

C.A. 15: Dismantling the Constitution

The proposed 15th Amendment Bill – C.A. 15 as it has come to be known a – not only aims to effect the most radical and unprecedented changes in the basic features of the Constitution, but also introduces new dimensions into the Constitutional structure which could leave any elected government vulnerable to an assault from forces beyond the democratic framework. Interestingly, the much debated C.A. 15 provides a classic vehicle for a journey into the basics of Constitutional Law, Pakistan's Constitutional system and Islamic Jurisprudence.

One of the most preliminary concepts of Constitutional Law is the bright line distinction between a rigid and a flexible Constitutional system. In essence, a rigid Constitutional system is one where the procedure of passing Constitutional amendments in Parliament is different from, and has higher procedural standards than, the passing of ordinary statute law. A flexible Constitutional system is one where the procedure governing Constitutional amendments and ordinary statute law is substantially the same.

By definition, Pakistan's Constitutional system has always been a rigid one (that is to say, as and when Constitutions have been in force). In the present Constitution, the legislative procedure governing ordinary statute law is contained in Articles 70 through 77 and the framework governing Constitutional amendments is contained in Articles 238 and 239.

In brief, a bill pertaining to ordinary statute law – with the exception of a Money Bill – may originate in either the National Assembly or the Senate. It has to pass by a simple majority in the originating House and is then transmitted to the other House where it also has to pass by simple majority before the formality of Presidential assent transforms the bill into an Act of Parliament. In the event there is a disagreement during the passage of a Bill between the three legislative organs – the National Assembly, the Senate and the President – a simple majority vote of the total membership in a joint sitting of the National Assembly and the Senate in the last resort cures the problem and an Act of Parliament is born, once again via the formality of Presidential assent.

A Constitutional amendment bill, on the other hand, may originate in either House of Parliament, but must pass by the votes of at least two-thirds majority – a supermajority as opposed to a simple majority – before being transmitted to the other House. It has to pass by a supermajority vote in the other House as well before Presidential assent is granted. In addition, a Constitutional amendment bill that has the effect of “altering the limits of a Province” must also pass by a supermajority vote in the Provincial Assembly of that Province before being presented for Presidential assent. Lastly, if the National Assembly and the Senate have differences regarding the contents of a Constitutional amendment bill, there is no provision for cure through a supermajority vote at a joint sitting of both Houses of Parliament.

The reasoning behind this varying set of procedural standards is simple. Statutory amendments are subject to lower procedural standards because they enable the government to handle the affairs of the State more efficiently. After all, it is by virtue of

the powers vested through statutory provisions that the government runs its day to day administration, enforces law and order, collects taxes and so on. Unless the mechanism allowing change is uncomplicated, the government administration would sooner or later come to a grinding halt. But Constitutional provisions perform a different, more critical function – documenting the ideology behind a State's creation, determining the structure and authority of the State and its political sub-divisions, acknowledging, defining and protecting fundamental rights, and providing a system of State organs and functionaries through which the executive, legislative and judicial powers are exercised. Among other reasons, it is due to its fundamental character that the Constitution is elevated to a rank higher than ordinary statute law and is made to be more tamper proof in the face of political expediency.

In one fell swoop, C.A. 15 aims to convert the rigid Constitutional system of Pakistan into a flexible one by treating Constitutional provisions and ordinary statutes on the same footing. The clauses that C.A. 15 proposes to add to Article 239 essentially abolish the supermajority vote required in each House of Parliament to effect a Constitutional amendment and replace it by the introduction of a simple majority vote in each House or at a joint sitting of both Houses of Parliament. The suggested change in the voting requirement only relates to those Constitutional amendments that purport to be for the "enforcement of any matter relating to the Shariah and the implementation of the injunctions of Islam".

However, in theory, the Shariah and the injunctions of Islam furnish a comprehensive code of conduct and cover any and every aspect of life ranging from political governance and administration of justice to matters of personal hygiene. In practice, it could mean that the entire Constitution can be abolished and replaced by a new one through a simple majority vote in each House of Parliament or at a joint sitting of both Houses.

That is not the end of the matter. The Constitution of Pakistan has certain other basic features in addition to being rigid by definition, and C.A. 15 proposes to alter or dismantle almost all of them. Unlike the Indian Supreme Court, the Supreme Court of Pakistan has tended to stop short of declaring outright any set of Constitutional features as being so basic or fundamental that they acquire a supra-Constitutional status and can never be departed from, even through a procedurally correct Constitutional amendment. However, in at least two major judgments, the Supreme Court of Pakistan has clearly identified some of the basic features of the Constitution. In *Mahmood Khan Achakzai Vs. The Federation of Pakistan* (PLD 1997 SC 426), the Court conducted an academic discussion recognizing Federalism, Parliamentary form of government blended with Islamic provisions as the basic features of the Constitution. Furthermore, in *Al-Jehad Trust Vs. Federation of Pakistan* (PLD 1996 SC 324) – commonly known as the Judges Case – the Court, while limiting the scope of executive interference in judicial appointments and transfers, in effect recognized the independence of judiciary and the trichotomy of powers as basic features of the Constitution.

The changes proposed in C.A. 15 not only clash with the concept of Federalism but are also inconsistent with the Parliamentary form of government, the trichotomy of powers

and the independence of the judiciary. The clash with Federalism arises from the procedure devised in C.A. 15 for effecting Shariah related Constitutional amendments. Under C.A. 15, if the National Assembly passes such a Constitutional amendment bill by a simple majority but the Senate rejects it, a joint sitting of both Houses would be called and if the bill passes in such joint sitting by a simple majority, it would become a Constitutional amendment upon Presidential assent. In essence, this diminishes the role of the Senate in passing Shariah related Constitutional amendments because the Senate consists of only 87 members as opposed to National Assembly which has 217. Unlike the National Assembly, the Senate has as an equal number of seats from all provinces and acts as a source of symmetry and equality in a Federation of disparate units. Such curtailment in the Senate's powers strikes at the heart of the existing Federal structure. In light of this, it is possible to argue that C.A. 15 is a bill "altering the limits" of the Provinces – limits that are not simply geographical boundaries but also limits on the legislative powers of the Provinces – and therefore cannot be passed until each Provincial Assembly grants its supermajority approval.

As proposed by C.A. 15, "the Federal Government may issue directives for the implementation" of the proposed Islamic provisions, "and may take necessary action against any state functionary for non-compliance of the said directives". This proposal collides head-on with the concept of Parliamentary form of government as well as the independence of the judiciary. The power to "issue directives" to implement Islamic provisions suggests a clear abdication of legislative powers in favor of the Federal Government. The Federal Government could proceed to enlarge the scope of its authority through executive fiat to regulate any and every aspect of the daily life of the citizens while the Parliament and the Judiciary appear as bystanders instead of participants. It is essentially the Parliament, under Article 227 of the Constitution, which has an obligation to bring all existing laws in conformity with the Holy Quran and the Sunnah and the judiciary which has to interpret and apply these laws. Furthermore, the power to take action against any State functionary for non-compliance with Federal Government directives potentially reduces not just the executive but also the legislative and judicial functionaries of the State to a position of abject subservience before the Federal government thus obliterating the separation of powers between the three organs of the State.

Finally, the C.A. 15 declares the Holy Quran and Sunnah as the supreme law of Pakistan and makes it obligatory upon the Federal Government to take steps to enforce Shariah, to establish Salat, to administer Zakat and to prescribe what is right and to forbid what is wrong. This proposed overarching role of the executive is a shift towards a more traditional form of the Islamic legal system and a departure from the reformist view articulated by the founders of Pakistan in the Objectives Resolution where Islamic provisions are blended with modern Parliamentary democracy and separation of powers among different branches of the State. More importantly, a reversion to the traditional system of Islamic law opens the door to the demolition of the democratic framework by arguably providing legal cover to any non-democratic change of government. In traditional Islamic Fiqh, jurists like Al-Mawardi – who in the 11th century A.D. wrote extensively on the rules of government – have regarded a successful revolution or

usurpation as a legal and valid form of change of government in the eyes of Shariah provided that the usurper promises to implement Islamic law. Shah Waliullah, a traditional scholar from the 18th century, while describing valid methods of establishing government in a Muslim State, categorically states that there are only three methods of constituting a government under Shariah: election, nomination and usurpation. However, it is clear from the Objectives Resolution that the views of the founders Pakistan was reformist not traditional. Therefore, they only accepted elections as the right method of constituting government in a modern Islamic State. According to them Democracy is a return to the original purity of Islam. Pakistan itself was created as a result of elections. Subsequently, the present Constitution was framed to contain Article 6 under which “any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or any other unconstitutional means shall be guilty of high treason”. Under clause 5 of the new Article 2B that C.A. 15 proposes to add to the Constitution, the supremacy of the Holy Quran and the Sunnah “shall have effect notwithstanding anything in the Constitution, law or judgment of any Court”. Thus, on basis of the traditional Islamic recognition of usurpation or successful revolution as a valid change of government, C.A. 15 in effect overrides and negates the Article 6 formulation of treason.

In taking stock of the fifty years of Pakistan's existence if one were to begin documenting the shattered dreams of the country's founders, the list would be painfully long. In its original form, C.A. 15 not only proposes to add yet another item to this ever expanding list, it also has the potential to shatter the present government's dreams of self-preservation by providing a mechanism of self-destruction.