Prime Minister Indira Gandhi’s impatience with Constitutional restrictions on her power threatened to plunge the country into authoritarian rule, and the Supreme Court, it appeared, was India’s last hope. A grimly divided court (7 to 6) concluded that Parliament’s power to amend or abrogate the Constitution was limited by what it called the document’s “basic structure.” But the majority differed on what this term meant, and pointed to general concepts instead of specific provisions. In the judgment, Chief Justice S. M. Sikri cited the republican and democratic form of India’s Constitution, its secularism, federalism, and separation of power as facets of the basic structure—but disagreements persist to this day.

Constitutional provisions, interpretative methodologies, and normative political theory provide the groundwork for basic-structure arguments. For Pakistan’s Supreme Court, the concept is covered by Articles 238 and 239 of the Constitution. Read together, they state that the Constitution “may be amended by an Act of Parliament” and that “no amendment … shall be called in question in any court on any ground whatsoever.” On the face of it, this is clear and simple. But the cumulative effect of these provisions turns on the lawyerly interpretation of what an amendment really is. Can Parliament validly delete fundamental rights, as India’s tried to, or are all amendments equally valid?

These questions are important, but so is the context. Two important differences between India and Pakistan are noteworthy. In 1973, India was descending into authoritarian chaos. In 2010, Pakistan is trying to recover from it. Principal questions in Kesavananda Bharti involved fundamental rights. Issues in Pakistan largely revolve around institutional arrangements, like the appointment of judges.

In Pakistan, three outcomes are possible. The Supreme Court can deny the existence of the Constitution’s basic structure—this is highly unlikely—rendering all amendments as equally valid, including those removing fundamental rights. Second, the court might affirm the Constitution’s basic structure as inviolable, and suggest that the independence of the judiciary is a part of it, and that Article 175-A related to the appointment of judges violates this independence. Here, the court subjects itself to a high interpretative burden—judges must show that there is only one right way of appointing members of the judiciary, which the new law falls short of describing. Alternately, they must establish that the general concept of judicial independence requires specific appointment practices. Third, the court might go with the second option but also conclude that Article 175-A is valid. Options one and two present absolutist positions, and would, in the public mind, separate the stakeholders into winners and losers. By having it both ways, option three gives something to both Parliament and the court.

By affirming the Constitution’s basic structure as inviolable, Pakistan’s Supreme Court secures an important power for itself: the power to decide on the constitutionality of future amendments. Underlying these struggles with legal (and political) concepts are larger questions about the role of the judiciary in shaping representative democracy. Should the courts be making up for the poverty of a representative system? What should they do and how far should they go? In its forthcoming verdict, Pakistan’s court will speak the language of logic. But basic structure is surely more than that. The verdict could shape the nature, and future, of Pakistan’s democracy.

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