

Judicial Appointments and Basic Structure Doctrine: Supreme Court of Pakistan's Verdict on Eighteenth Amendment

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ABSTRACT

Federalism and institutions work within a basic structure of governance and state. Question of basic structure doctrine has been answered by many superior judiciaries of various countries in divergent ways. This question was answered by Supreme Court of Pakistan (SCP) in Eighteenth Amendment Case against the backdrop of judicial activism. Basic structure doctrine was premised on procedure of appointment of judges in this case. Supreme Court of Pakistan ensured autonomy, coherence, adaptability and complexity of not only Superior Judiciary but also for other institutions, which are the features necessary for institutionalization in the process of governance. But on the other side, judicial intervention in the matters legislative amendments have been perceived as institutional encroachment by actors associated to other institutions. Research attempts to sketch a comparative picture of the institutionalization in superior judiciary through analysis of verdict on Eighteenth amendment.

KEYWORDS: Judicial Appointments, Basic Structure Doctrine; Institutionalization.

INTRODUCTION

'An institution is a network of structures, procedures and shared values within a social system, of a relatively permanent nature, which is concerned with some social function or group of functions' (Geogrey, 1971). Institutions play an unavoidable role in determining the fate of democracy in any country. Framework of democratic state stands on three sub-structures: Law making body, law executing body and law-interpreting body. Generally these sub-structures are recognized as Legislature, Executive and Judiciary. The role of institutions for the success of democracy is pivotal (Heinz, 2000). The Executive, Legislature and Judiciary are the pillars of a democratic state (Prasad, 2006). While the people's will is reflected by legislature and is assigned the task of making laws, governance is linked to execution and function of the state carried out by executive (John, Cheryl & Katherine, 2008). However this research will expose its readers to Supreme Court's institutional role in fostering good governance through its verdict on 18th Amendment.

Dictators- the menace for the process of democracy can only be curbed by strong political institutions with whom judiciary otherwise can't fight (Geogrey, 1971). Judiciary plays a very important role in any democratic setup. It is the backbone of most of liberal democratic systems in today's world (Mahmoud, 2008). It not only defines the liberties of masses but also stretch its scope in case of violation of masses' right. Judiciary's role is two folds. First is to ensure the protection of individual's rights and second is to preserve, protect and interpret the constitution where existence and functions of all the institutions of state are rooted and hence is one of fundamental determinant of good governance. But for all that to be realised, a democratic society or political community is a pre-requisite.

1. What Does The Eighteenth Amendment Contain? Various alterations in institutional framework, federalism and constitutional skeleton in the shape of changes in dozen of articles of constitution were the results of eighteenth constitutional amendment. Explanation of this amendment can't be swept under the carpet by highlighting it as mere transfer of power from dictatorial legacy to real representative Westminster style executive i.e. Prime Minister or its restoration to status existing in 1973. It covers the domains where centre-province relations, institutional skeleton and constitutionalism are evolved and geared to contemporary socio-political requirements. These reformed alterations in abovementioned domains can be classified into three categories: normative, substantive and procedural changes. Normative category encircles the alterations in constitution which have reverted the dictatorial deformations to morally recognized shape. Hence normative refiguring snuffed out all dictatorial impurities. Such restoration is contained in article 6 and article 270 of the constitution in which changes have been inserted by eighteenth amendment. New version of article 6 now unequivocally bars the judges from extending judicial cover to militarised or unconstitutional manoeuvring. Similarly new version of article 270 has established that verdicts delivered in accordance of unconstitutional engineering were void ab initio which has purified our fundamental law to augment its coherent concreteness. Procedural alteration includes the stringent criterion set for disqualification of a parliamentarian and thinning the

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rubric of cabinet. The third category contains those elements, which became the centre of friction among various institutional actors in consequent institutional game. Acquisition of education became the fundamental right which will be an effective step towards increasing political and social awareness (Muhammad, 2012; Pakistan Today, July 20 2012). Injection of access to information circulating around the structure of state and other hubs of power as a fundamental right in constitution became the guarantee of transparency which ensures good governance (Meghna, 2013). Such increased transparency has links with other variables of good governance such as fairness and accountability. Independence of judiciary was translated by depoliticizing the process of judges' appointment. Participative and democratic approach was followed by author of eighteenth amendment regarding appointment of judges. Though the process prescribed by the said amendment had been opened to several questions, one can say with full certainty that in comparison to early procedure this substantive nature of change regarding the appointment of judges was an attempt to give autonomy to judiciary to a considerable extent. However, this procedure was critically underlined as reason of institutional conflict against the backdrop of case heard by Supreme Court of Pakistan (SCP). Verdict on the said amendment dealt with the procedure in depth. Last sub-category of substantive change is relevant to provincial autonomy which funnelled dozen of ministries in exclusive domain of provinces (Qaiser, 2013). Abolition of concurrent list was the major step towards such realisation of provincial autonomy on the basis of which provincial administration became the masters of their own destinies in many fields.

Transparency, consultation and filtered procedure of judicial appointments enshrined in 18th amendment were serious steps towards enhancement of judicial independence. Two phases or filters have been incorporated for such purpose. First compartment designed for appointment of judges is a Judicial Commission which will recommend the names for appointment (The Express Tribune, July 6 2010; Daily Times, October 29 2013). The commission consists of Chief Justice of Supreme Court of Pakistan as its chairman and senior-most judges of the Supreme Court of Pakistan. Second phase comprises confirmation by a parliamentary committee consisted of equal number of members from treasury and opposition benches of Parliament (Dawn, December 2 2013; Amir, 2013).

Considerable weight has been given to judges recommendations in the procedure designed for selection of judges. Composition of commission has apparently tilted the balance in favour of judges. New procedure ended the monopoly of any individual and gave due part to all necessary sections of the state (Sohail, 2010; Hassan, 2010). Three pillars of the state have been given representation. Every organ of the state which is given the representation in procedure of judges appointment has also been made diverse by equalizing the strength of various players with different goals and interests. Article 175A of the Constitution embodies this new composition and procedure. New article has transformed the discretionary nature of powers held by different authorities into comparatively democratic nature. Procedure has become more transparent, fair, efficient, and accountable. All these features drive any political system towards good governance.

Eighteenth amendment itself is also important in the sense that it altered the function and jurisdiction of office of president. It can be said that the amendment was a serious step towards restoring the nature of the constitution to the one which truly characterise a Westminster style of democratic system where president only acts as a figurehead. Four articles: article 75, article 48, article 58-2(b) and article 224 of the constitution were effected in this regard. This amendment altered article 75 by decreasing the time period given earlier to President for consideration of bills ratified by the parliament (Mahbub, 2012). Prime minister was accorded the power to pass the affairs for approval or disapproval in form of securing yes or no vote to parliament directly under altered article 48 of constitution (Ibid). Powers to pack the assembly through invocation of emergency clauses have also been gleaned away from President. Then procedure of constitution of caretaker government was also made transparent and democratic (Abid, 2013). Both outgoing Prime Minister and opposition leader were taken on board in this regard through consultation. Article 224 envisaged the whole procedure of caretaking appointments by president required to manage the transition phase between outgoing and incoming government. These new alterations relevant to office of president provided stability and strength to political process and democratic culture. New phase of evolution of democratic society has begun.

Eighteenth amendment strengthened parliament. Prime Minister is part and parcel of parliament. Federal government is declared as embodiment of Prime Minister and his ministers. Prime Minister was declared as chief executive instead of president (Cohen, 2011). Consultation required for Prime Minister in different administrative affairs was reduced. Consultation with the Prime Minister was entered as pre-requisite for president in pursuit of his /her choice of appointment of provincial governors or military chiefs. A member of parliament can serve the nation for the third time. Provinces have been made the masters of their own resources to great extent. Senate which is considered as the representative envelope of any federal setup was strengthened.

Parliament was strengthened through introduction of eighteenth amendment in which federal government became the embodiment of Prime Minister and federal minister. Prime Minister replaced the President as chief executive of the country (Article 10 and Article 99). Consultation between president and Prime Minister reduced to purpose of communication of policy matters (Article 46). Consultation between the Prime Minister and President became meaningful and binding in matters pertaining to appointment of services chiefs and provincial

governors (Article 101, 243, 260). Concurrent list comprising subjects over which both federal and provincial governments can legislate was removed. Hence through removal of concurrent list decentralized the administrative and legislative powers and enhanced the autonomy provincial units in letter and spirit. A member of parliament was allowed to become Prime Minister for third time (Article 91).

Relations between the federal government and provincial units of the state were reformed for the first time through eighteenth amendment. Institutions like council of common interest and Senate were strengthened by enhancement of their roles in the game of politics. Removal of concurrent list lessened the entrenched domain of federal government over legislation. Provinces were made to realise that they have become master of their own soil by giving them more powers to mobilize the natural resources in favour of their development. Provisions were made to make it compulsory for a governor to be permanent resident of the province (Article 101). Hence the capacity of provinces in legislative and administrative domains was augmented. All these measures enshrined in eighteenth amendment removed the nostalgic misperception about the self-constructed link drawn by rightists between decentralisation and disintegration.

2. Contested Points Of Eighteenth Amendment Debate And Institutional Debate The eighteenth amendment to the 1973 Constitution was aimed to incorporate a more transparent and consultative process for judicial appointments to the superior judiciary. The amendment created a two tier structure consisting of Judicial Commission and Special Parliamentary Committee. The Special Parliamentary Committee will evenly consist of the members of the government and the opposition. The Judicial Commission will comprise of the Chief Justice of Pakistan and the senior most judges of the Supreme Court.

The eighteenth amendment was challenged before the august Supreme Court of Pakistan. The Supreme Court (exercising judicial restraint) through an interim order identified the anomalies in the provisions relating to judicial appointments impacting the independence of judiciary and made recommendations to the parliament on how to address it.

The Parliament in pursuance of the Supreme Court's suggestions enacted nineteenth amendment. Notwithstanding the enactment of nineteenth amendment, the Supreme Court through its decision in *Sindh High Court Bar Association v. Federation of Pakistan* (Judicial Nominations Case PLD 2009 SC 393) declared the role of the Parliamentary committee as insignificant when it struck down the decision of the Parliamentary committee not to confirm certain nominations of the Judicial Commission (Ibid).

The decision of the Supreme Court in the *Judicial Nominations Case* made the Parliamentary Committee ineffective and irrelevant. The decision on one side triggered a power game between the two institutions, but on the other side reignited the dialectic debate on the role of Judicial Commission and the Parliamentary Committee in the procedure, method, and appointment of judges; tension between independence and accountability of judiciary in the country. In this context it is pertinent to analyze the genesis, design, and role of judicial commission as an institution in the other parts of the world and its appropriateness in the institutional architecture of Pakistan.

The selection of judges features prominent in theoretical content on judicial independence (Garoupa and Ginsberg, 2009). There is universal consensus on the fact that an individual who in any manner if is dependent on the will of another individual for his appointment to preside over the court compromises his ability to render independent, just, transparent, neutral, and high quality decisions. Hence the legal systems around the world have constructed different mechanisms through institutional modelling to strike a balance between independence and accountability. However, so far the experiments with different institutional models and research show that there is divergence of views on the perfect mode/tool to achieve independence (Kate & Peter, 2006).

Notwithstanding the diversity of mechanisms around the world to achieve independence of judiciary, the recent shift has been towards the adoption of judicial councils to achieve the same. The fundamental purpose of constitution of judicial council is primarily to address the extremes' of judicial independence and accountability. It has also been the outcome of efforts to create "best practices" linked with the legal and judicial reforms package given by donor agencies like World Bank and has been adopted by recipient countries (Garoupa and Ginsberg, 2009).

It aimed to ensure the judicial independence by insulating the process of judicial appointment, promotion, and discipline from political intervention but also to secure a reasonable degree of accountability. However, the achievement of such balance is context specific i.e. it depends on the specific social, political, institutional, and legal settings of a country. These specific settings consequently structure the institutional design i.e. composition and competencies of the council and reflects concerns about the judiciary of a country.

For instance, in France and Italy the desire to give more independence and the establishment of the Judicial Councils emanated from frustration with the increased politicization. However, very soon a concern was raised about increasing involvement of judiciary in politics and was followed by demands of accountability.

2.1 France: French judiciary collectively exercised self restrained but the cumulative impact of consolidation of judicial review by the Constitutional Council in 1970, sharp increase in litigation (civil and administrative), the

criminalization of various activities, extension of the scope of application of European Convention of Human Rights enhanced the influence of French judiciary (Ibid).

In addition to the above mentioned factors the involvement of judiciary in investigating political scandals further consolidated the power and prominence of otherwise subservient judiciary and tilted the scales of power in favour of French judiciary. Consequently, the judicial investigation of political scandals triggered the debate on external accountability of the judges involved in investigation (Valery, 2005).

2.2. Italy: The Italian Judicial system is also portrayed as extremely independent. The independence can easily be illustrated from the control exercised by judiciary in the regulating itself (appointment and promotion of judges) and regulating the political process via investigation of political scandals. The balance of power inside the Italian Judicial Council tilted in favour of Italian judiciary. The Judicial Council controls all aspects and process of appointment and promotion of judges working in lower tier of the judicial hierarchy.

Like French judiciary, Italian judiciary was also involved in the investigation of political and corruption scandals of Italian businessmen, politicians, and bureaucrats from 1992-1997 (Petruzia, 2004; David 1996; Carlo 2001). The increasing involvement of Italian judiciary due to their investigative role in the political scandals and corruption resulted in the Italian Parliament altering the composition of the Italian Judicial Council in 2002 that increased the parliamentary representation in the Judicial Council (Nuno, 2009). The *raison d'être* for the adoption of councils in the French-Italian tradition had been the independence of judiciary in post undemocratic rule. Such independence had been achieved by grafting the establishment of judicial council in the constitution.

It is pertinent to understand that independence is a complicated and multivariate phenomenon. Independence of judiciary might be achieved by insulating it from partisan politics, but it might become hostage to the whims of senior judges in judicial hierarchy. In either case under the influence of politicians or senior judges the independence of judiciary is compromised. The countries with Civil law traditions address this aberration differently.

In Civil law countries judges are mostly hired from law schools with little or no professional experience through some sort of public examination (Georgakopoulos, 2000). This mode of appointment encourages interaction between the judiciary and other state institutions that in turn increases their dependence on other state institutions for their promotions and salaries. Consequently, it raised demand for external accountability and inserted in the mandate of judicial councils as their second objective. The judicial councils in Germany, Austria, and Holland demonstrate this model. It is pertinent to briefly explain the relationship between the judicial council and Supreme Court of the countries. The nature of this relationship varies across countries in Civil Law jurisdictions.

For example in Costa Rica and Austria, Judicial Council works under the supervision of the Supreme Court and overlook the management. Similarly Brazil's first judicial council was created in 1977 apparently with the objective to present the face of independence, but was unable to prevent military interference with the courts. However, from 1988 till 2004 the council was governing without any oversight. In 2004 the structure and composition of judicial council was changed with the return of democracy. The reforms were introduced to make the judiciary politically accountable and break its dependent relationship with the military.

The mode of appointment in Common Law countries are comparatively different resultantly the structure of the judicial councils appointing is different. The judges in Common Law countries are usually appointed late in their life time and after appointment are considered fairly immune from the influence of partisan politics. Accordingly, the appointing authority or council intensively focused on the appointment/selection of judges because once appointed they are subsequently considered free from political influence. The Appointment of Judges in UK by the Judicial Appointment Commission under the Constitutional Reform Act 2005 focus on the appointment based on merit (Garoupa and Ginsberg, 2009).

Singapore presents an interesting model in Common Law tradition that reinforces the argument against the achievement of independence through Council. Singapore has Legal Service Commission with limited role (Ibid). The President appoints judges of the Supreme Court on the recommendation of the Prime Minister after consultation with the Chief Justice.

The Legal Service Commission deals with the supervision and appointment of subordinate court judges on the recommendation of the Chief Justice. The Judges are usually given high salary in lieu of an understanding that the judges would adjudicate in favour of government in cases involving government. The Chief Justice is personally responsible for the supervision to ensure that judges of the lower judiciary do not deviate from independence formula in commercial cases and submissiveness in the political cases (Ibid).

2.3. The American Model : Majority of states in the United States decided to adopt Merit Commissions (which is similar as Judicial Councils) to insulate judicial appointments from partisan politics and make the appointments on merit. The Merit Commission (MC) was primarily non-partisan mixed body consisting of politicians, judges, and lawyers.

In some states it is the exclusive jurisdiction of the Merit Commission to select and appoint judges, but in some states the Merit Commission sends a set of candidates to the Governor and the Governor then selects a candidate for appointment. These judges are then subjected to uncontested elections which they rarely lose. The

impact of adopting Merit Commission on the independence and quality of judicial decision making is contentious (Ibid).

Studies conducted by Reddick conclude that there is insignificant evidence to support the claim of the proponents that appointment of judges on merit (by Merit Commission) insulates the appointment of judges from partisan politics (Ibid). Hansenn concludes that of all the methods, the Merit Plan is the most appropriate of all to protect state judiciary from partisan politics (Ibid).

The scope of the Merit Commission is restricted to selection of judges because in common law jurisdictions judges are appointed late in their career therefore the Merit Commission does not have to involve itself in the promotion and discipline of judges. This underlines the importance of decoding the variation in institutional design before demanding the judicial council model for appointment of judges.

2.4. The British Model: In 2003 the Prime Minister (PM) Tony Blair announced its intention to introduce changes to the system for judicial appointments in England and Wales. The simmering demand for changing the judicial appointment system stemmed from multiple factors like office of Lord Chancellor, high profile cases, Art 6 of the European Convention of Human Rights, and the gender and racial bias in the judicial appointments. The bearer of the office of Lord Chancellor was wearing two hats i.e. Lord Chancellor was judiciary's representative in the government and government's representative to the judiciary (J. Steyn, *The Case for a Supreme Court* 118 L.Q.R 382). Hence the office was uniquely placed in the governance structure but unlike the judiciary in the United States it was not separate and independent. The defect with this system was its inability to cater to the diversity of opinion. Anyone who would not comply with the establishment policies or views was not appointed to the judicial position.

The Pinochet case in 1999 in which half of the senior judges were sitting members of the House of Lords. Another case titled *McGonnell v. UK* (2000) in the European Court of Human Rights regarding the office of bailiff in the Island of Guernsey in which the Court adjudicated that an official who holds the position of a judge and also act in an administrative role was violation of Art 6 of European Convention of Human Rights.

Another important factor was the increased judicial intervention and lack of racial and gender representation in the judicial appointments. All these factors went hand in hand leading to the creation of United Kingdom (UK) Supreme Court under Constitutional Reforms Act 2005. The Supreme Court consisted of twelve judges' independent from House of Lords. The Act abolished the office of Lord Chancellor and his judicial powers were transferred to the President of the Courts of England and Wales. The Act established a Judicial Commission for the appointment of judges based on merit and transparency.

Eighteenth amendment was challenged before the Supreme Court of Pakistan by many petitioner on various grounds out of which two are worth emphasising. First ground was the conflicted nature of eighteenth amendment with the basic structure of the constitution with and second was the new procedure introduced for appointment of new judges. Legality of the arguments in favour or against the eighteenth amendment in case submitted to it will remain opened to contested debate but grounds pushed in the case are missing their roots in the legal setup of Pakistan. Track record of Supreme Court of Pakistan obstructs the channel through which basic structure's theory prevailing in India's legal structure can be infused into Pakistani jurisprudence. This theory triggered a clash between Indian parliament and court which remained frictional for a long time. The main theme of the theory projected in this case decided by Supreme Court of Pakistan is that the power of two-third of the total membership of parliament to amend the constitution is limited and subjected to judiciary's guardianship when an amendment tries to alter the fundamental framework of the constitution. This theory deliberated upon by various actors in this case directly affected two institutions: parliament and judiciary. Channel of amending the constitution and binding nature of the laws made by one parliament over successive parliaments have been brought into question. With such questions into centre of debate question regarding the legal boundaries of Judiciary within which it makes law through the instrument of interpretation has also become the beauty of critical views of academicians, scholars and jurists. Article 239 of Constitution of Pakistan is vital in this regard which provides that judiciary should not attempt to entertain the petitions challenging the constitutional amendments which can be brought by parliament at any time. No limitations have been put on parliament regarding its power to amend the constitution under article 239 of the constitution of Pakistan. In presence of article 239 invocation of basic structure theory requires judiciary to interpret the unclear contents of article 239 in the way in which a judge can reflect the process of giving meaning to constitutional articles based on his personal like and dislikes as the will of individuals seeking the justice. In pursuit of such avoidance court has to accept some hollow thoughts. First among such train of thoughts is this that society and the state contracting the constitution is not same which was in existence in 1973 and resultant constitution holds divinity. Second thought seems to be a total supposition that constitution of Pakistan 1973 is static and insulated to alteration. The reason of being such thought as a supposition is its inherent ignorance towards factual processes like social change and social mobility explained in academic discourse. Third thought is this that if courts duty is to interpret the law then such duty of interpretation also includes the power of giving leverage to one article over other article which may disregard other provisions of the constitution (Beverly, 2005).

Meticulous evaluation of abovementioned thoughts and basic structure theory can be made by keeping the changing representativeness of legislative assemblies in two different time frames. Electoral behaviour, wishes, desire, demands, values, mandate, goals, objectives and ideas of Pakistanis in 1973 are different from that of those living now. All these terms between government and people continue to change. Due to these natural circumstances constitutional apparatus had been endowed with an instrument of dynamism in shape of article 238 and 239 which can switch over the constitution to new demands of transformed people and hence lessened the room for claim of divinity and omnipotence by constitution itself or its makers. Constitution-makers didn't settle the basic attributes building up the structure of constitution before its enactment by the constituent assembly (The News, May 29 2010). They didn't provide any procedure through which such structural attributes can be anchored to evolving political dynamics. Inquisitiveness about the questions of form of government and unknitting the religion from folds of law and politics arises (Awaz Today July 16, 2010; Ran, 2010). Sticking to basic structure theory reduced the available channels of bringing change in constitution to revolutionary methods. When the decision of defining the basic structure of constitution is being monopolized by an institution who normally acts as a referee in the institutional game then conflict becomes inevitable and can be expressed and pursued through revolutionary politics but the major problem with revolutionary politics in Pakistan is the consequent creation of conducive environment for intervention of unconstitutional forces who succeed to attract public supportive opinion in power corridors of the state.

Supreme Court plays a vital role as a protector of Constitution in institutional framework. The instrument available with Superior Judiciary in any country in general and Supreme Court of Pakistan in particular is judicial review or constitutional review. Through usage of this instrument in its verdicts SCP gives its input in whole evolving process of basic structure theory. Hence constitutional instrument of judicial review empowers Supreme Court to block the laws enacted by parliament, which conflict with fundamental rights or constitutional provisions pertaining to basic structure theory (Simeon, 2005). But usage of this instrument is prone to rewriting of constitution depending upon the mode of interpretation used by the judges (Imtiaz, 1996).

Supreme Court through its verdicts has impeded incorporation of basic structure theory in legal structure of Pakistan. One aspect of this barricade is the acknowledgement of duty by Supreme Court of Pakistan to refrain from freezing the constitutional amendments and parliament's limited role to alter the fundamental attributes of constitution. Second section of barricade is linked to instrument of interpretation which is used to amalgamate the apparently conflicting contents of constitution instead of amputating one organ/article of constitution for its out-of-line relation with another organ/article (Irwin, 1987; Donald, John and Gary, 2004). This second section of doctrinal barricade seems to be flawed because the notion that parliament is limited in bringing constitutional amendments on pretext of threatened basic framework but this notion is far better than that of India where usurpation on the jurisdiction of parliament is observed on the part of Supreme Court in handling of disputes pertaining to constitutional amendments. Such projection of limits on exercise of parliament in introduction of constitutional amendments has no foundations in juristic discourse. But ultimate fate of instruments used by Supreme Court depends upon determination of existence of authority to strike down the constitutional amendment. It also needs deep assessment to judge whether eighteenth amendment really brought that changes on the basis of which Supreme Court found justification to intervene and covered up the deficiency left in explanation of constitutionalism and abovementioned limited power in verdicts decided such as NRO verdict and PCO judges verdict (PLD 2009 SC 265; PLD 2010 Supreme Court 879). Number of debatable points arise which give in-depth analysis of this case. First point is this that all institutions and individuals entail their boundaries of power from constitution within which they are allowed to play its role (Hilaire, 2010; Masterman, 2011; Richard & Daniel, 2010). Hence freedom to reject any explicit provision of law on the basis of particular legal argument through interpretation requires skilled application of mind for affirmation of limited domain in legislative issues (Robert, 1992). During such course of interpretation it is not beyond comprehension that superior courts usually stretch the effect of statutory law through interpretation to increase its jurisdiction but courts eligibility to ignore the limit put on it by constitution is not amenable to criticism when constitution itself puts such limits (Bradley, 2006). Second, coining the theory of implied limits put on domains of power by constitution on the part of superior courts is strange according to which it creates gap between meaning and words about narrowed boundaries of jurisdiction of parliament and court enshrined by article 239 of constitution of Pakistan. It means that words of articles in constitution do not mean what it holds generally or literally. Meanings of words used in constitutional article can't be taken as what are perceived in daily life interaction rather meaning of such words can be clarified in verdicts coming out through following of different approaches of judicial interpretations (Donald, Russel & Ruth, 2012). Third the argument that any article or clause like 239(5) and 239(6) of constitution of Pakistan introduced by a dictator in constitution can be ejected is not amenable to criticism because if such argument is admitted then article 2A embodying the soul of fundamental structure of constitution i.e. judicial independence should be ejected as it was also entered by a dictator General Zia ul Haq. It is noteworthy that article 239(5), 239(6) and article 2A were entered in constitution in same amendment during the regime of General Zia. Fourth, Supreme Court uses its instrument of interpretation to integrate apparently conflicting and divergent provisions of law instead of making preferences

between various contents of constitution and accruing weight to one article over other. Incongruities may probably be created within the constitution in ascribing particular constitutional provisions to certain level of importance over others. Hierarchical arrangement of constitutional provisions creates a chaotic picture of institutional chessboard which inherently provides leverage to one institution over other because ultimately Supreme Court has to decide the explicitness and implicitness of a provision (Eisenstadt, 1991; Donald, John and Gary, 2004). Five, that decision of the case on the basis of rationality and logic substantiating justice in transgression of constitutional boundaries is different from doing the same but on the basis of constitutional mandate. Same fact was reflected by Oliver Wendell Holmes, Jr. when he said, *“This is a court of law, young man, not a court of justice”* (Buckner, 2010). There are two ways to dispose off the case. One is to deal with it in accordance to textual law. Other is to think about justice in prism of judge’s own application of mind which if is not meted out then he/she steps out of the boundary carved by textual law. This exposes our attention to a boundary thinning out between doctrine of necessity and basic structure theory as both the laws have no basis in textual law. Justice Khawaja during NRO cases delve into the distinguishing boundary between constitutional provisions and criterion deciding good or bad for the people which in no way is the domain of a judge. He said, *“the court, while exercising the judicial function entrusted to it by the Constitution, is constrained by the Constitution and must therefore perform its duty in accordance with the dictates of the Constitution and the laws made there under. If the court veers from this course charted for it and attempts to become the arbiter of what is good or bad for the people, it will inevitably enter the minefield of doctrines such as the law of necessity, with the same disastrous consequences... Decisions as to what is good or bad for the people must be left to the elected representatives of the people, subject only to the limits imposed by the Constitution...”* (pljlawsite, 2013). Such remarks clarify the doubt about court’s eligibility to discuss the efficacy of eighteenth amendment. Deciding the desirability and necessity of constitutional amendment in this regard seems to be out of Supreme Court’s domain. Sixth point deals with precedents as binding source of law for courts in Pakistan. Article 189 and article 201 of the constitution envisage the binding nature of early verdicts delivered by Supreme Court and High Courts of Pakistan. Second justification of referring to precedents in judicial cases is historical similarities between our legal structure and English common law. Relying on verdicts delivered by superior courts of the country is then understandable in light of article 189 and article 201 but reliance on verdicts delivered by Indian Supreme Court on the issue of basic structure doctrine which is completely different in its application seems to be beyond comprehension. Indian version of basic structure doctrine makes her superior judiciary to forbid her parliament from stepping over fundamental rights during implementation of principles of policy provided by Indian Constitution. Verdicts delivered by foreign courts in different socio-political context with roots in a constitution embodying different legal structure are problematic in its applicability to our judicial cases. Precedents and their applicability depends upon the time period during which such precedents are relied upon by Superior courts and duration of antiquity of precedents build up judicial norms. Deriding a established norm due to its existence for four decades in shape of precedents characterizes judicial behaviour in various high profile cases as messy and incoherent. It becomes more criss-cross when is observed in context of institutional friction between executive and judiciary.

3. Supreme Court Of Pakistan’s Verdict On Eighteenth Amendment-An Overview: Leader of a major political party i.e. Watan Party Barrister Zafrullah challenged the eighteenth amendment in Supreme Court’s Lahore registry on ground of basic structure theory, disturbance of trichotomy of powers, and transformed shape of 58-2(b) by accruing enhanced powers to party chief who under the eighteenth amendment holds power to cancel the membership of political party (Daily Times April 21 2010). He considered deletion of article 172(4) as akin to strengthening of dynastic politics (Ibid). Later identical petitions had been submitted to the apex court (The Express Tribune May 13 2010). The apex court arranged full bench to hear the petitions challenging eighteenth amendment (Ibid). In its first reply government took exception to presence of Chief Justice Iftikhar Mohammad Chaudhry in the larger bench because he serves a cause in appointment of judges (The Express Tribune, May 28, 2010). Secondly absence of Justice Zahid Hussain was also one of the reasons for objection on larger bench by government (Ibid).

Many petitioners have made serious concerns and raised questions about the 18th amendment especially the Articles 1, 17, 17(4), 27, 38, 45, 46, 48, 51, 582(b), 62, 63, 63A, 91, 106, 148, 175, 177, 193, 203c, 209, 219, 226, 245, 260, 267A and 175A which are the integral part of this amendment.

They based their argument on the logic that various of these articles are not coinciding the main characteristics of Constitution of 1973 which means that the essence of the original Constitution would be destroyed. According to them, following are the main features of the Constitution which ensure its originality:

1. Parliamentary System
2. Islamic Democracy
3. Fundamental Rights
4. Independence of Judiciary
5. Federal state

3. Article 175(A) of the amendment is the main article which has been seriously opposed and defied by the petitioners which illustrates

Article 175(A):

1. The appointment of the judges of the Supreme Court, High Court and the Federal Shariat Court(FSC) should be done by a Commission which will be known as Judicial Commission of Pakistan.
2. For the Supreme Court Judges, the Chief Justice will perform as the Chairman and the two senior most judges of the same Court are the members of the Commission.
 - i. The Chief Justice with the assent of the two senior judges shall appoint the judge of the Supreme Court for a period of two years.
 - ii. The Federal law Minister, Attorney General(AG) shall become the members of the Commission for a period of two years
 - iii. Pakistan Bar Council(PBC) shall also nominate a senior judge as the member of the Commission
3. The President of Pakistan shall appoint the judge of the Supreme Court.
4. The rules of business will be decided by the Commission.
5. For the appointment of High Court judges, the Chief justice of the high Court, senior judge, provincial Minister and a senior advocate of Provincial Bar Council shall be its members for two years. In case of selection of the Chief justice, the senior judge of the court is replaced by ex-chief justice of respective court to be nominated by mutual agreement of chief justice of Pakistan and two member judges of the judicial commission.
6. According to clause 2, the judges of Islamabad high court are selected by the committee containing members i.e chief justice of Islamabad, senior judge of Islamabad, high court, chief justice of four provincial high courts.
7. According to clause 2, for the selection of judges of Federal Shariat court, the commission says in the point 2 that it shall contain chief justice of Shariat Court and its most senior judges as member.
8. One member person is appointed as the member of parliamentary committee, as for a vacant seat of the apex court seat or any vacant seat of federal shariat court
9. In the Article It is provided that the parliamentary committee consists of eight members, four of upper house and four member from lower house respectively.
10. Out of the 8 members, 4 shall be from the treasury benches, 2 from each house, and 4 from opposition, 2 from each house. The leader of the opposition made the selection of member of opposition benches and leader of parliament shall made the appointment of member of treasury benches.
11. Senate shall work as the secretary of the committee.
12. The commission shall confirm nominee by majority of votes on receiving the receipt paper of nomination within 14 days. If any nomination fails within 14 days, the commission shall send another nomination.
13. The conformed nominee shall be sent to President by the commission for the appointment
14. The commission decision taken is valid on the ground of a vacant seat by the absence of its members from the meeting.
15. The rules of procedure shall be made by committee.

This provision has also been challenged as repugnant to the constitution of 1973 which ensure independence of judiciary. According to clauses 12, 13 of Article 175 A, the appointment of judges in this process came into contrast with the independence of judiciary which says that the parliamentary committee has been assigned the power of confirming the nominations of the commission, through voting of six out of eight members of the Parliament, and sent it to the president for approval. It has also been argued that the court should use its power of judicial review against the original constitution.

In several liberal or modern democracies the power of amendment of constitution is part of constitutional law. Many references can be taken from Supreme Court of India and Bangladesh. In Pakistani Constitution the structure is also acknowledged by this court in Mehmood Khan Achakzai, Syed Zafar ali shah vs General Pervez Musharaf and many more cases has given reference to the constitutional provision

Highly qualified judges like Attorney General of Pakistan Moulvi Anwar ul Haq, Mr. KK Agha appearing for federation. Mr Wasim Sajad hold the view that any new concept amended in our constitution is strange to our jurisprudence and the court may not be favoured to review its own judgments as no good reason are there to defend them. A highly educated Mr. Shahid Hamid Advocate Supreme Court (ASC), in a fair play accepted that implementation of Article 175A may elevate certain issues and it will be more appropriate if it is referred to parliament for review of Article 267A of constitution.

All the articles were challenged. The court did not fully express its opinion on the merits of issues and other consequences but at first defer to the parliamentary opinion, on the Article 175A to this order

The structure of government based on three-dimensional powers has made the court thoughtful. As the powers are distributed between three organs executive, legislature and judiciary on the basis of separation of powers, the political sovereignty according to constitution belongs to the people as a sacred trust. The judges are supreme only in the interpretation of laws.

It is also a power given to the judges that they should provide justice on the basis of equality without any nepotism and favoritism. As independence of judiciary is the most important provision of our constitution as is concern with the implementation of fundamental rights as given in article 184(3). And under article 199 of the constitution "Rule of Law". The judiciary has not been made part of the executive or the legislature under Article 7. It is separation between the three institutions. But under Article 177, the process of appointment of judges and removal under article 209 was kept isolated from legislature and opinions of the chief justice of Pakistan and chief justices of High courts were given priority. In all democratic countries, judiciary is in bad condition to the power of legislature as it create and set up the judicial structure like removal, appointment of judges.

In our country legislative power over judiciary is restricted and it is also under the attention of parliament as under Article 175A. Parliament cannot amend any point which is an interference to the independence of judiciary. Only the appointment process has been changed as based on the balance between legislature and judiciary.

The council for federation was aware of the fact that parliament is respected by liberal democracy. The rule of law and independence of judiciary in passing the eighteenth amendment has been taken care of. The provision can be in contradiction with the judicial independence like under Article 175A. It disturbs the overall structure of judicial system because of number of reasons. First, Superior judiciary in Pakistan works under the leadership of Chief Justice of Pakistan (CJP). CJP represents the judiciary as an institution and hence channelizes and envelopes the voice of dispute-settling pillar of the state. Therefore he can rightly be said as head of judiciary. Before eighteenth amendment article 175 was interpreted in Al Jihad Trust case in the way in which input of CJP was declared as assertive and decisive in process of appointment of judges. As a result of eighteenth amendment article 175 was changed to the extent in which weight of CJP's input in the process of appointment of judges had been reduced to capacity of a member of judicial commission. Then there seems to be jurisdictional imbalance between judicial commission and parliamentary committee charted out in eighteenth amendment. Parliamentary committee will be at liberty to reject the recommendations of judicial commission.

Second, Composition of judicial commission has been constituted in the way which gives leverage to executive. Two members of judicial commission: the Attorney General and law minister are part and parcel of executive branch of the state tilt the decision of procedure in favor of executive. Hence independence of judiciary has been eclipsed by interlocking of two institutions in one apparatus.

Third, Insulation wrapped around the judiciary by the constitution earlier which was ensuring institutional autonomy and freedom from tentacles of legislature, has been stripped down as new amendment empowered Prime Minister-the chief executive to nominate four members in eight members parliamentary committee.

Fourth, The dissolution of national assembly is discussed under clauses 9 and 10 of article 175A in which loopholes have been noticed pertaining to likely vacuum created in case of dissolution of assembly and consequent incompleteness of parliamentary committee. Article 213 of constitution in this regard does not contain clear cut directions and hence uncertainty and problem of clarity is present in it.

Fifth, Questions have also been raised on the composition of the judicial commission and parliamentary committee has a veto power. Unaltered articles were though vague but didn't require any upside down change. It was observed that earlier constitutional provisions which required CJP to consult other senior judges before making of recommendation only needed formalization. Supreme Court envisaged following design of amending the article 175 in its verdict on Eighteenth Amendment to strike the balance among concept of separation of power and judicial independence.

- i. Two most senior judges of Supreme Court should be part of judicial commission.
- ii. Judicial Commission (JC) will recommend the names of judges for appointment. Parliamentary committee on receiving the names will deliberate on nominations and will approve with 3/4th majority of the committee. If reservations are expressed over the nominations then case can be sent back to judicial commission with strong reasons for reconsideration. During the reconsideration if judicial commission came up with maintaining the earlier recommendations then on sending the same recommendations for second time would leave no other way with parliamentary committee except to forward it with approval for presidential assent.
- iii. Activities of parliamentary committee can be carried out in camera but formal detailed record such proceedings should be preserved and protected.
- iv. Mian Raza Rabbani acknowledged the importance and significance of basic structure of constitution on the floor of national assembly by showing extreme cautiousness about the fundamental principles of the constitution. He ensured maintenance of such principles during his address.

- v. He clearly stated that the new system under 175A and the appointment of judges should be from the recommendation of the chief justice of Pakistan
- vi. The personal made arguments and effect of Article 175A on independence of judiciary are also deferring to the parliamentary mandate. Reference to the Parliament has been made in the lieu of appointment process of judges
- vii. The serious note was given to the legislative in the constitutional history to think over on issues regardless of its legislative functions. The sovereignty of parliament and the independence of judiciary are both important and indispensable. It should not be contradicted in their legislation and judicial power so that the people can live in peace and in such society Rule of Law should prevail. We have to think as a nation over all the multidimensional issues we are suffering from. We should keep in mind that institutions have different and separate role to perform and function but the ultimate goal is one and common between them in a constitutional mandate

Submission of eighteenth amendment to the apex court for decision of its fate has created new scenario in wake of appointment of additional judges before the enactment of eighteenth amendment. New appointments can also be in consideration. Without any link to pendency of current case on eighteenth amendment, the new amendment came into effect. The apex court during the hearing of petitions on eighteenth amendment issued the directions for insertion of an arrangement which must be in line with other constitutional provisions and ensure judicial independence. For such a balanced approach following directives were issued by the apex court regarding the channel of effect given to article 175:

Chief Justice of Pakistan on being informed about any vacant post of higher judiciary will call the meeting of judicial commission. He will chair the meeting and then will propose names for vacant seat of justice in Supreme Court of Pakistan. Chief justice of Federal Shariat court and that of provincial high courts will do the same thing for vacant seat in Federal Shariat court and provincial high courts respectively.

Meetings of commission for appointment to vacant post of justices in higher judiciary will be conducted according to appropriateness deemed by Chief Justice of Pakistan. Judicial commission will send its proposed recommendations to parliamentary committee for acceptance. Parliamentary committee will conduct meaningful deliberations over the proposed recommendations and then will forward it to Prime Minister for further approval by president but if it took exception to recommendations then ball will again come to Supreme Court of Pakistan with strong reasons of exception.

4. Institutional Role of Supreme Court of Pakistan: Huntington has attributed strength and scope of political institutions to magnitude and efficacy of governance. The level of governance can be analysed by the relations existing between the people running the political organizations and political institutions. Huntington (1975) has inked his views about institutions in following words:

“The institutions are the behavioural manifestation of the moral consensus and mutual interest. Historically, political institutions have emerged out of the interaction among and disagreement among social forces, and the gradual development of procedures and organizational devices for resolving those disagreements.”

Huntington underlines political organization as network or an apparatus built to ensure order, judicious settlement of disputes, ascendance of hands-on leaders to representative positions, and mushrooming of governance among various kinds of forces present in society. He shows dependence of governance upon strength of political organization and processes in society as crucial for development. Such strength is in turn hostage to scope of support among the general public and level of institutionalization. Before mentioning the contents of institutionalization it is necessary to flash some light on Huntington’s definition about institutionalization as a process which makes organizations and processes involved among organizations, groups, individuals and various kinds of forces to value and follow it. Such following should be consistent in time. He underlined various factors or contents of institutionalization as adaptability, complexity, autonomy, and coherence. Supreme Court’s verdict needs to be passed through these avenues in order to analyse its impact on good governance existing in Pakistan.

Which aspects of verdict on Eighteenth Amendment assure adaptability? Most of the aspects assure it as it gears up the nature of environment among various political organizations and forces to higher level of harmony. Sending it to parliament for reconsideration is the sign of enhancement of adaptability of legislature to new dynamics of power. Adaptability of many political organizations has been increased. Legislature and executive acquired adaptability by swallowing the bitter pill of constitutional amendment having been sent back to its post. Judiciary faced augmentation in its adaptability to new nature of the case which involves diverse questions of parliamentary democracy, federalism and basic structure of constitution at a time with its focus on procedure of judicial appointment. Critics view this case as an addition of fuel to fire set in shape of apparent clash among

institutions. Increasingly charged environment among the institutions in wake of hearing of eighteenth amendment case further increased the adaptability to situation where gaps and divergences among political organizations seem to be widened. Here it is necessary to mention that Supreme Court didn't go to the extent of striking down constitutional amendment down but it sent it back to parliament. Such restraint on the part of Supreme Court of Pakistan against the backdrop of apparently odd interaction between executive and judiciary demonstrates the readiness of Supreme Court to not only adapt itself but also to move other organizations with itself in gaining adaptability.

Complexity is the main thing which Supreme Court absorbed in carrying out its constitutional assignments and actually incessantly increasing complexity in functions of Supreme Court in shape of its verdict on eighteenth amendment like other cases is being perceived as thorny and suffocative by forces and other organizations in institutional framework of governance. Earlier, Supreme Court of Pakistan had already been made the centre of criticism regarding its attitude towards institutional boundaries in framework of governance but this verdict further added the complexity in functions of Supreme Court when article 239 was interpreted in a new way. Diverse functions funnelled to SCP through its interpretation of article 239 were the determination of basic structure of constitution, deciding the procedure of judicial appointments on institutional terms of Supreme Court of Pakistan, and alteration of pattern of federalism in Pakistan. It also added and strengthened a sub-unit of Judiciary i.e. Judicial Commission in Supreme Court of Pakistan which is considered another sign of complexity necessitated by institutionalization in words of Huntington.

Autonomy was gained by Supreme Court to boundless extent in its verdict of Supreme Court of Pakistan. As main bone of contention in this case between executive and judiciary was procedure of judicial appointment enshrined in article 175, SCP in its verdict ensured ejection of executive in matters of judicial recruitments. Such enormity in autonomy of SCP can be criticised on the ground of missing balance between two theories of separation of power and check and balances. Separation of powers was blindly accorded in this case by turning blind eye to concept of check and balance. But as far as essential element of institutionalization mentioned by Huntington is concerned that was achieved in toto. Organizational system of accountability was long ahead granted in shape of article 209. And now exclusive domain of recruitment has been acquired by SC to portray itself as apolitical organization. Though the ground of depoliticization of judicial appointment taken for such autonomy is opened to criticism, one can consider upper hand given to judiciary in procedure of judicial appointment as initial baby steps towards eradication of nepotism and favouritism in the realm of said procedure. Such autonomy drove the system towards transparency, freedom in shape of depoliticization and fairness in shape of incorporating merit in procedure of attracting new entrants in higher judiciary.

Coherence is obtained both in function and structure of Higher Judiciary in this verdict by Supreme Court of Pakistan. Machinery and structure was made complex and organized through passing back the amendment to parliament with exceptions taken to judicial appointments and basic structure of constitution. Structure of Judicial Commission which was proposed in its verdict on eighteenth amendment and had been translated in nineteenth amendment brought the various parts of provincial and supreme judiciary together on same platform. This platform enveloped the voice and demands of superior judiciary in shape of organized and shared institutional interest. In terms of functions, coherence was acquired in new function of scrutinizing executive's wishes and having final say in judicial appointment, accrued to superior judiciary through apparatus of judicial commission.

5. Conclusion Verdict on Eighteenth Amendment Case is the verdict in which stance was taken by the Apex Court that question of court's intervention in matters of judicial appointments decided by a Parliamentary Committee is not unequivocally excluded by the law. Logic would have been rational and judicious if it had accorded uniformity in its application and avoided selective approach. The apex court under the same logic didn't submit itself to judicial review. The court however didn't state that accordingly the recommendations of the Judicial. Due to contradictory approach in following the law Judicial Nominations Case seem to be opened to criticism. There is no denial of the fact that that independence of judiciary is sole theme of our constitution but it doesn't mean that only monopoly over the decision of judicial appointment substantiate judicial appointment and without giving the power of rejection of Parliamentary Committees recommendations to Superior Judiciary judicial independence can't be ensured.

Given the origins of our constitution in English Common Law, other Countries in the world are examples for us to follow where judges keep themselves at an arm's length from procedure of appointment of judges of Superior Courts. Contradiction between the issue and function to be adopted, exists in the verdict. First judicial independence has been taken exclusively for judicial appointment and then judicial appointment has been taken for exclusive domain of Superior Judiciary. Attributes of institutional independence in context of liberal democratic system have been ignored. Transparency, participation, pluralistic consultation are the ethos to be transfuse in the mechanism of judicial appointment. The verdict instead focused on actors and its association to higher judiciary. Established approaches of judicial interpretation have not been followed. Constitutional words where its meanings were clear have been afforded new meanings. In the case reference have been made to Al Jihad Case in which Supreme Court of Pakistan equated consultation to consent of Chief Justice of Pakistan in

matters of appointment to Supreme Court. Appreciation of AlJehad Trust case can't be attributed to approach of constitutional interpretation followed by the apex court but to its characterization as an attempt of freeing Supreme Court from the tentacles of executive. Such reason of appreciation was not justified but had been accepted due to particular socio-political situation prevailing at that time.

There is difference between the context in which AlJehad Case was decided and the context in which Eighteenth Amendment case was decided. Institutions involving political organizations are working in a different institutional environment. Judiciary which heard and concluded the Eighteenth Amendment Case was very different from that which heard and decided cases like Al Jihad Trust because it emerged to the institutional screen through a quasi revolutionary movement in shape of Lawyer's movement. With enough scope of support as mentioned by Huntington necessary for institutionalization, post-2009 judiciary has no fear of executive overwhelming behaviour. In absence of such fear it is necessary to debate on making the procedure of judicial appointment more representative and democratic. Monopolizing the procedure to have the final say in the said appointment process superior judiciary will be vulnerable to adopts executive style of working.

Main point on which the apex court differed and went to the extent of sending back the said amendment for review to parliament is this that if Parliamentary Committee is empowered to reject the Judicial Commission's recommendation then such leverage may make Judicial Commission dysfunctional or toothless. Secondly such preferable say of the parliament will politicize the process and ultimately political favourites will be ascended to higher judicial posts. Third, as a matter of logic, merit to be fulfilled by interested candidate for post of a judge of higher judiciary can best be judged by experienced and senior member of legal fraternity. But if these probable reasons of difference are observed with extreme sensitivity against the backdrop of liberal democracy where stress is applied on more participation, pluralism, constitutionalism, tracheotomy of powers, debates etc then it is necessary to adopt different stance over same issue. Difference between stances and arguments pushed forward in support of stances can expose various actors of the game to variety of alternatives and options available for resolution of any problem at hand.

Verdict on Eighteenth Amendment created a complex scenario in which mistrust seems to exist among institutions. Though this mistrust has some historical and real time rational foundations, the very rationale of Parliamentary Committee can be questioned when its disagreement over judicial appointment with Judicial Commission is not allowed on the pretext that such disagreement may give rise to trespassing of judicial domain.

Verdict on Eighteenth amendment was not the result of judicial findings based on merit. During the course of hearings by the apex Court legal and political wizards were expressing their concerns about potential clash among the institutions. But sanity prevailed when Supreme Court of Pakistan delivered which struck a balance between judicial activism and judicial restraint. Supreme Court's recommendation has already been adopted in the shape of nineteenth amendment which shows a positive and mature response from parliament in general and executive in particular. Governance was strengthened and had been made more responsive because institutional interests of both judiciary and executive have been taken care of which Huntington symbolised as indicator of public interest. If members of an organization increase their individual interest then public interest will be lost sight of institutionalization necessary for good governance. But if institutional interest is achieved then that means achievement of public interest.

6. Recommendations Judicial independence is quintessential for federalism because it plays an important role of referee among provinces and between province and federation in case of dispute. Such independence, in case of Pakistan, is not an easy task to achieve unless the appointment of judiciary is free, fair, transparent and apolitical. Though nineteenth amendment has already adjusted majority of reservations raised by superior judiciary in its verdict on eighteenth amendment but doctrine of necessity needs to be kept intact. Other institutions of government must have some rational say in appointments of judge to determine the rationality. After involvement of other institutions, rational methods, means and procedures should be established for making of best choices.

Amendment is an exclusive domain of parliament. Stretching of judicial interpretation should be avoided to prevent institutional encroachment. While interpreting eighteenth amendment, superior judiciary judges didn't clarify the institutional boundaries. It set a wrong precedent which can resist the legislative powers of the parliament. Hence superior judiciary is required to override it in next cases, if submitted before it.

Basic structure doctrine should be brought in harmony with democracy. If the model of democracy is electoral or other, then such doctrine should not be left as hurdle in implementation of the voice of the people. In federal democracy voice of the people is supreme. Behaviours of the people and social dynamics change with time and space. Constitutional amendments are aimed at adjustment of such an evolving situation. Democracy and federalism, both are processes which can be stopped from evolution, if courts start intervening incessantly on the account of basic structure doctrine.

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