

UNCONSTITUTIONAL
CONSTITUTIONAL AMENDMENTS OR
AMENDING THE UNAMENDABLE?

A CRITIQUE OF DISTRICT BAR ASSOCIATION
RAWALPINDI V. FEDERATION OF PAKISTAN

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ABSTRACT

On 5th August, 2015, the Supreme Court of Pakistan passed what may be the most significant decision in its over 60 years-long history. The case is formally titled District Bar Rawalpindi v. Federation of Pakistan but is referred to in this paper as the 'Amendments case'. The Amendments case directly addressed the question: is there such a thing as an unconstitutional constitutional amendment in Pakistani law? The opinions of the different Justices on this question were highly divided. This paper analyses and critiques the opinions of three of the Justices to ascertain the position of Pakistani constitutional law on the subject of unconstitutional constitutional amendments. It proposes a separate and limited ground on which the Supreme Court of Pakistan should review a constitutional amendment: where such an amendment frustrates the will of the people from being exercised by the people's elected representatives.

INTRODUCTION

Jurists in Pakistan have long pontificated and grappled with the question as to whether an amendment to the Constitution¹ can be declared unconstitutional by the judiciary. Can an unelected judiciary, in its role as the guardian and ‘enforcer of the Constitution’,² judicially review a constitutional amendment, keeping in view that such an amendment has been passed in complete accordance with the procedure prescribed in the Constitution by a democratically elected Parliament vested with constituent power? In other words, can the judiciary declare one part of the Constitution to be more or less constitutional than another part of it? Are there certain provisions or features that are so intrinsic to the country’s constitutional fabric that they are unamendable? Until 2015, the judiciary largely erred on the side of the democratically elected Parliament, but the tide has now turned in favour of the judiciary in view of the judgment in District Bar Association Rawalpindi v. Federation of Pakistan (‘the Amendments case’).³ It took two amendments to the Constitution which putatively undermined the existence of constitutionalism in Pakistan for the judiciary to directly address the question in the Amendments case. The features of these two amendments that this paper will focus on are:

1) Members of Parliament must vote on certain bills and motions in line with their party’s leader; lest be disqualified from their seat in Parliament – in effect providing that legislators cannot vote their own conscience on a number of matters. This is the so called ‘anti-defection clause’ of the Eighteenth Amendment.⁴

2) Military tribunals presided by army officers set up for trying civilians suspected of terrorism are given constitutional cover and shall not be subject to the fundamental rights guaranteed in the Constitution. This is known as the ‘military courts clause’ of the Twenty First Amendment.⁵

¹The Constitution of the Islamic Republic of Pakistan, 1973. Referred to in this paper as the ‘Constitution’.

²See, e.g., White, CJ in *Wilson v. New*, 243 US 332, 359 (1917).

³PLD 2015 Supreme Court 401.

⁴Nikolenyi Csaba, *The Adoption of Anti-Defection Laws in Parliamentary Democracies*, 15(1) Election Law Journal: Rules, Politics, and Policy, Published Online (4 Mar 2016), <https://doi.org/10.1089/elj.2015.0345>.

⁵The Constitution (Twenty First Amendment) Act, 2015, introduced the military courts for a period of two years, which expired on 7th January 2017. The operation of the courts was prolonged for two more years by the Constitution (Twenty Third Amendment) Act, 2017, Section 1(3). The Supreme Court Bar Association has filed a Constitutional Petition against the institution and operation of Military Courts. See

The Supreme Court, in its most divided opinion ever, held that the Court can review an amendment if it violates the ‘salient features of the Constitution’ or ‘commands/directives of the People’ or the ‘basic structure of the Constitution’ but the plurality does not review the amendments in question. Moreover, there is no consensus among the opinions on the standard or touchstone to be used in judicially reviewing a constitutional amendment. This paper humbly posits that the Supreme Court of Pakistan did not take into account some factors in its decision, and will attempt to suggest a standard or touchstone whereby amendments to the Constitution should be susceptible to judicial review. It must also be noted that the national as well as international commentary on the decision in the Amendments case has focused on the military courts clause,⁶ although, as it will be argued, the root of the problem is the anti-defection clause. In addressing this matter, the paper is structured in four chapters. The first chapter shall briefly describe the amendment provisions in the Constitution, peruse the theory of unamendable provisions or unconstitutional constitutional amendments, and detail the historical backdrop for the passage of the amendments in question. The second chapter shall address the arguments and judgment in the Amendments case in light of the Pakistani case law which preceded it, and analyse the reasons and disparate conclusions therein, with particular focus on three opinions in the judgment. The third chapter shall compare the position in Pakistan with the ‘basic structure’ doctrine of the Indian Supreme Court, and attempt to place the history of Pakistan in the overall theoretical framework on unconstitutional constitutional amendments. The fourth chapter shall posit a theory of striking down constitutional amendments on a limited ground, namely that a constitutional amendment may only be struck down when it frustrates the will of the people from being exercised by the people’s own chosen representatives.

Hasnaat Malik, SCBA Challenges Military Courts, *The Express Tribune*, 14 Apr 2017, <https://tribune.com.pk/story/1383663/scba-files-petition-extension-military-courts/>.

⁶Both local and international newspapers reported the ruling as a judgement which upheld the existence of military courts. *See inter alia* Nasir Iqbal, Military courts get Supreme Court nod, *The Dawn*, 5 Aug 2015, <http://www.dawn.com/news/1198533>; Hasnaat Malik, Supreme Court upholds establishment of military courts, *The Express Tribune*, 5 Aug 2015, <http://tribune.com.pk/story/932537/supreme-court-upholds-establishment-of-military-courts/>; *Pakistan judges uphold creation of military courts*, AL-JAZEERA, 5 Aug 2015, <http://www.aljazeera.com/news/2015/08/pakistan-judges-uphold-creation-military-courts-150805100022055.html>; *Pakistan empowers military courts to pass death sentences on civilians*, *The Guardian*, 5 Aug 2015 <https://www.theguardian.com/world/2015/aug/05/pakistan-empowers-military-courts-to-pass-death-sentences-on-civilians>.

I. THE CONTEXT

This chapter lays out the context within which the analysis of the paper shall be undertaken. First, the provisions relating to amendment of the Constitution shall be set out, along with a note on the past activism of the Supreme Court. Second will be a description of the general theory of unamendable provisions or unconstitutional constitutional amendments. Thirdly, the historical context leading to the passage of the two amendments in question shall be provided.

A. The Provisions dealing with Amendment to the Constitution

In this paper, unless otherwise specified, any provision prefixed with the word ‘Article’ shall be a reference to the Constitution of Pakistan. For the purposes of this paper, it is pertinent to note that the procedure given to amend the Constitution is provided in Part XI of the Constitution. From the bare text of Part XI, particularly clauses (5) and (6) of Article 239, it seems abundantly clear that the Parliament is conferred with unfettered constituent power to amend the Constitution. However, despite the express wording to the effect that ‘No amendment of the Constitution shall be called in question in any Court on any ground whatsoever’, amendments to the Constitution have in fact been challenged in the Pakistani courts many times, without any substantive success.⁷

1. The Supreme Court under Chief Justice Iftikhar Muhammad Chaudhry - A Government by the Judges?

Since the time the position of Chief Justice of Pakistan was held by Iftikhar Muhammad Chaudhry, the notion of a powerful Pakistani Supreme Court has been popularized and so influential was the leadership of the Chief Justice that the apex court in those days used to be called ‘the Chaudhry Court’. But it is also true that solely on a formal textual basis, the judiciary seems to be the most powerful organ of the State in Pakistan. This much was expressed by jurist A. K. Brohi in his pre-eminent treatise on Pakistani constitutional law, *The Fundamental Law of Pakistan*:

⁷See, e.g., Fouji Foundation and another v. Shamimur Rehman, PLD 1983 SC 457; Pir Sabir Shah v. Federation of Pakistan, PLD 1994 SC 738; Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263.

The Government thus established by the Constitution may well be described as a Government by the Judges. The powers of the executive and the legislature, as even of the judiciary, being themselves the creatures of the Constitution, must operate within the spheres of their allotted jurisdiction. The authority of the Constitution being superior to the judgment of the authorities it creates, the organ of the sovereign power which is authorized to interpret and apply the Constitution thus, in a qualified sense at least, becomes *superior* to other organs and authorities. It is no doubt true that the judiciary, while interpreting and applying the law, must surrender itself at the altar of the obvious constitutional limitations imposed on its general power, but since the *determination of questions relating to those limits is once again, in the last resort, a matter of the interpretation of the Constitution, which function is assigned to the judiciary in our Constitution, the Judges in effect become judges of the limits of their own jurisdiction, power or authority.*⁸ (emphasis in the original)

Formally speaking, A. K. Brohi may be correct that the Constitution establishes a government by the Judges. However, in the context of most of the constitutional history of Pakistan, this has not been the case, where a traditionally pliant Supreme Court would be seen legitimising military coups by invoking concepts such as Hans Kelsen's theory of revolutionary legality.⁹ This all changed in 2005, when Mr. Justice Iftikhar Muhammad Chaudhry¹⁰ was appointed as Chief Justice of Pakistan under the virtual military dictatorship of then President of Pakistan, General Pervez Musharraf. Chief Justice Chaudhry differed greatly from his predecessors; while his immediate predecessor exercised the *suo motu* power only twice in his tenure, Chief Justice Chaudhry exercised it eleven times in just his first six months in office. Such actions gave rise to critique against the Court, primarily on the grounds that the Court was violating the separation of

⁸ALLAH BAKSH K. BROHI, *FUNDAMENTAL LAW OF PAKISTAN* (Karachi: Din Muhammadi Press) (1958) 39 (italics in the original).

⁹For contrasting views on this, see the majority opinion of Chief Justice Munir in *State v. Dosso* PLD 1958 Supreme Court 533 and the dissenting opinion of Justice Jawwad S. Khawaja in the Amendments case. See also Jawwad S. Khawaja, *Foreword* in M. H. CHEEMA & I. S. GILANI, *THE POLITICS AND JURISPRUDENCE OF THE CHAUDHRY COURT 2005-13* (Oxford: OUP) (2015) xiii; Moeen H Cheema, *Two steps forward one step back: The non-linear expansion of judicial power in Pakistan*, 16(2) *International Journal of Constitutional Law*, 503-526 (15 June 2018).

¹⁰It is pertinent to point out that the author of this paper served as Law Clerk to the Honourable Chief Justice Iftikhar Muhammad Chaudhry.

powers. This paper will not give an opinion on this (highly divisive) issue,¹¹ but it is sufficient to note that the Chaudhry Court¹², in a sense, instituted a ‘government by the Judges’ as stated by A. K. Brohi.¹³

2. The Theory of Unamendable Provisions or Unconstitutional Constitutional Amendments¹⁴

The phrase ‘unconstitutional constitutional amendment’ is facially counter-intuitive, to the point of appearing to be a blatant contradiction in terms. On its face, it would mean that one part of a Constitution is somehow more constitutional than another part of it. The topic of unconstitutional constitutional amendments arises when an amendment is made to a written constitution that conforms to the procedural requirements set out for amendment (so for example, in Pakistan, the procedure given in Article 239

¹¹For differing accounts on the role and impact of the Chaudhry Court, *see generally* M. H. CHEEMA AND I. S. GILANI, eds., *THE POLITICS AND JURISPRUDENCE OF THE CHAUDHRY COURT 2005-13* (Oxford: OUP) (2015). *See also* Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers’ Movement* in M. TUSHNET & M. KHOSLA eds., *UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA* (Cambridge: CUP) (2015); Daud Munir, *From judicial anatomy to regime transformation: the role of the lawyers’ movement in Pakistan* in T. C. HALLIDAY et al., eds., *THE FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX* (Cambridge: CUP) (2012); Tasneem Kausar, *Judicialization of politics and governance in Pakistan: Constitutional and Political challenges and the role of the Chaudhry Court* in ASHUTOSH MISRA & MICHAEL E. CLARKE eds., *PAKISTAN’S STABILITY PARADOX: DOMESTIC, REGIONAL AND INTERNATIONAL DIMENSIONS*, 1st Edition (London: Routledge) (2011).

¹²Chief Justice Chaudhry attained the age of superannuation on December 11, 2013, and thus laid down his robes of office and retired from his position.

¹³Since then the Supreme Court has not ceased to play a decisively active role in the country’s legal and political affairs: Umair Jamal, *Democracy and Judicial Activism in Pakistan: Is growing judicial activism in Pakistan coming at the expense of democracy in the country?* *The Diplomat*, 1 May 2018 <https://thediplomat.com/2018/05/democracy-and-judicial-activism-in-pakistan/>.

¹⁴*See generally* Aharon Barak, *Unconstitutional Constitutional Amendments* 44 *Isr. L. Rev.* 321 (2011); Gabor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?* 19(2) *Constellations* 182 (2012); Otto Pfersman, *Unconstitutional Constitutional Amendments: A Normativist Approach* 67 *ZÖR* 81–113 (2012); Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Migration of a Successful Idea* 61 *Am. J. Comp. L.* 657 (2013); Pojen J. Yap, *The Conundrum of Unconstitutional Constitutional Amendments* 4(1) *Global Constitutionalism* 114–136 (2015).

of the Constitution)¹⁵ but conflicts with some provisions or features of that constitution that are deemed unamendable. Such features may be laid out in the written text of the Constitution itself, or may be interpreted to be a part of the ‘basic structure’ of the Constitution by the constitutional court of the country. Examples of the former are included in the US,¹⁶ German,¹⁷ and Turkish¹⁸ constitutions. The pre-eminent example of the latter is the decision of the Indian Supreme Court in Kesavananda Bharati v. State of Kerala,¹⁹ wherein a plurality held, ‘The amendment power under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure of the Constitution.’²⁰ Or, in the words of S.M. Sikri, C.J., ‘The expression “amendment of this Constitution” does not enable Parliament to abrogate or take away, fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity.’²¹

¹⁵*Supra* Chapter I, Section A. For a detailed account of constitutional amendment procedures in a number of jurisdictions, see Saad Rasool, *Basic Structure Doctrine in Pakistan: Fidelity to constitutionalism, or judicial expediency?* (Cambridge, MA: Harvard Law School) (2011).

¹⁶Article I, §9, 1: ‘The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight...’.

¹⁷Article 79(3), known as the ‘Eternity Clause’: ‘Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible. [Art. 1: Human dignity/Human rights/Legally binding force of basic rights; Art. 20: Constitutional principles (The Federal Republic of Germany is a democratic and social federal state)]. See Y. Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, Ph.D. Thesis submitted to LSE Department of Law (London: LSE Publications) (2014) 258.

¹⁸The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed. [Art. 1. The Turkish State is a Republic; Art. 2. The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk and based on the fundamental tenets set forth in the Preamble; Art. 3. The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish. Its flag, the form of which is prescribed by the relevant law, is composed of a white crescent and star on a red background. Its national anthem is the ‘Independence March’. Its capital is Ankara]. See Roznai, *supra* note 17, at 277.

¹⁹AIR 1973 Supreme Court 1461.

²⁰*Id. per* H. R. Khanna, J, 1599(vii).

²¹*Id. per* S. M. Sikri, CJ, 506(c).

The generally accepted view on this judgement, however, is that ‘...the Kesavananda case did not provide a precise list of unamendable features that constituted the Constitution’s basic structure, thus forming a sort of common-law doctrine that develops on a case-by-case basis.’²² The Indian Supreme Court further expanded and elaborated on this doctrine in a number of cases.²³ The main criticism of the basic structure doctrine is that it is fundamentally counter-majoritarian.²⁴ Under the basic structure doctrine, the ultimate power to declare the validity of a constitutional amendment is left to the unelected judiciary, not the democratically elected legislature.

3. Historical and political backdrop to the passage of the Amendments

This section shall cover the historical and political backdrop to the passage of the Amendments that were challenged in the amendments case. These Amendments were the Eighteenth and Twenty First Amendments to the Constitution, and they both have their own particular historical, political and factual contexts.²⁵

a. The context of the Eighteenth Amendment

The Eighteenth Amendment amended many parts of the Constitution, but this paper focuses on the challenge to Article 63A. Article 63A basically provides that political ‘party heads’, who themselves are often not elected members of Parliament, have the power to remove elected members of Parliament or Provincial Assemblies if they vote contrary to directions issued by the party on elections of the Prime Minister or Chief Minister, a vote of confidence or of no-confidence, or a Money Bill or a Bill to amend the Constitution.²⁶ A mere glance at Article 63A evokes the impression that it runs counter to democratic norms, and its political

²²Roznai, *supra* note 17, at 56.

²³*See, e.g.*, *Minerva Mills v. Union of India*, AIR 1980 Supreme Court 1789. For the most recent exposition, *see* *Advocates on Record Association v. Union of India* (2016) 5 SCC 1.

²⁴*See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (New Haven, CT: Yale University Press) (2nd Edition, 1986).

²⁵As mentioned above, *supra* note 5, the operation of Military Courts inserted by the Twenty First Amendment has been extended for two more years by the Constitution (Twenty Third Amendment) Act, 2017, suggesting that the move was not merely a contextual response to the Army Public School’s terrorist attack. *See* Maria Kari, No Sunset for Pakistan’s Secret Military Courts, *The Diplomat*, 24 April 2017 <https://thediplomat.com/2017/04/no-sunset-for-pakistans-secret-military-courts/>.

²⁶Constitution, Article 63A, Sub-article 1(b)(i), (ii) and (iii).

justification may have been to strengthen party leaderships, by giving them the possibility to refer a defecting member to the Election Commission of Pakistan (ECP) even if they were not Parliamentary Party leaders. In the Pakistani context this is most relevant as it may happen that, due to ineligibility, a Party leader may not be the Parliamentary leader as well. The provision would ensure the leadership could control parliamentarians without the need to be house members themselves.²⁷

The Eighteenth Amendment also included an amendment to the procedure of appointments to the superior judiciary by creating a Judicial Appointment Commission and a Parliamentary Committee on Judicial Appointment,²⁸ which garnered much greater attention from the legal fraternity and the media in Pakistan than Article 63A. The *vires* of the Eighteenth Amendment was challenged before the Supreme Court in its original jurisdiction by a number of Bar Associations from across the country, with the central argument being that certain provisions of the Eighteenth Amendment were ‘violative of the salient features of the Constitution,’²⁹ a seemingly identical argument to the basic structure theory in India. The Court also focused on the procedure of judicial appointments, passing a short order stating, ‘...we would like to refer to Parliament, for reconsideration, the issue of appointment process of Judges to the superior courts...’³⁰ The Court, in this instance, sidestepped the question of unconstitutional constitutional amendments or elaborating on what the ‘salient features of the Constitution’ are, and decided to refer the question to Parliament to reconsider the new judicial appointments process. Parliament did indeed modify the process for the appointment of the superior judiciary by passing the Nineteenth Amendment to the Constitution. The substantive challenge to the *vires* of the Eighteenth Amendment, however, was kept pending in the Court docket for the next five years.

b. The context of the Twenty First Amendment

On 16 December 2014, Pakistan experienced the worst terrorist attack in its history in the form of the Tehreek-e-Taliban (‘TTP’) attack on the Army Public School in Peshawar, where 145 people, mostly children,

²⁷Hussain H. Zaidi, The law and politics of floor crossing, *The Dawn*, 13 Mar 2011, <https://www.dawn.com/news/612849>.

²⁸See Article 175A of the Constitution.

²⁹Nadeem Ahmed v. Federation of Pakistan PLD 2010 Supreme Court 1165, 2.

³⁰*Id.* at 13.

were martyred.³¹ The collective shock of the nation was palpable; among the many reactions to this horrendous incident was the call for military courts to be set up to try civilians suspected of terrorism. After the Peshawar attack, Parliament passed the Twenty First Amendment to the Constitution and the Pakistan Army (Amendment) Act, 2015, which established military courts to try civilian terrorist suspects and gave these courts constitutional cover because earlier, such courts had been held to violate fundamental rights to fair trial and due process.³²

Bar Associations across Pakistan petitioned the Supreme Court to review the constitutionality of the Twenty First Amendment, and, as a corollary, the Pakistan Army (Amendment) Act, 2015, which modified the Pakistani Army Act, 1952. Once again, the salient features/basic structure doctrine was invoked by the petitioners to argue that the Twenty First Amendment violated precepts of the Constitution such as parliamentary democracy and the independence of the judiciary. The Supreme Court clubbed these petitions together with the long-pending petitions against the Eighteenth Amendment and finally released a judgment on the issue of unconstitutional constitutional amendments. On 5 August 2015, the Supreme Court declared in plurality opinion, that it has the power to review constitutional amendments, but did not reach any consensus on the touchstone upon which constitutional amendments may be susceptible to judicial review. However, the plurality held that the Eighteenth and Twenty First Amendments were, on the facts, not amenable to judicial review. The next chapter shall analyse three of the opinions in the Amendments case in light of previous Pakistani case law and the academic commentary on unconstitutional constitutional amendments.

II.

THE AMENDMENTS CASE ANALYSED

As stated above, the judgment in the Amendments case is the most divided in the history of the Supreme Court. A full bench of 17 Justices heard the case, with 10 Justices writing opinions. The plurality opinion of

³¹Declan Walsh, Taliban besiege Pakistan school, leaving 145 dead, *New York Times*, 16 December 2014, http://www.nytimes.com/2014/12/17/world/asia/taliban-attack-pakistani-school.html?_r=0.

³²See *inter alia* Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504.

the Court is represented by the opinion of Justice Sheikh Azmat Saeed, on whose opinion seven other Justices signed off. Overall, the Court reached five conclusions, which are best represented by five of the Justices, namely Chief Justice Nasir-ul-Mulk and Justices Jawwad S. Khawaja, Sheikh Azmat Saeed, Asif Saeed Khan Khosa and Ejaz Afzal Khan. The conclusions, in a nutshell, are laid out below, along with each Judge who signed off or ascribed to the said conclusion:

Chief Justice Nasir-ul-Mulk: Held that an amendment to the Constitution is not amenable to judicial review, thereby dismissing the petitions as non-maintainable. His opinion was signed by Justice Iqbal Hameedur Rehman; and Justice Mian Saqib Nisar authored a separate opinion which essentially arrives at the same conclusion.

Justice Jawwad S. Khawaja:³³ Held that an amendment to the Constitution can be reviewed by the Supreme Court if it violates ‘the directives/commands of the People as are given in the Preamble’³⁴ of the Constitution. On this touchstone, Justice Khawaja decided that Article 63A as amended by the Eighteenth Amendment and Article 175 as amended by the Twenty First Amendment must be struck down. Justices Dost Muhammad Khan and Qazi Faez Isa authored separate opinions which essentially agree with the opinion of Justice Khawaja, with the caveat that Justice Qazi Faez Isa held that Article 63A as amended by the Eighteenth Amendment does not violate the commands/directives laid out in the Preamble.³⁵

Justice Sheikh Azmat Saeed held that amendments to the Constitution can be struck down if they violate the ‘salient features’ of the Constitution: namely parliamentary democracy, federalism, and the independence of the judiciary. At one point he also mentions the ‘rule of law’ as a salient feature. However, he reasoned that none of the provisions of the Eighteenth and Twenty First Amendments violate these salient features. Seven other Judges signed off on this opinion.

Justice Asif Saeed Khan Khosa held that the petition was non-maintainable with respect to the *vires* of the Eighteenth and Twenty First Amendments for the same reasons enunciated by Chief Justice Nasir-ul-Mulk, but he struck down the Pakistan Army (Amendment) Act, 2015, for separate reasons that shall not be examined in this paper.

³³It is pertinent to point out that the author of this paper served as Law Clerk to the Honourable Chief Justice Jawwad S. Khawaja.

³⁴Amendments case, opinion of Justice Jawwad S. Khawaja, 52.

³⁵*Id.* opinion of Justice Qazi Faez Isa, 81(4)(b).

Justice Ejaz Afzal Khan, with whom Justice Ijaz Ahmed Chaudhry concurred, held that various provisions of the Eighteenth and Twenty First Amendments violate the ‘basic structure’ of the Constitution, and focused on elaborating various principles of the religion of Islam as forming the basic structure. This opinion shall also not be examined in this paper.

This paper shall focus on analysing the opinions of Chief Justice Nasir-ul-Mulk and Justices Khawaja and Azmat Saeed. Before that, the arguments advanced by the senior legal luminaries of Pakistan who presented before the Supreme Court in the Amendments case will be briefly laid out. For complete context, the ‘Judgment of the Court’ in the Amendments Case is reproduced hereunder, after which an analysis of the three opinions mentioned shall be undertaken.

In view of the respective opinions recorded above, by a majority of 13 to 04 these Constitution Petitions are held to be maintainable. However, by a majority of 14 to 03 the Constitution Petitions challenging the Constitution (Eighteenth Amendment) Act (Act X of 2010) are dismissed, while by a majority of 11 to 06 the Constitution Petitions challenging the Constitution (Twenty-first Amendment) Act (Act I of 2015) and the Pakistan Army (Amendment) Act (Act II of 2015) are dismissed.³⁶

A. Arguments Advanced in the Amendments Case

This section shall briefly lay out the arguments of some of the lawyers as are pertinent to this paper. The substance of the arguments is taken as recorded in the opinion of Chief Justice Nasir-ul-Mulk.

1. Arguments of the petitioners

Mr. Hamid Khan,³⁷ who led the arguments on behalf of the petitioners, argued that:

...there are certain basic features of the Constitution which are unamendable and that notwithstanding ostensible conferment of unlimited power on the Parliament by clause (6) of Article 239 and

³⁶*Id.* at the ‘Order of the Court’.

³⁷Former President of the Supreme Court Bar Association. Prominent leader of the Lawyers’ Movement. Most well-known for the number of treatises he has published on Pakistani law, in particular, HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN (Oxford: OUP) (2nd ed. 2005).

ouster of jurisdiction of the Courts by clause (5) thereof, the Parliament is not empowered to bring about changes in the basic structure of the Constitution...³⁸

In furtherance of his argument regarding basic features of the Constitution, he maintained that ‘there was no absolute power granted to Parliament to amend or change basic features of the original Constitution.’³⁹

He further contended that Article 239(5) and (6) were inserted by a military dictator in 1985, therefore, did not represent the will of the people. He cited a number of Indian Supreme Court cases regarding the basic structure doctrine in India and submitted that ‘the idea of basic structure prevents the power to amend from turning into a power to destroy the Constitution’.⁴⁰ He went on to cite a number of cases wherein he contended that the Supreme Court of Pakistan recognized certain salient features of the Constitution.

Mr. Abdul Hafeez Pirzada,⁴¹ credited to be the principal author of the Constitution, also presented arguments in the Amendments case as a petitioner in person. He relied on the case of Jhamandas v. Chief Land Commissioner⁴² to assert that there is a constitutional conscience of Pakistan. He distinguished the terms ‘spirit of the Constitution’ and ‘conscience of the Constitution’; ‘that spirit is something which encouraged one to do something, while conscience is a restricting force which bounds or limits... that Courts can strike down a constitutional amendment if it is found to be against the constitutional conscience; that this Court has the jurisdiction of judicial review over constitutional amendments.’⁴³ In particular, Mr. Pirzada argued that:

...if the Court was of the opinion that convention of independence of judiciary was being encroached upon by the legislature through constitutional amendments, it can interfere. In this context he argued that amendment by definition has to be progressive and the Courts can interfere in the constitutional amendments which are retrogressive...He referred to the Objectives Resolution as providing the...conscience of the Constitution.⁴⁴

³⁸Amendments case, opinion of Chief Justice Nasir-ul-Mulk, 8.

³⁹*Id.* 10.

⁴⁰*Id.* 12.

⁴¹Federal Minister for Law at the time of the promulgation of the Constitution.

⁴²PLD 1966 Supreme Court 229.

⁴³Amendments case, opinion of Chief Justice Nasir-ul-Mulk, 16.

⁴⁴*Id.* 17.

At this juncture, it is pertinent to contextualize the argument of Mr. Pirzada; as to firstly, what is the Objectives Resolution, and secondly, some background on the Jhamandas case. The Objectives Resolution was passed by the Constituent Assembly of Pakistan in 1949 and has at various points been considered as a ‘*grundnorm*’⁴⁵ or ‘master key to the Constitution’⁴⁶ by the Supreme Court. The Objectives Resolution was adopted with some amendments as the Preamble of the Constitution of Pakistan, 1973. The Objectives Resolution, as enshrined in the Preamble of the Constitution, received much scrutiny in the opinion of Justice Khawaja and shall be further elaborated upon in the analysis of his opinion in this paper. It is important to note that the Jhamandas case was decided in the context of the Constitution of 1962 and was a case with a factual background of a succession dispute under Hindu law, but also involved constitutional issues on the right of property with respect to acquisition of land by the Government. The Martial Law Administrator at the time had passed a regulation regarding such acquisition of land and had ousted the jurisdiction of the Court to judicially review the regulation. Finding such ouster unconstitutional, the Chief Justice at the time, Mr. Justice A. R. Cornelius, held,

...deprivation of valuable property rights, assured under the personal law of the affected parties, is to take place in consequence of an order which is not based in a correct appreciation of the law of the Land Reforms Regulation. To say so is not merely to suggest something unconscionable in a general sense, that is something not in accordance with what is right and reasonable, something about which scruples should be felt. What is hit is something which in terms of the present Constitution, may well be described as the *constitutional conscience of Pakistan*.⁴⁷ (italics supplied)

It must be noted that Chief Justice Cornelius did not enunciate his idea of the constitutional conscience of Pakistan in terms of issues raised with respect to potentially unconstitutional constitutional amendments. However, the reasoning of Chief Justice Cornelius with respect to ‘what is right and reasonable, something about which scruples should be felt’ is pertinent in examining the *ex facie* invidiousness of the anti-defection clause and the military courts clause. This reasoning shall be revisited after the analysis of the three opinions in the Amendments case *infra*.

⁴⁵See Asma Jillani v. Federation of Pakistan PLD 1972 Supreme Court 139.

⁴⁶Amendments case, Judgement of Justice Dost Muhammad Khan, 11.

⁴⁷Jhamandas v. Chief Land Commissioner PLD 1966 Supreme Court 229, 251.

Mrs. Asma Jahangir⁴⁸ represented the Supreme Court Bar Association of Pakistan. She argued against applying the basic structure doctrine to Pakistan, adopting a floodgates argument to the effect that any amendment could then be challenged. She also argued that even in India, the basic structure theory is in decline, and that the Indian Constitution was drafted by the founding fathers of that country, therefore, it was easier to ascertain basic features therefrom. According to Mrs. Jahangir, this was in contradistinction to the historical position of the Constitution of Pakistan, which was promulgated in 1973, twenty-six years after the creation of Pakistan in 1947. Mrs. Jahangir contended that it was best to find some 'middle way' whereby the amendment to the Army Act could be struck down without having resort to the basic structure theory. She presented an argument to this effect, which was accepted by Justice Asif Saeed Khan Khosa, but falls outside the scope of this paper.

Mrs. Jahangir's argument regarding the Constitution of India being drafted by the founding fathers of that country was dismissed by Justice Khawaja's views on the Preamble of the Constitution as presented in his opinion, which shall be analysed below. In addition to this, it is submitted that the Constitution of 1973 was essentially drafted by the founding fathers of the Pakistan that emerged after the separation of East Pakistan (Bangladesh) in 1971. Prior to 1971, Pakistan consisted of two geographically non-contiguous wings, West Pakistan, which is what Pakistan now is, and East Pakistan, which is now Bangladesh. The majority (statistics vary, but there is consensus that over 53%)⁴⁹ of the population of Pakistan lived in East Pakistan prior to 1971. After 1971, it is a real historical question as to what part of the country could actually be taken to have seceded. The part of the country that continued to call itself 'Pakistan' was actually the minority of the country in terms of population. The promulgation of the 1973 Constitution could thus well be described as a founding moment in the constitutional history of Pakistan. In this vein, the drafters of the Constitution, 1973 and the Constituent Assembly of Pakistan at the time could be described as the founding fathers of the new State of Pakistan that emerged from the ashes of the 1971 war. A number of parallels could be drawn between the Constituent Assemblies of 1947-56 and that of 1971-3, not least of which the fact that members of both constituent assemblies were elected in elections conducted by previous dispensations and continued to ostensibly represent the will of the people by virtue of such

⁴⁸Renowned human rights activist; founder of the Human Rights Commission of Pakistan; formerly Special Rapporteur to the United Nations Human Rights Committee; formerly President of the Supreme Court Bar Association - also first and only woman so far to have held this office.

⁴⁹See KHAN, *supra* note 37, at 216-7.

elections. Mrs. Jahangir's arguments did not countenance such a view of the legal and political history of Pakistan.

2. Arguments of the respondents

Mr. Syed Iftikhar Gillani represented the Province of Khyber-Pakhtunkhwa and led the arguments on behalf of the respondents. He contended that Parliament has unfettered constituent power; and can thus amend the Constitution in accordance with the procedure laid out in Article 239. He further argued that it was facially illogical to propose that one part of the Constitution was somehow more constitutional than another part of the same document; and on this score, even the fundamental rights guaranteed in the Constitution could not be taken to have any primacy over other parts of the Constitution.

Mr. Khalid Anwar represented the Federation of Pakistan. He started off by giving a bipartite description of the basic structure doctrine:

a) Basic structure as a 'descriptive doctrine': It identifies provisions considered to be primary to the basic structure of the Constitution.

b) Basic structure as a 'prescriptive doctrine': It grants power to the Judiciary to strike down constitutional amendments which modify basic features of the Constitution. Basic structure as a prescriptive doctrine creates unamendable parts of the Constitution, which are to be protected from amendment by the Courts.⁵⁰

Mr. Khalid Anwar further argued that the basic structure theory as a prescriptive doctrine is merely a theory that cannot be equated with law, as law needs to be clear, certain, in the public domain and within public knowledge. In this vein, he said that the basic structure theory as a prescriptive doctrine has never been clearly laid down by the courts. He criticized the approach of the Indian courts as an arrogation of power that,

...destroys the separation of powers as has been ordained in the Constitution. He contended that the search for a basic structure by the Courts is basically an exercise in metaphysics... that is an indeterminate process... that even the Indian judiciary could not identify the basic structure... with clarity and it could only identify

⁵⁰Amendments case, opinion of Chief Justice Nasir-ul-Mulk, 25.

various aspects forming basic structure of the Indian Constitution in various succeeding judgments.⁵¹

He further cited Dewan Textile Mills v. Federation of Pakistan,⁵² a judgment of the Sindh High Court wherein it was held that the Preamble of the Constitution does not place any implied limitations on the powers of Parliament to amend the Constitution. He contended that thus the basic structure theory could at best be used only to describe basic features of the Constitution, but could not be used as a test to judicially review constitutional amendments. With regards to the Twenty First Amendment, he argued that it had been enacted in a situation of war, and that the law of war, being fundamentally different to the law of peace, warranted such enactment by 'balancing rights of the people with the need for security.'⁵³

It is interesting to note the parallels in the arguments of Mr. Khalid Anwar and the speech of Chaudhry Nisar Ali Khan, then Federal Minister for Interior, when he spoke in favour of passing the Twenty First Amendment in Parliament. This paper shall analyse how the plurality opinion expressed by Justice Azmat Saeed also drew upon this reasoning. Below is an English translation from Urdu of a relevant portion of the Minister's speech:

This is a constitutional amendment, which on its face, would seem to contradict the concept of parliamentary democracy. A few years ago, no-one would have in their wildest dreams thought that this Parliament would not only legislate on military courts, but in fact temporarily amend the Constitution to give military courts legal effect. I have said before that in a democratic system of governance, where democratic institutions are functioning, where courts are functioning, it is mind-boggling that still all parties have come together to legislate on military courts. But why have we reached this stage? Because, Mr. Speaker, at this point in time, Pakistan is not facing ordinary circumstances. Pakistan is facing extraordinary circumstances. The people of Pakistan, the institutions of Pakistan, the leadership of Pakistan, the opposition of Pakistan, in fact every child in Pakistan is facing a state of war. Whenever military courts have been created in the world, they have been created either in a state of war, or immediately after a state of war. After 9/11, even a democratic country like the USA created military tribunals... We are in a state of war, and this is no ordinary war. At one end, you have

⁵¹*Id.* at 27.

⁵²PLD 1976 Karachi 1368.

⁵³Amendments case, opinion of Chief Justice Nasir-ul-Mulk, 31.

our Army, which is fighting this war within constitutional and legal limits for the past twelve years. At the other end, we have the enemy, which places no limits on itself...They have no Geneva Convention. They do not distinguish between militant and non-militant. There are no peaceful citizens, or children or women in front of whom they will stop.⁵⁴

Lastly, the then Attorney-General for Pakistan, Mr. Salman Aslam Butt, largely adopted the arguments of Mr. Khalid Anwar. He added that in his speech before the Constituent Assembly in 1973, Mr. Abdul Hafeez Pirzada himself, then Federal Minister for Law, stated that the Objectives Resolution as adopted in the Preamble was to only have utility as a Preamble to the Constitution, not as a criterion whereby constitutional amendments could be struck down.

B. Chief Justice Nasir-ul-Mulk

In his opinion in the Amendments case, Chief Justice Nasir-ul-Mulk concluded that the Court does not have any power derived from basic structure/salient features' doctrine, whereby it can question constitutional amendments. He therefore did not examine the substantive arguments related to the amendments and focused only on laying down that there is no doctrine of unconstitutional constitutional amendments in Pakistan. He ended up in the minority on this, but he is part of the plurality for the purposes of not reviewing the Eighteenth and Twenty First Amendments. He started by analysing the crucial South Asian case on salient features of the Constitution, Fazlul Quader Chaowdhry v. Muhammad Abdul Haque,⁵⁵ which was the first case in South Asia to recognize salient features of a Constitution. In that case, it was held that the President, in the presidential form of government established by the 1962 Constitution, could not use his power to remove difficulties to alter fundamental features of the Constitution. The fundamental feature in question was the High Courts' power of judicial review. Chief Justice Nasir-ul-Mulk distinguished this case from the Amendments case, holding that it pertained to particular powers of the President under a defunct Constitution; it had nothing to do with the unfettered power of Parliament to amend the Constitution. Moreover, in Fazlul Quader's case, the Court struck down a Presidential Order, not an amendment passed according to the procedural provisions of

⁵⁴Chaudhry Nisar Ali Khan, Federal Minister for Interior, Speech before the National Assembly of Pakistan, 5 Jan 2015, available at http://www.na.gov.pk/uploads/documents/1421119900_258.pdf. Translation is provided by the author.

⁵⁵PLD 1963 Supreme Court 486.

the Constitution; and the Court made clear the fact that it was only through this power to remove difficulties that the fundamental features of the Constitution could not be amended, distinguishing ‘removing difficulties’ and ‘amendment’, as the President even under the 1962 Constitution did not have the power to amend.

The second case which Chief Justice Nasir-ul-Mulk relied heavily upon was State v. Ziaur Rehman,⁵⁶ wherein the competence of the Constituent Assembly to frame the Interim Constitution of 1972 was challenged. The Court therein held that

it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution...[and therefore] the judiciary cannot claim to declare any of its provisions *ultra vires* or void. This will be no part of its function of interpretation.⁵⁷

With respect to the Objectives Resolution, Chief Justice Nasir-ul-Mulk cited the cases of Hakim Khan v. Government of Pakistan⁵⁸ and Kaneez Fatima v. Wali Muhammad⁵⁹ in support of the proposition that the Objectives Resolution as incorporated in the Preamble of the Constitution could not be used to strike down provisions of the Constitution. He proceeded to cite a number of other cases where the Supreme Court repeatedly rejected applying the basic structure doctrine of the Indian Supreme Court to Pakistani jurisprudence. According to the Chief Justice, at best, cases like Ziaur Rehman, Hakim Khan, and Kaneez Fatima support the view articulated by Mr. Khalid Anwar, that the basic structure/basic features doctrine in Pakistan is merely descriptive, not prescriptive.

Chief Justice Nasir-ul-Mulk went on to write that the basic structure doctrine even as applied in India is uncertain due to the case-by-case nature of the doctrine; in fact, there is no exhaustive list of the basic features of the Indian Constitution. It is worth mentioning that Chief Justice Nasir-ul-Mulk mentioned that in Pakistan, there is no question that the Parliament possesses constituent power by virtue of Article 239.⁶⁰ There is little force in arguments that contend that the Parliament does not possess constituent power, the question is whether there are any implied limits thereof. He also

⁵⁶PLD 1973 Supreme Court 49.

⁵⁷*Id.* Judgement of the then Chief Justice Hamoodur Rahman.

⁵⁸PLD 1992 Supreme Court 595.

⁵⁹PLD 1993 Supreme Court 901.

⁶⁰Amendments case, opinion of Chief Justice Nasir-ul-Mulk, 66.

repelled the contentions regarding the Objectives Resolution as laying out unamendable provisions of the Constitution, stating that ‘the will of the people in enacting the Constitution of 1973 was that the Objectives Resolution was nothing more than a Preamble’.⁶¹ The judgment of Justice Khawaja analyses the preamble at length. In attempting an analysis comparing and contrasting these approaches to it, and the nature of unconstitutional constitutional amendments, it is necessary to lay out what was held by Justices Khawaja and Azmat Saeed first.

C. Justice Khawaja

In view of the amendments that are the focus of this paper, which seem to strike at the core or the essence of the concept of constitutionalism itself, it was argued by the petitioners that there needs to be some limitation on the Parliament’s power to amend the Constitution. It would be the case that under the proposition advanced by Chief Justice Nasir-ul-Mulk, there is no limitation on Parliament to amend the Constitution even in the case of fundamental rights. The Parliament, therefore, could even amend the Constitution to delete the fundamental rights to life,⁶² dignity⁶³ and equality⁶⁴ from its text. Under such a construction, Parliament could even amend the Constitution to make Pakistan a dominion of Britain instead of a Republic.⁶⁵ Such a situation may not be the domain of the judiciary to resolve, and it may indeed be the province of the political process to ensure that such a situation does not arise. But that would only be possible where the legislature is able to exercise the mandate it has received as an expression of the will of the people who voted them into power. Such a capacity for the political process to maintain a progressive or self-correcting power or influence is curtailed by the changes to Article 63A introduced by the Eighteenth Amendment, which does not allow legislators to vote their own conscience on bills to amend the Constitution. In his opinion, Justice Khawaja presents a distinctive ground on which amendments to the Constitution may be reviewed by the judiciary to prevent amendments like that of the Eighteenth Amendment on Article 63A from becoming a reality.

⁶¹*Id.* at 64.

⁶²Article 9.

⁶³Article 14.

⁶⁴Article 25.

⁶⁵Article 1(1).

1. The Preamble – Command of the People

Justice Khawaja's opinion is characterized by its unique and detailed interpretation of the Preamble to the Constitution. He prefaces this interpretation by stating that unlike the preambles to the American and Indian constitutions, '...in Pakistan... the social contract theory was reduced into a well defined document, the Preamble to our Constitution...' ⁶⁶ and continues by stating '...that Parliament is not sovereign as its power to amend the Constitution is constrained by limitations which are clear from the reading of the Constitution as a whole. Secondly, these limitations are not only political but are subject to judicial review and, as a consequence, this Court has the power to strike down a Constitutional amendment which transgresses these limits.' ⁶⁷ He dismissed the contention of the respondent-Federation that Article 239(5) and (6) place an absolute bar on judicial review of constitutional amendments, holding that such a view represents a truncated approach to constitutional adjudication as it goes against the rule of organic construction. To this effect, Justice Khawaja cited the allegory of Maulana Jalaluddin Rumi, wherein the Maulana talks of five blind men touching different parts of an elephant and recounting an image of a creature that is completely inaccurate. The one who touches the ear thinks it is a fan, the one who touches the trunk thinks it is a pipe, and so on. In concluding this point, Justice Khawaja held, '...Article 239 of the Constitution has to be read as being one small cog in the Constitutional machinery and has little significance as a standalone provision.' ⁶⁸ Justice Khawaja also agreed with the argument of Hamid Khan to the effect that Article 239(5) and (6) are of 'dubious provenance' ⁶⁹ as they were inserted in the Constitution by the Presidential Order of a military dictator, not by the Parliament. ⁷⁰ It is submitted that such an argument is the correct view of constitutional theory in Pakistan. It would in fact be counter-intuitive to support the argument that an amendment to the Constitution inserted by a military dictator – the antithesis of the concept of constitutionalism, and a scourge that has plagued Pakistan for half of its existence as an independent State – could result in emerging as a rule that putatively governs the entire Constitution. In a sense, the highest norm of the Constitution under such a misleading construction would be the rule that states that no provision is un-amendable; and this rule, too, would be one brought about by a dictator whose 'unscrupulous tampering with and the addition of his commandments to the 1973 Constitution changed the entire complexion of the supreme law of the

⁶⁶Amendments case, opinion of Justice Jawwad S. Khawaja, 9.

⁶⁷*Id.* at 4.

⁶⁸*Id.* at 16.

⁶⁹*Id.* at 17.

⁷⁰Presidential Order No.14 of 1985, Article 2 thereof read with Schedule Item 48.

land'.⁷¹ In view of the clear position of Pakistani constitutional history, giving such primacy to Article 239(5) and (6) is illogical. Furthermore, addressing the comparisons made between Articles 368 of the Indian Constitution (which lays out the constitutional amendment procedure and power of the Indian central legislature) and Article 239, Justice Khawaja reproduced the relevant portion of the said Article 368: 'there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation, or repeal the provisions of [the Indian] Constitution.' [underlining supplied by Justice Khawaja] The Pakistani Constitution, however, does not use the words underlined by Justice Khawaja, which he took to mean that the constituent power of the Pakistani Parliament is limited as well as distinct from compared to that of the Indian constituent power.

In an attempt to entrench his doctrine of the people as ultimate holders of authority under the Constitution, Justice Khawaja expressly overruled the ruling of the Sindh High Court in Dewan Textile Mills v. Pakistan⁷² that was relied upon by the respondent-Federation. It is from here that Justice Khawaja launches into his exposition of the Preamble of the Constitution. He first overrules the holding in Dewan Textiles that the will of the people is nothing more than a useful fiction; and as a corollary thereof, dispenses with the concept that sees Constitutions as proceeding from the will of the people as a mere 'rhetorical flourish'.⁷³ Justice Khawaja rejected the judgment of the Sindh High Court, holding that it was based on foreign theories not grounded in the particular circumstances and context of Pakistani constitutional history and jurisprudence. At a first glance, the Pakistani Preamble is much more detailed than the preambles to the American and Indian Constitutions. The Pakistani Preamble sets out what may be taken to be the nine directives/commands of the people that Justice Khawaja refers to.⁷⁴ It is indeed distinct from statutory preambles enacted by

⁷¹KHAN, *supra* note 37, at 385.

⁷²PLD 1976 Karachi 1368.

⁷³Amendments case, opinion of Justice Jawwad S. Khawaja, 34.

⁷⁴Justice Khawaja highlights the following text from the Preamble of the Constitution as containing the nine directives commands of the people:

'...it is the will of the people of Pakistan to establish an order –
 WHEREIN the State shall exercise its powers and authority through the chosen representatives of the people;
 WHEREIN the principles of democracy, freedom, equality, tolerance and social justice, as enunciated in Islam, shall be fully observed;
 WHEREIN the Muslims shall be enabled to order their lives in individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;

the English Parliament and most other common law jurisdictions. The will of the people has also been given primacy in the Preamble, which as Justice Khawaja recounts, is a significant departure from the text of the Objectives Resolution.⁷⁵ ‘The Preamble can, in its existing form, be seen as the embodiment of the nation’s social contract in outline.’⁷⁶ Justice Khawaja further elaborates that as the true elected representatives of the people, it is necessary for the legislators to act as fiduciaries towards the people, who are their beneficiaries in this fiduciary relationship, and exercise the constitutional amendment power only within the directives/commands of the people. It is submitted, however, with great respect, that the reasoning with regard to the Preamble as a limiting factor on the amendment power is not without flaws. Before launching into a critique of this argument, it is imperative to lay out the logical grounds whereby Justice Khawaja decided that the amendment to Article 63A and the Twenty First Amendment should be struck down.

2. The will of the people striking down the will of the people’s representatives

Article 63A of the Constitution was introduced by the Fourteenth Amendment to the Constitution in 1997 in the wake of floor-crossing in Parliament, which would often be exploited by ambitious generals in an effort to validate military rule through Parliament.⁷⁷ Before being amended by the Eighteenth Amendment, Article 63A gave the parliamentary leader of

WHEREIN adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;

WHEREIN the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

WHEREIN shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

WHEREIN adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

WHEREIN the independence of the judiciary shall be fully secured;

WHEREIN the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded;’

⁷⁵Justice Khawaja refers to the debates in the Constituent Assembly in 1949 and the debates in the National Assembly 1972-3 as to why the term ‘will of the people’ was adopted. Amendments case, opinion of Justice Jawwad S. Khawaja, 63.

⁷⁶*Id.* at 64.

⁷⁷*Supra* note 27.

a political party the power to initiate proceedings against a party member in Parliament for voting against the party line on the election of the Prime Minister or Chief Minister, a vote of confidence or a vote of no confidence, and a Money Bill.⁷⁸ The Supreme Court previously declined to pass any adverse directions with respect to Article 63A, which faced a direct challenge in the case of Lawyers Front for the Defence of the Constitution v. Federation of Pakistan,⁷⁹ wherein it was held that Article 63A, as it then was, did not violate any principle of democracy. The Eighteenth Amendment added a Constitution (Amendment) Bill to the list of Bills where a member could not defect and added that a party head is no longer necessarily a parliamentary leader, he/she is instead 'any person, by whatever name called, declared as such by the party'.⁸⁰ As mentioned above,⁸¹ such party heads in Pakistan are sometimes not even elected to Parliament. Under such a dispensation, a directly elected legislator could be bound to the wishes of a non-elected party head; and could thus not vote his/her own conscience in line with the will of the people that put him/her in Parliament in the first place. Moreover, the Eighteenth Amendment also dispensed with the requirement of intra-party elections that was instituted by the Seventeenth Amendment. Therefore, democratically elected legislators can have their hands tied by a completely undemocratically elected party heads. There is perhaps no greater illustration of this than the case of Mr. Raza Rabbani, which was recounted by Justice Khawaja:

107. Learned counsel representing the Bar Associations of the Supreme Court and the Sindh High Court respectively, drew the

⁷⁸Article 73(2): ...a Bill or an amendment shall be deemed to be a Money Bill if it contains provisions dealing with all or any of the following matters, namely:-

- (a) the imposition, abolition, remission, alteration or regulation of any tax;
- (b) the borrowing of money, or the giving of guarantee, by the Federal Government, or the amendment of the law relating to the financial obligations of that Government;
- (c) the custody of the Federal Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund;
- (d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge;
- (e) the receipt of moneys on account of the Public Account of the Federation, the custody or issue of such moneys;
- (f) the audit of the accounts of the Federal Government or a Provincial Government; and
- (g) any matter incidental to any of the matters specified in the preceding paragraphs.

⁷⁹PLD 1998 Supreme Court 1263.

⁸⁰Article 63A(b)(iii).

⁸¹*Supra*, Chapter 1, Paragraph 3.1.

Court's attention to the chilling effect Article 63A can have on members of Parliament, thus preventing them from voting their conscience. Both learned counsel referred to a report appearing in the Press on the day after the twenty first Amendment Bill was passed. On 7.1.2015 it was reported by the daily Dawn that PPP Senator Raza Rabbani stated 'in choked voice that during his time in the Senate, he never felt so ashamed as today in voting for military courts'. Mr. Raza Rabbani, it may be noted is currently the Chairman of the Senate. He is a Parliamentarian of high standing and moral integrity. He has also consistently demonstrated his commitment to advancing the cause of constitutional rule and Parliamentary democracy. It is on this basis that Mr. Abid Zubairi representing SHCBA⁸² argued that the Twenty First Amendment could not be permitted to stand because the vote on this amendment could not be treated as an independently cast vote by the requisite two-thirds of the two Houses of Parliament. Here it is important to bear in mind that it is not necessary to determine if a Parliamentarian was or was not, in fact, influenced by his party head. What is relevant is whether a party head can be allowed Constitutional (as opposed to political or moral) authority for pressing his views on members of Parliament while they vote on a Constitutional amendment? In my humble view, this plainly is impermissible for reasons noted above.

Thus, Justice Khawaja extensively relied upon the notion that the will of the people was being usurped by the amendment made to Article 63A. Interestingly, he did not refer to any one of the directives/commands he earlier highlighted in the Preamble as a touchstone to strike down the amendment. It is submitted that the elevation of the status of the Preamble was unnecessary, and instead, an elaboration of the notion of the will of the people should have been used as the criterion upon which to strike down Article 63A as amended by the Eighteenth Amendment as well as the Twenty First Amendment. This theory shall be looked at in further depth after considering the opinion of Justice Azmat Saeed and the basic structure doctrine as applied most recently in India.

D. Justice Sheikh Azmat Saeed and the unlikely plurality

Just Sheikh Azmat Saeed held that the Supreme Court can strike down a constitutional amendment if it violates what he identified as the salient features of the Constitution. However, he decided that none of the

⁸²Sindh High Court Bar Association.

provisions of the Eighteenth and Twenty First Amendments that were challenged were violative of these salient features. Justice Azmat Saeed essentially accepted the contention of Mr. Abdul Hafeez Pirzada that the word ‘amendment’ refers only to progressive changes made to the Constitution; and that it was open to the Court to strike down constitutional amendments where they are retrogressive: ‘...the term ‘Amendment’ as used in Articles 238 and 239 has a restricted meaning. Therefore as long as the Amendment has the effect of correcting or improving the Constitution and not of repealing or abrogating the Constitution or any of its Salient Feature (*sic*) or substantively altering the same, it cannot be called into question.’⁸³

1. What are the salient features?

It is submitted that Justice Azmat Saeed has applied a version of the expansive basic structure doctrine of the Indian Supreme Court and is therefore susceptible to the same critique that appertains to that theory generally as well as its inapplicability to the context of Pakistan. This critique shall be undertaken in the next chapter after analysing the latest case law on the basic structure doctrine in India. For the moment, suffice to say that the basic structure/salient features doctrine places too much discretion in the hands of individual Judges to determine what elements of the Constitution are included in the basic structure/salient features. This much is clear from the internal omissions or contradictions, whichever way they may be characterized, in the opinion of Justice Azmat Saeed itself. At various points in the opinion, Justice Azmat Saeed highlights parliamentary democracy, federalism and the independence of the judiciary as salient features, but at one point, he also points out ‘the Rule of Law’ to be a salient feature,⁸⁴ and, most strikingly, the Honourable Judge omits to mention federalism as a salient feature in the operative portion of his opinion.⁸⁵

2. Dealing with Article 63A and the Twenty First Amendment

The reasoning offered by Justice Azmat Saeed for upholding Article 63A on his salient features doctrine is largely derived from the politics of Pakistan, rather than from legal doctrine. He starts with a brief summary of how elections are contested by political parties in Pakistan; that political parties contest elections mostly ‘on the strength of the name and charisma of

⁸³Amendments case, opinion of Justice Sh. Azmat Saeed, 73.

⁸⁴*Id.* at 84-5.

⁸⁵*Id.* at 180(b): ‘The Salient Features as are ascertainable from the Constitution including Democracy, Parliamentary Form of Government and Independence of the Judiciary (*sic*).’

their leader and the trust and confidence that he invokes⁸⁶ and that prior to the Eighteenth Amendment members of Parliament of various political parties would change loyalties to join a governing party or coalition. It is, with respect, submitted that this is not legal reasoning, and in any case, this sort of reasoning was clearly disproven in the 2018 general elections where a large number of independent candidates were elected to the Punjab Assembly and then coerced or convinced in the same way that Justice Azmat Saeed mentions to join the governing coalition in Punjab. Thus, Article 63A has been proved to not have the effect he posited in his opinion.

Justice Azmat Saeed further reasoned that the effect of the Eighteenth Amendment of shifting emphasis from Parliamentary leader to the Party Head accords with the *modus operandi* of Pakistani politics, as it is due to the party leader's popularity which the entire party wins. It is respectfully submitted that this is a truncated view of Pakistani politics and is in any event in stark contrast with the 'salient feature' of parliamentary democratic form of government that the Honourable Judge himself has held up to be unamendable. It is also submitted that passing judgment on the basis of outright political reasoning is outside the province of the Judge. The reasoning of Justice Azmat Saeed is easily contradicted by a number of politicians who have been elected numerous times from the same party.⁸⁷ Electoral success in particular constituencies may relate to a number of factors, including the influence of a candidate, or his/her past record of contributing to the development of that constituency. The reasoning provided by Justice Azmat Saeed is therefore, with respect, flawed in this regard.

In dealing with the Twenty First Amendment, Justice Azmat Saeed adopted similar reasoning as that of Chaudhry Nisar Ali Khan when he presented the Twenty First Amendment Bill in Parliament, to the effect that Pakistan is in a state of war with terrorists not limited to the Tehrik-e-Taliban Pakistan who hold nothing back in killing the people of Pakistan on an almost daily basis, noting that, according to the Attorney-General, '...since 2002 more than sixteen thousand terrorist attacks have occurred...'⁸⁸ and that 'in order to deal with the current situation, an additional tool to counter the situation has been provided by the way of the questioned Amendments in the Constitution and the Pakistan Army Act.' Justice Azmat Saeed thus accepted the arguments of the Attorney-General and upheld the

⁸⁶*Id.* at 107-108.

⁸⁷See generally the website of the National Assembly of Pakistan for records of politicians who have been repeatedly successful despite the fortunes of their parties, <http://www.na.gov.pk/en/index.php>.

⁸⁸Amendments case, opinion of Justice Sh. Azmat Saeed, 143.

Twenty First Amendment, even though it *ex facie* would clearly impinge on the salient feature of judicial independence that the Honourable Judge himself identified. Military tribunals by definition are headed by military officers, not Judges, which is a clear usurpation of the judicial function by the Executive. This once again displays the inherent subjectivity of the basic structure/salient features doctrine that results in internal contradictions in the same judgment.

III.

THE BASIC STRUCTURE DOCTRINE IN INDIA AND THE PLACE OF PAKISTAN IN THE LITERATURE ON UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

As stated above, the Supreme Court of India established the basic structure doctrine in the case of *Kesavananda Bharati* and most recently upheld and applied it in *Advocates-on-Record Association v. Union of India*,⁸⁹ whereby individual members of the judiciary identify certain basic features of the Constitution which they deem as unamendable. The most cited exposition of the basic structure doctrine is that of Y. V. Chandrachud, J in the case of *Minerva Mills v. Union of India*,⁹⁰ where he held, 'Parliament cannot, under Article 368, expand its amending power to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.'⁹¹ This was essentially the argument of Mr. Abdul Hafeez Pirzada in the Amendments case, as accepted by Justice Azmat Saeed. In fact, he defined the basic structure doctrine as recognizing that 'the Constitution has Salient Features, which cannot be altered or destroyed through a Constitutional Amendment.'⁹²

A. Critique of the basic structure doctrine in the Amendments case

The most trenchant critique of the basic structure doctrine is that it is intrinsically uncertain and subjective, being dependent wholly on the personal proclivities of Indian Supreme Court Judges to identify what the

⁸⁹2016 (5) SCC 1.

⁹⁰AIR 1980 Supreme Court 1789.

⁹¹*Id.* opinion of Chief Justice Chandrachud, 17.

⁹²Amendments case, opinion of Justice Sh. Azmat Saeed, 23.

basic features are. This is clear in the Pakistani context as well, with Justice Azmat Saeed unable to identify concretely in his opinion what the salient features are, as stated above. Justice Khawaja, in rejecting the applicability of the basic structure doctrine, has provided one of the most succinct and powerful critiques of the basic structure doctrine:

48. There is indeed a great degree of uncertainty attached to the basic structure doctrine, which is something that the Supreme Court of India is still grappling with. There is some blurring of lines and lack of clarity with respect to the contours of the 'basic structure' in the Indian Constitution; thus what are the 'essential' or 'fundamental' features of the Constitution remains a question which the Indian Supreme Court decides on a case by case basis. As such Parliament in India is handicapped in not knowing beforehand, as to what is or is not part of the 'basic structure' of the Indian Constitution. Even in the Kesavananda case, there was disagreement amongst the judges as to what constituted the 'basic structure' of the Indian Constitution. Shelat, J. and Grover, J. added two more basic features to the somewhat elastic list: the dignity of the individual secured by the various freedoms and basic rights and the mandate to build a welfare state; and the unity and integrity of the nation. Hegde, J. and Mukherjea, J. identified another list of basic features: sovereignty of India; democratic character of the polity; unity of the country; essential features of the individual freedoms secured by the citizens; mandate to build a welfare state and an egalitarian society, while Reddy, J., stated that elements of the 'basic features' were to be found in the Preamble to the Constitution and these were primarily: a sovereign democratic republic; social, economic, and political justice; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; parliamentary democracy; and separation of the three organs of the state. Interestingly though even if all the basic features identified in these separate judgements were compiled in a list, this list would not be exhaustive. A detailed study by Dr. Ashok Dhamija⁹³ shows that a total of 27 different basic features have been identified by various judges of the Indian Supreme Court so far, though there may not be a consensus among them as regards each feature.⁹⁴

The inherent subjectivity of the Indian basic structure doctrine was underscored in the opinion of Justice Mian Saqib Nisar (who concurred with

⁹³ASHOK DHAMIJA, NEED TO AMEND A CONSTITUTION AND DOCTRINE OF BASIC FEATURES (Nagpur: Wadhwa and Company) (2007).

⁹⁴Amendments case, opinion of Justice Jawwad S. Khawaja, 47-8.

Chief Justice Nasir-ul-Mulk). Justice Saqib Nisar, at the end of his opinion, provides a table which shows the differing views of Indian Supreme Court Judges with regards to what elements constitute the basic structure. A cursory glance at this table shows that the basic structure is entirely dependent on the subjective proclivities of individual Judges and is therefore too arbitrary a doctrine to be utilized in striking down constitutional amendments.

B. Pakistan in the literature on unconstitutional constitutional amendments

Yaniv Roznai, who wrote his Ph.D. dissertation on unconstitutional constitutional amendments in 2014,⁹⁵ thereby prior to the ruling in the Amendments case, described the position of Pakistan on unamendable provisions of the Constitution as ‘Implicit Limitations without Judicial Enforcement’. This seems to be in line with the argument of Khalid Anwar mentioned *supra* that the ‘basic structure’ or ‘salient features’ are a descriptive, not prescriptive doctrine in Pakistani constitutional law. Roznai cites in particular the case of Zafar Ali Shah v. Pervez Musharraf⁹⁶ wherein the operative part of the order stated ‘that no amendment shall be made in the salient features of the Constitution i.e. independence of the Judiciary, federalism, parliamentary form of government blended with Islamic provisions.’⁹⁷ In that case as well, the Court declined to strike down the amendments in question, though it should be noted that the amendments to the Constitution referred therein were in the context of constitutional changes that could be brought in by a military dictator under the doctrine of necessity and Hans Kelsen’s theory of revolutionary legality; not amendments brought in accordance with the procedure laid down in the Constitution, although the Court did mention in passing that if Parliament cannot amend the salient features of the Constitution, then the Chief Executive (then the Chief of Army Staff, Musharraf) would by analogy also be circumscribed by the same limitations. It may also be noted that, to follow on the point of subjectivity with regards to identifying salient features/basic structure, the ‘Islamic provisions’ found no mention in the opinion of Justice Azmat Saeed in the Amendments case. The holding in Zafar Ali Shah’s case was also completely contradicted by the Supreme Court in the later case of Pakistan Lawyers’ Forum v. Federation of Pakistan,⁹⁸ which Roznai has not mentioned, wherein it was held,

⁹⁵Roznai, *supra* note 17.

⁹⁶PLD 2000 Supreme Court 869.

⁹⁷*Id.* at 221, section 6(iii).

⁹⁸PLD 2005 Supreme Court 719.

no constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the Courts. A Constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.⁹⁹

Thus, the position on unconstitutional constitutional amendments in Pakistan was still not clear at the time Roznai wrote his dissertation, but his exposition to the effect that there were implicit limitations on constitutional amendment that are not enforced by the judiciary is still not a wholly incorrect description even in view of the *ratio* in Pakistan Lawyers' Forum. It is submitted that the most accurate way to describe the position of basic structure/salient features prior to the Amendments case was in the words of Khalid Anwar, i.e. as a descriptive as opposed to prescriptive doctrine.

The Amendments case gave a much more critical examination to the basic structure/salient features doctrine. However, there is still no agreement on the touchstone upon which constitutional amendments can be struck down. The varying conclusions of the plurality have, as laid out above, gone to great lengths to stress that the Court does indeed possess the power to strike down a constitutional amendment, with the disagreement being on the method. This much is clear, that at this point, Khalid Anwar's words no longer hold water. Although the Court declined to strike down the amendments in question, it is clear in the opinion of Justices Khawaja and Azmat Saeed that it has arrogated to itself the power to prescribe whether a constitutional amendment is in fact constitutional. The current position of Pakistani law in the framework of a global constitutional jurisprudence on unconstitutional constitutional amendments may thus be described in Roznai's terms with slight modification: 'Implicit Limitations without Judicial Enforcement - Yet'.

⁹⁹*Id.* at 57.

IV.

A PROPOSED LIMITED GROUND TO REVIEW CONSTITUTIONAL AMENDMENTS – THE WILL OF THE PEOPLE

As has been stated above, the basic structure/salient features doctrine is not applicable in Pakistan the same way it is in India; and to follow it would be unwise given the subjectivity that appertains to the doctrine. However, in a situation where amendments such as those that are the focus of this paper, which putatively undermine the premise of a constitutional democracy by taking away the ability of legislators to vote their conscience and instituting military courts to try civilians suspected of terrorism, the view of Chief Justice Nasir-ul-Mulk, that constitutional amendments can never be questioned, is not a solution. This seems to offend the notion of a ‘constitutional conscience’ that was put forward by Chief Justice Cornelius and argued by Mr. Abdul Hafeez Pirzada. It is submitted, that a solution can be found in a limited ground to review constitutional amendments, by taking from the theory posited by Justice Khawaja on unconstitutional constitutional amendments. However, instead of citing the directives/commands in the Preamble as the yardstick whereby constitutional amendments can be struck down, it is proposed that a constitutional amendment may be struck down only if it frustrates the will of the people from being exercised by the people’s chosen representatives. This would apply in the present case, where the inability in Article 63A as amended for legislators to vote their conscience means that they cannot vote in the way that their electoral mandate instructs them to, rather, they are bound by the dictates of often unelected party leaders. This section will first critique the theory put forward by Justice Khawaja and build thereon to posit a limited ground upon which constitutional amendments may be struck down by the judiciary.

A. The Preamble – unamendable?

Justice Khawaja identifies the Preamble as an expression of the will of the people, addressing directives/commands to the executive, legislature and judiciary to act within certain bounds in accordance with their fiduciary duty towards the people. According to him, the judiciary must act as a check on the legislature to ensure that the legislature does not transgress the directives/commands enshrined in the Preamble. It is duly noted that there is much weight in Justice Khawaja’s holding that the Preamble of the Constitution of Pakistan is indeed unique in its prolixity and the commands that it sets out. For example, in his commentary on the preamble to the Irish Constitution, Mark Tushnet focuses on how preambles are useful in defining

national identities.¹⁰⁰ The conception of a Preamble being a ‘beacon light’ for understanding the Constitution and constraining constituent power is, as Justice Khawaja forcefully asserts, one that would be original to Pakistan.

The inconsistency with the holding of Justice Khawaja is that it means that the Preamble, or at least the nine directives/commands highlighted by Justice Khawaja therein are immutable. It may be the ‘master key’ to understanding the Constitution, but does that mean that it is unamendable? It would indeed seem abominable for Parliament to amend the provisions of the Preamble relating to the guarantee of fundamental rights and securing the independence of the judiciary. In fact, almost all features of the Preamble seem to emanate from the will of the people and strengthen the result of Justice Khawaja’s holding to the effect that the Parliament is constrained from amending the Constitution in contravention to the values set out in the Preamble. One question, however, that was posed by the Bench during arguments as well,¹⁰¹ remains unaddressed by such a construction of the Preamble. What if a Parliament was elected with a clear mandate from the people, as demonstrated in the manifesto that the victorious party published for the purposes of contesting elections, that Pakistan should cease to be an Islamic Republic and should instead become a secular State? An argument based on the origin of the Preamble could be advanced: at the time of the adoption of the 1973 Constitution, which, as stated above, could be taken as a founding moment of a new nation-state in the aftermath of the events of 1971, the founders-drafters of the Constitution, democratically elected and representing the will of the people, clearly intended to create an Islamic Republic and to this effect, inserted unamendable provisions related to Islam in the Preamble. However, such a construction results in an internal contradiction in the reasoning of Justice Khawaja. The Honourable Justice has consistently throughout his jurisprudence accorded primacy to the will of the people and the fiduciary obligation of the State and its representatives to serve this will. If the will of the people clearly emerged in the form of a command/directive to delete the provisions of the Preamble related to religion, should it not be accorded deference and fulfilled as a part and parcel of the fiduciary obligation that Justice Khawaja has painstakingly and eloquently elaborated not only in his opinion in the Amendments case, but also in the course of his illustrious

¹⁰⁰Mark Tushnet, *National Identity as a Constitutional Issue: The Case of the Preamble to the Irish Constitution of 1937*, in EOIN CAROLAN ed., *THE CONSTITUTION OF IRELAND: PERSPECTIVES AND PROSPECTS* (Haywards Heath: Bloomsbury Professional) (2012).

¹⁰¹Hasnaat Malik, Supreme Court asks if Parliament can declare Pakistan a secular State, *The Express Tribune*, 5 May 2015, <http://tribune.com.pk/story/881083/supreme-court-asks-if-parliament-can-declare-pakistan-a-secular-state/>.

career as a Supreme Court Judge? Such a position seems untenable and would not be helpful to the judiciary in evolving a standard whereby constitutional amendments can be judicially reviewed.

B. The will of the people – how can it be a touchstone?

The argument being made here, for purposes of clarity, is that Justice Khawaja's reasoning suffers from an internal contradiction, but that the conclusion that Justice Khawaja reached in striking down the amendment to Article 63A and the Twenty First Amendment is correct. This conclusion, however, could have been made without adverting to the Preamble as immutable, and, still have been in line with Justice Khawaja's doctrine on the will of the people. It is submitted that the reasoning of Justice Khawaja should be modified to excise the elaboration of the Preamble in the terms he has set out and instead focus on elaborating what it means to strike down a constitutional amendment on the concept of the will of the people. It is proposed that this would mean that the judiciary should be empowered to strike down constitutional amendments where they clearly do not allow the will of the people to be expressed, which is precisely the effect that the Eighteenth Amendment had on constitutional arrangements through the changes inserted to Article 63A. This by extension, resulted in the passage of the Twenty First Amendment, as is evocatively recounted by Justice Khawaja in his opinion when he cites the reaction of Senator Raza Rabbani when being forced to vote in favour of the passage of the Twenty First Amendment.

One more point mentioned above that bears elaboration that has been briefly mentioned above is that amendments such as those under examination in this paper strike at the heart of the concept of constitutionalism. In a first-year constitutional law class in most common law countries, students are taught that constitutionalism basically means 'limited governance'.¹⁰² A more sophisticated description of the concept of constitutionalism is provided by Mark Brandon:

Constitutionalism' refers to a set of theories, values, principles, and institutions that are concerned with the authorization, organization, direction, and constraint of political power... The element of constraint means that neither anarchy nor a totalizing concentration of power (in one, a few, or many hands) is consistent with constitutionalism. Between these two poles, however, a range of constitutionalist politics or political systems is possible. A

¹⁰²See, e.g., Brohi, *supra* note 8, at 13.

constitutionalist system will include three essential elements: (1) institutions authorized by and accountable to the people (both in the regular operation of government and, perhaps, in the making of the constitutional order); (2) some notion of limited government (whether by the designation of purposes for governmental action, the specification of rights, or the allocation of authority among institutions); and (3) the rule of law (i.e., the regularization of processes by which public norms are made and applied).¹⁰³

The Eighteenth Amendment, by taking away legislators' ability to exercise their power to vote on bills to amend the Constitution and placing such power solely in the hands of party heads, violates the very concept of constitutionalism. Under such a dispensation, much power is concentrated in the few party heads, some of whom are not members of Parliament and thereby unaccountable to the people. The only limit on the head of the majority party's head is the other party heads and however many legislators are available for them to command. It is from this premise that this paper posits that a limited ground must exist for constitutional amendments to be reviewed, when they frustrate the will of the people from being expressed and exercised by the people's representatives.

C. Dealing with the counter-majoritarian difficulty

Prima facie, the argument that is being advanced in this paper, that the judiciary should cite the will of the people as the standard to strike down constitutional amendments, would seem to be inherently contradictory. A cursory knowledge of the precepts of Alexander Bickel's thesis on the counter-majoritarian difficulty in 'The Least Dangerous Branch'¹⁰⁴ would seem to be sufficient to repel such a notion of judicial supremacy. The orthodox position would be that it is inconceivable for an unelected judiciary to be able to fathom the will of the people. On this view, an attempt by the judiciary to adjudicate on the will of the people would at best be an exercise in idle cogitation, and at worst, 'a naked usurpation of the legislative function'.¹⁰⁵ This formulation would be incorrect because the judiciary should only intervene to strike down a constitutional amendment where it is blocking the will of the people from being expressed in the first place. However, the proponents of the other side of the argument would still

¹⁰³Mark E. Brandon, *Constitutionalism* in M. TUSHNET et al., eds., THE OXFORD HANDBOOK OF THE US CONSTITUTION (Oxford: OUP) (2015) 763.

¹⁰⁴Bickel, *supra* note 24.

¹⁰⁵Viscount Simonds of the House of Lords in *Magor and St Mellons Rural District Council v. Newport Borough Council*, [1951] 2 All ER 839.

argue that this would amount to according the judiciary too much power to determine when the will of the people is not allowed expression. They would reiterate that the judiciary is unelected and is thus not in a position to make determinations based on the will of the people. This is exactly the pitfall that most South Asian, and particularly Pakistani, judges, jurists, and academicians have been wont to fall into. Such a transposition of a foreign concept of the role of judges without contextualization in the particular circumstances and history of the country in question is a fallacious enterprise. The particular historical facts that set the Pakistani legal system and polity apart from all other legal systems of the world are the Lawyers' Movement and the subsequent empowerment of the Supreme Court under Chief Justice Iftikhar Chaudhry. In particular, the Bickel or Federalist Society-inspired arguments of Pakistani jurists¹⁰⁶ fail to take into account the special democratic access that the people of Pakistan have to address issues of public importance¹⁰⁷ in the Supreme Court under Article 184(3) and in the High Courts under Article 199.

The argument stemming from the counter-majoritarian difficulty does not apply in Pakistan. The courts vested with constitutional jurisdiction, i.e. the Supreme Court and High Courts, are constantly seized in their respective original jurisdictions by cases involving the adjudication of matters of public importance relating to the enforcement of fundamental rights. Combined, the Supreme Court and High Courts decide thousands of such cases in a calendar year. Therefore, they are acutely aware of issues affecting the people of Pakistan. This is in stark contradistinction to the US Supreme Court, which has an extremely narrow and virtually quiet original jurisdiction, and an appellate jurisdiction wherein the US Supreme Court resolves hardly one hundred cases a year. Elected members of Parliament, on the other hand, face elections every five years. Indeed, they are accountable to the people, and ostensibly, if they do not 'perform', they are voted out, but in Pakistan, public access and exposure to Supreme Court

¹⁰⁶See Waqqas Mir, *Saying not what the Constitution is... but what it should be: Comment on the Judgement on the Eighteenth and Twenty First Amendments to the Constitution*, LUMS Law Journal (2016) 64.

¹⁰⁷The age of judicial activism under the tenure of Chief Justice Muhammad Iftikhar Chaudhry began after the invigorated use of the Human Rights Cell within the Supreme Court, aimed at using the powers of the original jurisdiction to take cognizance of gross deprivations of the people of Pakistan's fundamental rights. From 2009 to 31 August 2015, the cell had received a total of 249,130 cases, out of which 224,680 were disposed of in the same period. See Asher A. Qazi, *A Government Of Judges: A Story Of The Pakistani Supreme Court's Strategic Expansion*, PhD Dissertation submitted to the University of Chicago's Law School, (Chicago, IL: Law School Publications) (2018) 158.

Judges is far more frequent than it is to politicians. In Pakistan, judges of the Supreme Court, in their exercise of the inquisitorial jurisdiction of Article 184(3) are in fact more receptive to the will of the people than any other branch of the State. This constitutional position was only magnified by the Chaudhry Court. Sultan Babar Mirza refers to this in his exposition of the ‘‘small-c’ constitutional perspective’, which he sets out as a defining feature of the Chaudhry Court.¹⁰⁸ Mirza cites the work of David S. Law¹⁰⁹ in elaborating that:

while a large-c constitution proclaims itself to be the law of the land and formally establishes the highest institutions of governance, the small-c constitution instead focuses on the most powerful institutions or sections of society from which other institutions and sections of society actually draw their powers, regardless of the fact that such hierarchies or powers may or may not have been created by the large-c constitution.¹¹⁰

Although the large-c constitution in the case of Pakistan does not explicitly envision the judiciary as an organ which can strike down a constitutional amendment *viz.* Article 239, the small-c constitution has in fact placed the Supreme Court as the most democratically accessible organ of the State. This much is clear by the fact that in order to invoke the original jurisdiction of the Supreme Court under Article 184(3), it is not even necessary to appear before the Court with a lawyer. Petitioners can, and many have and do, present their cases before the Court *pro se*, or, as put in Pakistan, as a petitioner-in-person. Under Chief Justices Chaudhry and Khawaja,¹¹¹ such petitioners were encouraged to appear before the Court in large part because of the Court’s push towards conducting its proceedings in Urdu.

This view of the judiciary as a democratic organ of the State by virtue of the democratic nature of access to it has been explored in the

¹⁰⁸Sultan. B. Mirza, *The Chaudhry Doctrine: A small-c constitutional perspective* in M. H. CHEEMA & I. S. GILANI eds., *supra* note 11.

¹⁰⁹David S. Law, *Constitutions* in PETER CANE & HERBERT M. KRITZER, eds. OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Oxford: OUP) (2010) 376-398.

¹¹⁰*Supra* note 108, at 34.

¹¹¹*See* Pervez Musharraf v. Nadeem Ahmed PLD 2014 Supreme Court 585, opinion of Justice Jawwad S. Khawaja, 19 and *generally* Muhammad Kowkab Iqbal v. Government of Pakistan PLD 2015 Supreme Court 1210.

context of Russia and Hungary by Kim Scheppele.¹¹² She argues that because of the sheer number of cases of constitutional significance argued before the Constitutional Courts of Russia and Hungary, the courts are in fact democratic in nature, and the counter-majoritarian difficulty as articulated in the American context does not apply in an analysis of the constitutional schemes of post-Soviet Russia and Hungary. The fact that people can approach these courts without lawyers means that there are few barriers to entry, and the courts in Russia and Hungary end up deciding regularly on issues that affect the pressing issues of the people. This analysis applies in the context of Pakistan as well, in view of the arguments elaborated above.

It is also interesting to note that members of the other branches of the State are frequently petitioners before the Supreme Court on issues of public importance. This was exemplified in the case of Khawaja Muhammad Asif v. Federation of Pakistan,¹¹³ where the petitioner, Khawaja Asif, was an opposition legislator in the National Assembly when he instituted the petition. However, by the time of the conclusion of the case, and indeed, when the Bench started conducting hearings in the case on a day-to-day basis, Khawaja Asif was an immensely powerful Federal Minister, holding the portfolios of Defence, Petroleum and Natural Resources. It is indeed ironic that the case involved public procurement fraud by the Musharraf government in LPG (Liquefied Petroleum Gas) concessions, which was within the domain of the Minister to remedy. But even the democratically elected Minister sought legitimacy for actions he was set to undertake. In this position of constitutional polity, it is not inapposite to accord a limited ground of judicial review to the Supreme Court with respect to constitutional amendments.

This is in contradistinction to the central and provincial legislatures, which have no such constant democratic access. The Senate (the upper house of Parliament), which is indirectly elected, has recently instituted a public petition system which is thus far only available in English.¹¹⁴ Such a public petition system is merely an eyewash and is far less democratic than the procedure (rather, lack of procedure) that is needed to petition the Supreme Court. Under Chief Justice Chaudhry, the Human Rights Cell of the Court was revolutionized. Any citizen can write a letter to the Human Rights Cell in English, Urdu, or any one of the myriad provincial and local languages of Pakistan and have her case taken up by the Supreme Court

¹¹²Kim L. Scheppele, *Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe*, 18(1) *International Sociology* (2003) 219-238.

¹¹³PLD 2014 Supreme Court 206.

¹¹⁴Senate of Pakistan Official Website, <http://publicpetition.senate.gov.pk/index.php>.

under its original jurisdiction. Special mechanisms have even been put in place for expatriate Pakistani's under Chief Justice Jilani.¹¹⁵ The kind of democratic access afforded by the Supreme Court is unprecedented and unparalleled in Pakistan. This is also evident from the press coverage that the Supreme Court has received from the heyday of the Chaudhry Court. In the words of Mirza, 'The Supreme Court also made a special effort to communicate directly to the masses. The judges' remarks during hearings, often in Urdu, were broadcast on the news channels on a daily basis'.¹¹⁶

Moreover, it is fallacious to make the sweeping statement that the superior judiciary in Pakistan is completely undemocratic. Under Article 175A as inserted by the Eighteenth Amendment and amended by the Nineteenth Amendment, the judiciary is now appointed by a Judicial Appointments Commission (JAC), and the decision of the JAC is approved by a Parliamentary Committee for Judicial Appointment.¹¹⁷ This is a sharp departure from the system that existed before, where the Chief Justice was, what is called in Urdu, فرد واحد (one man holding all the power). The judges of the superior courts would be appointed essentially by the Chief Justice under the rule established in the case of Al-Jehad Trust v. Federation of Pakistan.¹¹⁸ In this case, the former Article 177 which read that 'judges shall be appointed by the President after consultation with the Chief Justice' was interpreted to the effect that the consultation of the Chief Justice was binding on the President; so essentially, the President was nothing more than a rubber stamp on the Chief Justice's decisions with respect to judicial appointments. This system has been dramatically revised after the Eighteenth and Nineteenth Amendments. Now, the JAC is headed by the Chief Justice and comprises the Attorney-General, the Federal Minister for Law, an elected representative of the Pakistan Bar Council, in addition to the four most senior Judges of the Supreme Court and one retired Supreme Court Judge.¹¹⁹ The Judges do retain primacy in this system of appointment, but the views of the democratically accountable executive are taken into account and considered. In addition to this, the Parliamentary Committee is empowered to request reconsideration of the nominees sent to it by the JAC,¹²⁰ which, although not as powerful a tool for scrutiny as say the ones available to the US Senate Judiciary Committee, still provides another democratic element to the appointment process.

¹¹⁵Supreme Court of Pakistan Official Website, <http://www.supremecourt.gov.pk/web/page.asp?id=1758>.

¹¹⁶*Supra* note 108, at 60.

¹¹⁷Article 175A of the Constitution.

¹¹⁸PLD 1996 Supreme Court 324.

¹¹⁹Article 175A of the Constitution.

¹²⁰*Id.*

The unique democratic nature of the Supreme Court of Pakistan provides the justification for it endowing itself with the power to strike down constitutional amendments. However, it is submitted that this power must be exercised only in the narrow circumstances that a specific amendment frustrates the will of the people being exercised, as is the case with the effect the Eighteenth Amendment had on Article 63A. This does indeed mean that the judiciary will need to police itself and ensure that it does not strike down amendments on any other ground, as this may result in a most marked departure from the balance of power envisaged by the drafters, where the judiciary gains overwhelming primacy over other institutions. This much is clear from the seminal work of A. K. Brohi that Judges in a system of a written constitution are the only branch that can determine the limits of their own powers;¹²¹ so to counteract this, the judiciary should only have the ability to strike down constitutional amendments on this narrow ground. In any event, Alexander Hamilton's assertion that 'the judiciary... has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments,'¹²² applies to the Supreme Court of Pakistan. This is reflected in Article 190 of the Constitution, which reads, 'All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court'. Thus, even with the freshly sparkled vein of judicial activism, the post-Chaudhry Supreme Court is still 'the least dangerous branch'.¹²³ Justice Khawaja is correct in holding that Article 239 is of 'dubious provenance' and cannot be taken to govern the whole Constitution, but it is respectfully concluded that citing the Preamble as unamendable frustrates the very will of the people that he has endeavoured to sanctify throughout his judicial career and vigorously defend in his judgement in the Amendments case; because it fails to take into account the possibility that it may be the will of the people to change the Preamble at some future point in time. In this vein, it is pertinent to mention that the view of Chief Justice Nasir-ul-Mulk is inconsistent with the unique position and ability of the Supreme Court of Pakistan to ensure that the will of the people is not frustrated. To ensure that such unconstitutional amendments do not have the effect of striking at what Chief Justice Cornelius referred to as the 'constitutional conscience' of Pakistan in

¹²¹Brohi, *supra* note 8, at 39.

¹²²ALEXANDER HAMILTON et al., THE FEDERALIST PAPERS, Paper 78, Library of Congress Online Open Access Document, http://www.loc.gov/tr/frd/Military_Law/Lieber_Collection/pdf/Federalist.pdf.

¹²³See Asher A. Qazi, *Suo Motu: Choosing Not to Legislate Chief Justice Chaudhry's Strategic Agenda* in M. H. CHEEMA & I. S. GILANI, eds., *supra* note 11.

another context, it is necessary for the Supreme Court to have the limited and closely circumscribed power to strike down constitutional amendments that have the effect of not allowing the will of the people to be expressed, as is the case with the effect of the amendment to Article 63A, which further allowed the Twenty First Amendment to be passed without protest by the people's representatives.

D. The will of the people or democratic self-correction?

Lastly, it is important to address the argument that the political process provides a vehicle for self-correction even where seemingly invidious amendments to the Constitution such as those in question are passed. For example, it may be argued that the Twenty First Amendment and the Amendment to the Army Act are sunset laws set to expire in two years, with a possibility to be extended for a further term.¹²⁴ Proponents of this argument would argue that it is the province of elected legislators, in expressing the mandate of their electorate to enact amendments to the Constitution; and that providing a judicial check on this power is not conducive to a laboratory of democracy,¹²⁵ and detracts from the ability of Parliament to try and test various techniques and methods of governance. On this view, any ground, even the limited one proposed in this paper, would be an unacceptable encroachment on the power of Parliament; violative of the doctrine of separation of powers. It is submitted that this argument is self-contradictory in the context of Article 63A as amended by the Eighteenth Amendment. The political process is only open to self-correction when the will of the people is allowed to be expressed. Under Article 63A as amended by the Eighteenth Amendment, legislators cannot vote for bills to amend the Constitution in line with the mandate given to them by the voters who elected them in Parliament. Instead, they are bound by the dictates of party leaders who are often not members of Parliament. With the Constitution espousing such a position, the argument that the political process provides for self-correction falls flat. This is precisely why the judiciary needs to have the power to review a constitutional amendment only where an amendment does not allow the will of the people to be expressed by the people's representatives – to protect the ability of the democratic process to correct itself.

¹²⁴As eventually happened when the Constitution (Twenty Third Amendment) Act 2017 was passed by Parliament.

¹²⁵To loosely borrow from Justice Brandeis in *New State Ice Co. v. Liebmann* 285 US 262 at 311 (1932).

CONCLUSION

The Amendments case may be described as Pakistan's Kesavananda Bharati. The 17-member Bench reached disparate conclusions from which a distinct standard or touchstone whereby constitutional amendments can be declared unconstitutional has not been put forward by a clear majority. The position that emerges from the case is that there are some implied limitations on the power of Parliament to amend the Constitution. These limitations are either salient features of the Constitution, or directives/commands of the people as enshrined in the Preamble of the Constitution. Despite emphatically declaring a power to review constitutional amendments, the Supreme Court of Pakistan declined to exercise this power, hence the Roznai-inspired description of the position of unconstitutional constitutional amendments in Pakistan: 'Implied Limitations without Enforcement - Yet'. This paper has argued that such a position leaves the law in a fundamentally unclear state with respect to an extremely important matter of adjudication. When will prospective petitioners be successful in challenging a constitutional amendment in Court? Not only is the answer to this question unclear, it is unclear what kind of test the Supreme Court may utilize to strike down an amendment to the Constitution as unconstitutional.

It is in this backdrop that this paper presents a distinct yet limited criterion whereby it is proposed that the judiciary should be able to review constitutional amendments. Where an amendment to the Constitution frustrates the ability of the representatives of the people from effectively expressing the will of the people, such an amendment should be susceptible to judicial review. The position of Article 63A as modified by the Eighteenth Amendment is just such an amendment. This was exemplified by the voting on the Twenty First Amendment, particularly the conundrum faced by current Senator Raza Rabbani, who tearfully had to vote in the Twenty First Amendment because of how Article 63A tied his hands, as recounted by Justice Khawaja in his opinion in the Amendments case. The objections and arguments to this theory have been dealt with in this paper. The majority of these objections stem from the counter-majoritarian difficulty. Such arguments fail to take into account the unique nature of democratic access to the Supreme Court and High Courts of Pakistan that is available to the people of Pakistan as a consequence of the success of the Lawyers' Movement and the efforts of the Chaudhry Court. The Supreme Court and High Courts are seized with thousands of cases every year that relate to the redressal of people's grievances on matters of public importance in connection with the enforcement of fundamental rights. As such, the superior judiciary is the most democratically accessible organ of

the Pakistani State, so the counter-majoritarian argument fails. The second argument that has been countered, against any ground, no matter how limited, of judicial review of constitutional amendments, is that this results in detracting from the capacity of the political process for self-correction. Such an argument is defeated by the fact that Article 63A as amended by the Eighteenth Amendment concentrates power to amend the Constitution in undemocratic party heads, thereby frustrating the democratic process rather than allowing for self-correction and experimentation. In such a situation, the solution that is proposed by the paper serves to in fact protect democratic institutions by shielding them from undemocratic party heads who hope to control elected representatives in Parliament. An adoption of this solution by the judiciary will lead to Pakistan 'becoming the nation founded on constitutionalism'¹²⁶ envisioned by the founders of the country.

¹²⁶ *Pervez Musharraf v. Nadeem Ahmed* PLD 2014 Supreme Court 585, opinion of Justice Jawwad S. Khawaja, 18.

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