

## Challenging Constitutional Amendments Made by Parliament in Pakistan: The Supreme Court’s View on Article 239(5), Judicial Review, and the Basic Structure Debate

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### Abstract

This paper examines the Supreme Court of Pakistan’s position regarding the challengeability of constitutional amendments made by Parliament. Article 239(5) of the Constitution provides that no amendment of the Constitution shall be called in question in any court on any ground whatsoever. At first glance, this language appears to exclude all judicial scrutiny; however, the Supreme Court’s jurisprudence reveals a more nuanced position. The Court has consistently affirmed that the Constitution is the supreme law of the land, that the superior judiciary has the duty to interpret and protect it, and that judicial review remains an essential constitutional function. At the same time, the Court has held that a constitutional amendment may be challenged only if it has not been enacted in the manner prescribed by the Constitution itself. The paper also reviews the Court’s treatment of the “basic structure,” “salient features,” and “grundnorm” theories. Although these ideas have been discussed in several judgments, the Court has repeatedly declined to strike down constitutional amendments on the ground that they violate any alleged basic structure. Recent decisions further reaffirm judicial deference to Parliament in the field of constitutional amendment, while preserving judicial power to review unconstitutional laws, executive action, and implementation measures that are ultra vires or void. The paper concludes that, under prevailing Supreme Court doctrine, constitutional amendments are generally insulated from substantive challenge, while procedural infirmity remains justiciable.

**Keywords:** Article 239(5); constitutional amendment; judicial review; basic structure; salient features; grundnorm; Parliament; ultra vires

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## 1. Introduction

The question whether constitutional amendments made by Parliament may be challenged before the courts is one of the most important issues in Pakistani constitutional law. The issue directly implicates the relationship between parliamentary amending power, constitutional supremacy, and judicial review. Article 239(5) of the Constitution of the Islamic Republic of Pakistan, 1973 states that no amendment of the Constitution shall be called in question in any court on any ground whatsoever.<sup>1</sup> On a literal reading, Article 239(5) appears to bar any form of judicial interference once a constitutional amendment has been validly enacted. Yet the Supreme Court of Pakistan has not treated the provision as eliminating all judicial oversight. Instead, the Court has repeatedly emphasized that the Constitution is the fundamental law of the State, that superior courts are its interpreters and protectors, and that judicial review is inherent in the constitutional scheme.<sup>2</sup> From the earliest constitutional cases, the Court asserted that no authority can act beyond the four corners of the Constitution. However, it also maintained a clear distinction between ordinary legislation and constitutional amendment. Over time, the Court's jurisprudence developed a consistent position: although Parliament has broad power to amend the Constitution, such amendments are challengeable only on procedural grounds, namely where they are enacted otherwise than in the manner prescribed by the Constitution itself.

A related controversy concerns whether Pakistani constitutional law recognizes a "basic structure" limitation on the amending power. Some judgments have referred to the Constitution's salient features, including federalism, parliamentary democracy, Islamic provisions, and judicial independence. But the Supreme Court has consistently declined to adopt the Indian-style basic structure doctrine as a ground for invalidating constitutional amendments. Instead, it has held that if the Constitution itself permits an amendment and the prescribed procedure is followed, courts cannot strike it down merely because it is said to offend some abstract constitutional theory.

This paper examines the relevant Supreme Court decisions and analyzes the current doctrinal position in Pakistan.

## 2. Research Question

The principal research question is: What is the view of the Supreme Court of Pakistan regarding the challengeability of constitutional amendments made by Parliament, particularly in the light of Article 239(5), judicial review, and the basic structure doctrine.

## 3. Scope of Study

This paper is confined to the jurisprudence of the Supreme Court of Pakistan cited in the research note provided. The study focuses on constitutional amendments, the judicial review of such amendments, the interpretation of Article 239(5), and the Court's position on the basic structure/basic features theory. This research paper is also significant in understanding the constitutional amendments and the concept of judicial review in view of Article 239 of the Constitution of Pakistan.

## 4. Methodology

This is a doctrinal legal research paper based on reported judgments of the Supreme Court of Pakistan. The analysis is confined to primary sources supplied in the research note. The paper applies comparative and analytical methods to extract the governing constitutional principle from the case law.

<sup>1</sup> Constitution of the Islamic Republic of Pakistan, 1973, art. 239(5).

<sup>2</sup> *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486.

## 5. Historical and Jurisprudential Development

### 5.1 Early Judicial Recognition of Constitutional Supremacy

In *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, the Supreme Court held that the Constitution is higher in authority than any law, direction, or order made under it, and that where there is conflict, the fundamental law must prevail.<sup>3</sup> The Court further observed that superior courts have the duty to interpret the Constitution and to declare invalid any enactment that is repugnant to it. The judgment also stressed that the judiciary must resist any erosion or whittling away of constitutional provisions. The Court's approach in *Fazlul Quader Chowdhry* is significant because it laid the foundation for constitutional review in Pakistan. At the same time, it did not go so far as to hold that courts may invalidate the Constitution itself or any duly enacted constitutional amendment on substantive grounds.

### 5.2 The Objectives Resolution and Constitutional Interpretation

In *The State v. Zia Ur Rehman*, the Supreme Court held that the Objectives Resolution is an important document and may be used to resolve ambiguity, but it is not a supra-constitutional document and cannot override clear constitutional text.<sup>4</sup> The Court further stated that the Constitution, once adopted by a competent body, becomes the organic law of the State and there is no power outside it.<sup>5</sup> The significance of *Zia Ur Rehman* lies in two propositions. First, it confirms that the Constitution is supreme and justiciable. Second, it rejects the idea that the Objectives Resolution, standing alone, can invalidate constitutional provisions.<sup>6</sup> The Court also remarked that it had never claimed the power to strike down any provision of the Constitution on the ground that it conflicts with any external document or abstract norm.

### 5.3 Challenge to Constitutional Amendments: Procedural, Not Substantive

In *Islamic Republic of Pakistan v. Abdul Wali Khan*, the Court stated that the judiciary cannot declare any provision of the Constitution invalid or repugnant to national aspirations, and that the validity of a constitutional amendment can only be challenged if it is adopted in a manner different from that prescribed by the Constitution.<sup>7</sup> This is one of the clearest statements in the case law that the only permissible challenge to a constitutional amendment is procedural. A similar view was taken in *Saeed Ahmed Khan v. The Government of Pakistan*, where the Court held that it could not declare a constitutional provision not to be law merely because it ousts the jurisdiction of the courts; rather, the Court could only interpret the provision and define its scope.<sup>8</sup>

### 5.4 Rejection of the Basic Structure Theory

In *Mahmood Khan Achakzai v. Federation of Pakistan*, the Court discussed the idea of constitutional salient features, including federalism, parliamentary democracy, Islamic provisions, and judicial independence.<sup>9</sup> However, it also observed that the basic structure theory had not been accepted in Pakistan.

The Court in *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* held that in case of conflict between two constitutional provisions, the conflict should be resolved through

<sup>3</sup> *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486.

<sup>4</sup> *The State v. Zia Ur Rehman*, PLD 1973 SC 49.

<sup>5</sup> Ibid.

<sup>6</sup> *The State v. Zia Ur Rehman*, PLD 1973 SC 49.

<sup>7</sup> *Islamic Republic of Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57.

<sup>8</sup> *Saeed Ahmed Khan v. The Government of Pakistan*, PLD 1974 SC 151.

<sup>9</sup> *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 426

interpretation, and that there was no need to invoke the basic structure theory.<sup>10</sup> The Court cited earlier precedent that no provision of the Constitution could be declared ultra vires on the ground that it conflicted with Article 2A. The most explicit rejection came in *District Bar Association, Rawalpindi v. Federation of Pakistan*, where the Court held that the basic structure theory does not apply in Pakistan and that no constitutional provision may be invalidated on the touchstone of the Objectives Resolution, even after its incorporation into Article 2A. The Court further stated that the remedy for any constitutional violation lies with the people and not the judiciary.<sup>11</sup>

### 5.5 Parliamentary Amending Power and Article 239

In *Pakistan Lawyers Forum v. Federation of Pakistan*, the Supreme Court held that an amendment to the Constitution can be challenged only on the ground that it was enacted in a manner not stipulated by the Constitution itself.<sup>12</sup> The Court emphasized that there were no limitations, express or implied, on Parliament's power to amend the Constitution other than the procedure laid down by the Constitution.

The Court also noted that the remedy for grievances against a constitutional amendment lies in the political process and not in judicial invalidation of the amendment itself. This case is of central importance because it crystallizes the Court's prevailing doctrine: constitutional amendments are not open to substantive invalidation on the basis of basic structure, but procedural compliance remains reviewable.

### 5.6 Subsequent Confirmations of Judicial Review and Deference

In *Dr. Mobashir Hassan v. Federation of Pakistan*, the Court declared the NRO, 2007 unconstitutional, illegal, void ab initio, and of no legal effect.<sup>13</sup> This demonstrates that the Court does exercise strong judicial review where the impugned instrument is not a constitutional amendment and is found to violate constitutional provisions.<sup>14</sup> In *Syed Zafar Ali Shah v. General Pervez Musharraf*, the Court reiterated the importance of judicial review and stated that the superior courts may strike down laws contrary to the Constitution.<sup>15</sup> It also recognized that ouster clauses and non obstante provisions cannot defeat the power of judicial review where the Constitution is implicated.<sup>16</sup> In *Imran Ahmad Khan Niazi v. Federation of Pakistan*, the Court reaffirmed that it has historically examined the vires of legislation in original jurisdiction in several important cases, but this does not alter the settled position regarding constitutional amendments.<sup>17</sup> The Court's more recent decisions continue to recognize the judiciary's power to invalidate unconstitutional laws while preserving deference to Parliament's legislative and amending function. The same pattern is evident in *Shahtaj Sugar Mills Ltd. v. Government of Pakistan*, where the Court emphasized the presumption in favour of constitutionality and the duty of courts to save legislation rather than destroy it.<sup>18</sup> Similarly, in *Senior General Manager, Pakistan Railways v. Muhammad Pervaiz and Naseem Khan v. The Government of Khyber Pakhtunkhwa*, the Court

<sup>10</sup> *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*, PLD 1998 SC 1263.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

<sup>13</sup> *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Syed Zafar Ali Shah v. General Pervez Musharraf*, PLD 2000 SC 869.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Imran Ahmad Khan Niazi v. Federation of Pakistan*, PLD 2024 SC 102.

<sup>18</sup> *Shahtaj Sugar Mills Ltd. and others v. Government of Pakistan*, 2024 SCMR 1656.

reiterated that judicial review is available where action is ultra vires, arbitrary, discriminatory, or contrary to law, but that the courts must remain within constitutional limits.<sup>19</sup>

## 6. Findings

The analysis of the Supreme Court judgments reveals the following settled propositions:

1. Article 239(5) creates a strong textual bar against questioning constitutional amendments in court.<sup>20</sup>
2. The Court does not recognize a substantive basic structure limitation on Parliament's constitutional amending power.<sup>21</sup>
3. The only generally accepted ground for challenging a constitutional amendment is procedural invalidity, i.e. failure to comply with the manner prescribed by the Constitution.<sup>22</sup>
4. The judiciary retains the power of constitutional interpretation and judicial review over laws and executive actions that are ultra vires or unconstitutional.<sup>23</sup>
5. The Objectives Resolution and salient features may aid interpretation, but they do not override the Constitution's substantive text.<sup>24</sup>
6. The remedy against a constitutionally valid but politically objectionable amendment lies with the people and Parliament, not with the courts.<sup>25</sup>

## 7. Conclusion and Recommendation

The Supreme Court of Pakistan's jurisprudence on constitutional amendments reflects a clear and settled constitutional philosophy. The Court has consistently held that Article 239(5) bars judicial questioning of constitutional amendments, except where the amendment is not passed in the constitutional manner. Although the Court has referred to the Constitution's salient features, it has never accepted the basic structure theory as a basis for striking down an amendment.<sup>26</sup> At the same time, the Court has preserved the essential doctrine of constitutional supremacy. It continues to exercise judicial review over unconstitutional laws, executive actions, and implementation measures, and it has repeatedly held that no authority may act beyond the Constitution.<sup>27</sup> The resulting doctrine is one of restrained constitutional review: Parliament may amend the Constitution, but only in the manner the Constitution itself prescribes; once that requirement is met, the courts will not invalidate the amendment on substantive grounds. Accordingly, the Supreme Court's present view may be summarized as follows: a constitutional amendment is generally immune from substantive judicial challenge, while procedural non-compliance remains justiciable.<sup>28</sup>

<sup>19</sup> *Senior General Manager, Pakistan Railways v. Muhammad Pervaiz*, 2024 SCMR 581; *Naseem Khan v. The Government of Khyber Pakhtunkhwa*, 2024 SCMR 1341.

<sup>20</sup> Constitution of the Islamic Republic of Pakistan, 1973, art. 239(5); *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719

<sup>21</sup> *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401.

<sup>22</sup> *Islamic Republic of Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57; *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

<sup>23</sup> *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486; *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265.

<sup>24</sup> *The State v. Zia Ur Rehman*, PLD 1973 SC 49; *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401

<sup>25</sup> *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

<sup>26</sup> *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401.

<sup>27</sup> *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486; *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265

<sup>28</sup> *Ibid.*; *Islamic Republic of Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57.

## Recommendations

1. Future constitutional litigation may carefully distinguish between challenge to the amendment itself and challenge to actions taken under the amendment.
2. Courts may continue applying strict procedural scrutiny where the constitutional mode of amendment is disputed.
3. Legislative bodies may ensure that constitutional amendments are drafted and adopted with full procedural compliance to avoid litigation.
4. Academic discussion may be avoided treating the basic structure doctrine as settled law in Pakistan, since the Supreme Court has repeatedly rejected it as a ground for invalidating amendments.