**Rewriting the constitution**

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The Supreme Court and other superior courts have the power to interpret the constitution. But there is a need for caution. A US chief justice, John Marshall, in his famous McCulloch vs Maryland case remarked that it is impermissible to rewrite the constitution.

Rewriting the constitution means an interpretation of the constitution by the court which is neither based upon constitutional text nor is supported by any principle of constitutional law, convention or custom of the constitution.

It is, in fact, reading into the constitution and supplying a supposed omission on some high moral principles or an imagined, national or public good which, the court believes, its interpretation of the constitution would serve.

However, the power to amend the constitution is exclusively vested in parliament. And, second, it is against the foundational constitutional norm which ordains that ‘authority’ that includes both legislative and administrative, is exercisable by the chosen representatives and democracy is the grundnorm of the constitution of Pakistan. Some recent SC decisions amount to rewriting the constitution in the general public’s perception.

A constitution unlike an ordinary statute or a by-law may not be interpreted literally. What is not in the text, at the most, can be interpreted in the light of the constitutional conventions or structure. The constitution of Pakistan contains different types of provisions which can be divided into four categories:

Ornamental provisions, which include the preamble and the principles of the policy. These are general provisions, and, on their own, do not create substantive rights or obligations; they can only be read along with some other substantive provisions of the constitution.

The second category is the charter of rights called fundamental rights and remedies for their enforcement. These rights, being inherent, are a check on the state’s power, and thus while interpreting these provisions and rights, a penumbra of rights come to life through a liberal judicial interpretation, and the power of the state to regulate or interfere in these rights is narrowly construed or interpreted in favour of the citizens (persons). It is this part where several principles and theories are put to use to expound the constitution.

The living constitution, organic law and the rule of purposive interpretation, and several other tools of interpretation are employed by the courts.

The third category of provisions relates to the creation and conferment of powers and jurisdiction of different institutions – more particularly parliament, executive and the judiciary. In the case of a federation, provisions of the constitution that deal with the distribution of legislative and administrative powers between the federation and states also come within this category.

These provisions of the constitution are to be interpreted firstly as per the letter of the constitution and then in the light of the underlying constitutional principles. Elections to the houses of parliament, voting rights, qualification of members of parliament, their powers and privileges, etc fall within this category.

In this category, courts, while interpreting those provisions, generally follow structuralism rather than positivism. In the US, where after the War Of Independence, the failure of the confederation, the importance of commerce in national life and then the civil war, were some dominating features that determined the judicial philosophy of the SC judges who set the nation on the right course of a union and made it a great nation.

In the UK, in the constitutional scheme as determined by the law and customs and the history of England – struggle between monarchy and parliament – ultimately the primacy was given to parliament, which became the ultimate protector of the liberties and rights of the people.

In India, the struggle has remained over the custody of the constitution between the court and parliament. The famous Indian case – the 1973 Kesawananda Bharati case – finally tilted the balance in favour of the Supreme Court but the ultimate beneficiaries of this constitutional battle were the people of India whose rights were upheld by the SC.

The ultimate sword and shield for the protection of rights and citizens was the power of judicial review which became a salient feature of the basic structure as expounded in the Kesawananda Case. The Indian Supreme Court, while interpreting the constitutional text, went beyond the text and brought in a constitutional theory, not fully recognized in the constitutional jurisprudence of the common law countries to control the amending powers of the Indian parliament. The fourth category is transitory provisions.

In Pakistan, the history of the judiciary has been a history of capitulation of the judiciary before an unelected executive. The first constitutional crisis (1954) set forth the future course when the constituent assembly was dissolved. The matter reached the federal court, chief justice Munir’s court, which became part of the intrigue and capitulated. In the Moulvi Tameezuddin case (1955), a constitutional deviation adopted became a permanent norm of the political and legal culture of Pakistan. The sanctity of the constitution was sacrificed for an unending political and national expediency.

The Supreme Court’s constitutional jurisprudence for the last 75 years is full of instances where the court, while interpreting the constitution, in fact, rewrote it. In the last two decades, dictated by political expediency created by real and imagined circumstances, the court has given several decisions that, when analyzed on constitutional principles and seen in the light of principles of interpretation, seem to weaken and erode political institutions and democracy.

Rule of law and supremacy of the constitution stand diluted. The ultimate consequence is that the constitution has lost its supremacy in the affairs of the state. Its violations are increasing day by day. There is a strong perception among the polity that a divided court, despite several disclaimers, has eroded the constitutional command. Its ultimate victims are the people of Pakistan who are left remediless in the face of flagrant violations of the constitution. Judges have become powerful, but the judiciary as an institution stands weakened. The judiciary has been unable to identify its true role in the system.

Two instances from recent decisions of the Supreme Court are in point. The defection case regarding Article 63A of the constitution (though based on structuralism) and the most recent judgment on Article 209 (overruling an earlier judgment) are being seen as a rewriting of the constitution. The last judgment held that proceedings against a judge who resigns during the course proceedings against him continue before the Supreme Judicial Council (SJC).

The SJC is not a court but a domestic tribunal. There is no textual or structural basis for such an interpretation. The legislative history of Article 209 and practice in other jurisdictions – Canada, India and Australia – shows that proceedings end with the resignation of the judge. The matter of corruption of a judge is a separate issue for other courts. All judgments on political issues leave room for criticism.

Even George Orwell’s ‘hanging judge’ will under no circumstances take a money bribe. But Francis Bacon, Lord Verulam, was tried and convicted by the House of Lords for bribery and corruption on May 5, 1621. That was prior to the Act of Settlement of 1701.

Even the highest court of law has no power to legislate in the garb of interpretation. Being the ultimate guardian of the people’s rights and rule of law, it guards against transgressions of their rights by the other branches of the government. It is empowered to say what the law is but cannot make law by itself.

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