

**Saying not what the Constitution is ... but what it should be:
Comment on the Judgment on the 18th and 21st Amendments to the
Constitution**

District Bar Association (Rawalpindi) v Federation of Pakistan
PLD 2015 SC 401

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Introduction

This Case-Note discusses the ruling of the Supreme Court of Pakistan ('Court') on the consolidated petitions challenging the 18th and 21st Amendments to the Constitution of the Islamic Republic of Pakistan, 1973 ('the Constitution').

A majority of the Court answered in the affirmative the question whether the judiciary can review the substance of constitutional amendments.¹ Never before has a majority of the apex court affirmed the existence of a power to sit in judgment over the substance of constitutional amendments. This ruling is arguably the most important constitutional law decision in the history of Pakistan. It decides who has the final say on what counts as a substantively valid constitutional amendment while also revealing the apex court's treatment of the two amendments that seriously impinge on the judiciary's turf—these are the new appointment mechanism for superior judiciary through the inclusion of Article 175-A under the 18th Amendment; and the trial of a specified class of civilians before military courts under the 21st Amendment. The decision matters immensely because, among other things, it reveals different conceptions of democracy that are at play in our legal system. Just like the domestic public discourse, the Justices disagreed vehemently on the extent of the Parliament's power to amend the Constitution. A significant majority, that is, thirteen out of the seventeen Justices, ruled that the Court can strike down a constitutional amendment if it repeals, alters or abrogates the 'salient features' of that document. Four Justices ruled that the Court has no power to examine the validity of constitutional amendments and hence they dismissed the petitions. Eight other Justices joined these four in dismissing petitions—but these eight Justices ruled that while the power to strike down constitutional amendments exists, it is not

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¹ For a concise yet nuanced explanation of how courts elsewhere have ruled on substantive validity of constitutional amendments see Aharon Barak, 'Unconstitutional Constitutional Amendments' (2001) 44 (3) Israel Law Review 321.

being exercised in the current cases. The remaining five Justices ruled that not only does the Supreme Court have the power to examine the substance of constitutional amendments, but that various parts of the 18th and 21st Amendments ought to be struck down.

The news-clippings as well as the Honourable Court's own short order explained the decision in terms of the split for and against allowing the petitions. But that is hardly the complete story. The real dichotomy between the majority and minority opinion lies between those who opined that the Court can strike down a constitutional amendment and those who disagreed. Hence, while four Justices who dismissed the petitions were ostensibly in the majority dismissing the petitions, they were actually in the minority on the bigger question of the limits on the respective powers of the Parliament and the judiciary.

This Case-Note will confine itself to the larger question of the limits on powers of the Parliament to amend the Constitution. It will not, for reasons of space and structure, go into the minute details of how individual challenges to various amendments were decided. That is, of course, an important endeavour in its own right and deserves separate engagement. This Note, however, concerns itself with the 'salient features' doctrine. It argues that while the Court did exhibit judicial restraint in not striking down far-reaching constitutional amendments, yet it is of considerable concern how far the plurality opinion goes in assuming a power that no previous majority on the Court had considered valid. The writer respectfully disagrees with the limitations laid down on the Parliament's power to amend the Constitution since the conception of democracy and constitutional interpretation relied upon by the plurality is at odds with history, the text of the Constitution, as well as precedent. Furthermore, while there are powerful arguments to support the existence of a 'salient features' doctrine, this Note argues that our democracy is weaker moving forward with the spectre of this newfound power hanging over the Parliament.

Part II provides a basic background to the questions involved in the 18th and 21st Amendment cases. Part III takes issue with the doctrine of 'salient features' as a basis for striking down amendments to the Constitution and examines its various aspects. The essential thesis of this piece is that while the contours and limits of the 'salient features' doctrine remain unclear, it is rather obvious that with an increase in judicial power to rule on constitutional amendments, the people of Pakistan will be more excluded and less able to hold the real decision-makers accountable.

Part I

There will, perhaps, never be a more ironic divide between the majority and minority in a major Supreme Court ruling. In principle, five in the minority and eight Justices in the majority agreed: the Supreme Court of Pakistan can strike down an amendment to the Constitution if an amendment violates ‘salient features’ of the Constitution. The only difference was whether to let the amendments under review stand. The power was announced in unequivocal terms—with five Justices in favour of striking down one or more parts of the amendments under review while eight assumed the power but chose to let the amendments stand.

In many important respects, this is the most important ruling on a constitutional question in the history of Pakistan. The 18th Amendment to the Constitution introduced a number of far-reaching changes to our constitutional scheme. These include, but are not limited to, increasing provincial autonomy through abolition of the Concurrent Legislative List,² reforming the appointments mechanism to superior courts (High Courts, Federal Shariat Court and Supreme Court),³ changes to representation of religious minorities in the Parliament,⁴ and powers of heads of political parties over legislators concerning voting on certain specified matters.⁵ The 21st Amendment, for a temporary period, granted constitutional cover to trials conducted by military courts of civilians claiming or known to belong to any terrorist group or organization using the name of religion or a sect.⁶

Among other things, the cases involved challenges to the new judicial appointments mechanism, the powers of leaders of political parties over parliamentarians and electorates for religious minorities under the 18th Amendment, as well as the constitutional cover granted, under the 21st Amendment, to military courts to try civilians accused of specified offences. Hence, the questions under scrutiny pertained to, and indeed affect, judicial power and the independence of the judiciary, as well as competing conceptions of democracy. If these issues were not enough to establish the seminal importance of this case, there was also the all-important question of who has the final word on how much the substance of the constitution can be amended; the Parliament or the Judiciary?

² Fourth Schedule of the Constitution.

³ Article 175-A of the Constitution.

⁴ Article 51(6)(e).

⁵ Article 63-A of the Constitution.

⁶ Article 175 and the First Schedule of the Constitution.

The biggest over-arching questions concerning both amendments before the apex court were these: Is there a 'basic structure' of the Constitution? Alternatively, does the Constitution have certain salient features which are not just descriptive but, in effect, proscriptive? If so, does existence of a basic structure/salient features limit the power of the Parliament to amend the Constitution? Furthermore, which actor, if any, has the power to enforce such limits if the Parliament transgresses its powers of amending the Constitution?

The 'basic structure' doctrine of judicial review is premised on the conviction that certain features of a written constitution are so fundamental to the constitutional edifice that they cannot be amended, i.e. they are immutable and not susceptible to repeal or significant alternation by the legislature.⁷ Furthermore, in case the legislature does try to change the 'basic structure' of a constitution through an amendment, the courts exercising powers of judicial review can strike down a constitutional amendment, i.e. declare it of no legal effect. There are certain countries, such as Germany, where the constitution itself provides that certain provisions cannot be amended. Hence, the text of the constitution limits the legislature's power of amendment. However, in other countries (such as India, Bangladesh, Nepal etc.) the superior courts have devised a 'basic structure' of the relevant constitution to strike down constitutional amendments.⁸ While our Supreme Court, more often than not, uses the word 'salient features' instead of 'basic structure' while examining the constitutionality of any amendments to the Constitution, it is submitted that in essence there is no substantive difference between the two. However, the approaches to how one arrives at a 'basic structure' or 'salient features' can vary between individual judges as well as jurisdictions.

Part II

Before the Court could get into the question of the 'basic structure' or 'salient features' of the Constitution, there was a preliminary question too, which set the tone for further analysis: Were the petitions maintainable considering Article 239(5) and (6) of the Constitution, which expressly oust the jurisdiction of any court to review constitutional amendments and expressly state that there is no limit on the power of the Parliament to amend the Constitution. This is where different methods of reading a constitution become particularly important. The Judges who followed the reasonable meaning of the text of the Constitution held, in powerful opinions, that the apex court lacks jurisdiction to hear petitions challenging the substantive validity

⁷ Barak (n 1).

⁸ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

of constitutional amendments. However, the majority chose to come up with salient features of the Constitution (based, we are told, on a holistic reading of the Constitution) and linked this to the scope of the power of the Parliament to amend the Constitution. This involved deciding what the ‘basic structure’ or ‘salient features’ doctrine requires, in application as well as precedent, along with a strong focus on the meaning of the word ‘amendment’—with the majority concluding that ‘amendment’ does not mean fundamentally changing the bargain struck by the Constitution. Hence, the real analysis does not begin with reading the Constitution but with each Judge/citizen asking himself a larger question: is there a ‘basic structure’ or ‘salient features’ theory applicable to the constitution? Those who answered this in the affirmative while considering it a proscriptive theory, that is allowing courts to strike down constitutional amendments that repeal, alter or abrogate the ‘basic structure’ or ‘salient features’ of the Constitution, then used the word ‘amendment’ to argue that the scope of an amendment, as opposed to a repeal or abrogation, is limited; thereby imposing a limitation on the power of the Parliament.

While there may be some ostensible appeal to the argument that the word ‘amendment’ implies a limited power, it becomes clear on a deeper analysis that this restrictive view of the Parliament’s power raises serious concerns. Why should the word ‘amendment’ not include the power to repeal any provision no matter how salient it may be? Do legislatures not repeal laws all the time by introducing legislation under the heading of amending the law? Did the framers of the Constitution think that they and their successors would have to answer to the apex court for each major amendment? Is it reasonable to think that the Parliament only has the power to correct mistakes of language without ever substantively changing the nature, quality or existence of salient rights and/or institutional mechanisms?

Even if one assumes for a moment that the power of the Parliament to amend the Constitution is limited, this still does not provide any support for the ‘salient features’ doctrine as a proscriptive tool to strike down constitutional amendments. The Court had never before used the ‘salient feature’ doctrine in such proscriptive terms. At best, it was used to outline the obvious characteristics of our Constitution in descriptive terms.⁹ The departure from precedent in the latest ruling is quite obvious and betrays the promise of clarity. It is therefore submitted with respect that

⁹ See *Mahmood Khan Achakzai v Federation of Pakistan* PLD 1997 SC 426; *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan* PLD 1998 SC 1263; *Pakistan Lawyers Forum v Federation of Pakistan* PLD 2005 SC 719; *Syed Zafar Ali Shah v General Pervez Musharraf* PLD 2000 SC 869; *Fazlul Quader Chowdhry v Mr. Muhammad Abdul Haque* PLD 1963 SC 486; and *The State v Zia-ur-Rehman* PLD 1973 SC 49.

the plurality opinions affirming the power to strike down constitutional amendments engages in a reading of precedent that is difficult to objectively justify.

The opinions of four Judges stand out and present powerful counter-arguments to the reasoning of the plurality that accepted ‘salient features’ as a basis for judicial review of the substance of amendments to the Constitution. Justice Saqib Nisar reminds us that judicial aggrandisement is a real danger.¹⁰ The restraint and realism exhibited by him, Justice Khosa, Justice Iqbal Hameed-ur-Rehman and Chief Justice Mulk will serve as an inspiration for all those who value clarity, judicial statesmanship and precedent in legal reasoning. Particularly relevant is Justice Nisar’s observation that ‘[T]he Constitution does not end (it certainly did not begin) with the Judges, and the courts would do well to remember that.’¹¹

One of the major cases relied upon by the plurality to justify the assumption of power to strike down constitutional amendments is the *Zafar Ali Shah*¹² case. In the said case, the Court articulated certain ‘salient features’ of the Constitution and ruled that while General Musharraf had the power to amend the Constitution, he could not be allowed to interfere with the ‘salient features’. Almost as an aside, the Court noted that even the Parliament did not have such power. Hence, the case was never considered express authority for the proposition that our top court could strike down constitutional amendments. The issue in the case did not concern the powers of the Parliament but a military dictator who had usurped power and was essentially seeking a temporary lease of life from the Court. Any limits imposed on him should hardly define the scope of authority of the people’s elected representatives when it comes to amending the basic bargain. A whole host of cases before this had expressly held that superior courts had no power to strike down constitutional amendments.

Any reliance on the *Zafar Ali Shah*¹³ case is also cast in an unflattering light when one considers that a few years later, in the *Pakistan Lawyers Forum*¹⁴ case, the Court itself chose not to follow the *Zafar Ali Shah* ruling. In the *Pakistan Lawyers Forum* case, it was once again affirmed by a majority that the ‘salient features’ of the Constitution were only descriptive, and even if the Parliament chose to interfere with them, the cost would be political—not legal. Yet the latest case explains the *Pakistan Lawyers Forum* case’s conclusion and the judicial restraint exhibited by

¹⁰ *District Bar Association (Rawalpindi) v Federation of Pakistan* PLD 2015 SC 401, para [185 (e)].

¹¹ *Ibid*, para [185 (j)].

¹² *Syed Zafar Ali Shah v General Pervez Musharraf* PLD 2000 SC 869.

¹³ *Ibid*.

¹⁴ *Pakistan Lawyers Forum v Federation of Pakistan* PLD 2005 SC 719.

the Court in that case as ‘prudence trumped jurisprudence’¹⁵—opining that the former case was decided that way in an attempt to save the system since democracy was being newly restored. This could be plausible, but then the question arises that if the Supreme Court in the past felt this power existed, why did it not spell it out in earlier cases? Nothing stopped earlier Courts from spelling out a similar power as this court and then reserving it. The lack of precedent is rather obvious and hence should lead us to see the transformation of the ‘salient features’ doctrine as an institutional response to changes affecting the judiciary in a fast evolving polity. In order to retain some semblance of control, it appears that the Honourable Supreme Court has seized all control. Even if it chooses not to apply this doctrine in the coming years, its presence as a precedent will raise many interesting and difficult questions.

There is no way for anyone to know what can or cannot be classified as part of the ‘salient features’ doctrine. This is an important point to remember. The only things that have been outlined as falling within the ‘salient features’ are democracy, parliamentary form of government and independence of the judiciary.¹⁶ Furthermore, the limit imposed says that the Parliament cannot abrogate, repeal or substantively alter these.¹⁷ However, the specifics remain unclear. There is, of course, a level of generality that exists but there is little guidance for the legislature. What we do know is that the new method of judicial appointments and (for the most part) denial for two years of an independent judiciary to a certain class of accused passes constitutional muster. Yet, if there was lack of clarity before this judgment then the acceptance of the ‘salient features’ as a prescriptive or proscriptive doctrine for the legislature has not clarified much.

Essentially, the standard is political and not legal¹⁸—blurring forever the scope of the Parliament’s power as well as the scope of judicial authority. Hence, in one way, the Court is now the final author of the Constitution—not a position that the framers of the Constitution or those in the first Constituent Assembly would have enthusiastically endorsed. The counter-argument would be that the authorship remains with the Parliament and the apex court will only step in when something drastic happens. But there exists no standard for determining what is drastic. Is this a desirable outcome? A.K. Brohi, while commenting on the broad powers of judicial

¹⁵ (n 10) Opinion of Justice Azmat Saeed, para [52].

¹⁶ *Ibid*, 370 and 371, para [180].

¹⁷ *Ibid*.

¹⁸ M. Rosenfeld, ‘Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts’ (2004) 2 (4) *International Journal of Comparative Law* 633.

review under the Constitution of 1956, stated that ours is a ‘government of judges’.¹⁹ The latest ruling reaffirms such fears and extends them to now include the judiciary being the final author of the substance of the Constitution. While superior courts do, indeed, often apply competing conceptions of various values to a society,²⁰ the Court could easily have avoided the murky waters of a doctrine the basic contours of which can conveniently change with the person engaging in the analysis. The legal or structural basis of ‘salient features’, which appear to be controlling the powers of the Parliament and making the Court more powerful than ever before, still remains unclear.

Equally problematic is any attempt to distinguish between the ‘constituent power’ of the Parliament versus its ‘legislative or amending power’. An argument is often made that the power of the assembly that drafts a constitution is somehow greater than any later assembly’s power—particularly when it comes to amending a constitution. However, this is problematic in the Pakistani setting. Firstly, the Constitution does not create any distinction between the two powers and therefore, the Parliament has been entrusted with the task of deciding what goes into the substance of the Constitution. Furthermore, one would do well to remember the importance of not overly romanticizing the mandate of earlier legislative bodies that existed to frame a constitution. For example, Pakistan’s first Constituent Assembly, which took office in 1947, was indirectly elected by legislators serving in provincial assemblies—these legislators were holding office as a result of an election in which historians claim that percentage of adults allowed to participate were between 15 and 28 percent.²¹ Should we put on a pedestal the first assembly or the one that framed the 1973 Constitution? What allows us to assume that the previous generations had any greater validity or legitimacy to write the Constitution and control our destinies?

However, constitutions (like other political ideals) end up developing a life of their own—often resulting in consequences not envisaged by their creators. Hence, the Court saw the Constitution as carrying ‘salient features’ even if they were not laid down as un-amendable by the framers. Why did this happen? One view could be that the latest assumption of power by the Court is an exercise in political compromise and the sharing of space with other state institutions. It is no small matter that the Court decided to not interfere with Article 175-A, considering the

¹⁹ A.K. Brohi, *Fundamental Law of Pakistan* (Din Muhammad Press 1958) 39.

²⁰ David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010).

²¹ Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011) 114.

process made the appointments process more broad-based and brought in non-judicial members. Courts in Pakistan have, in the past, seen themselves as conducting a dialogue between the state and civil society²² and the assumption of power while foregoing its exercise could be seen in this light. However, even this explanation is problematic since neither civil society nor democracy is necessarily stronger as a result of this judgment. The four Justices who dismissed the petitions for lack of jurisdiction to hear challenges to constitutional amendments go to great lengths to remind us of the dark past of the court itself—as well as imploring us to be mindful of the fact that even values like the independence of judiciary in Pakistan are best safeguarded by safeguarding and strengthening democracy. Justice Saqib Nisar’s opinion for the ages makes a poignant observation that judicial independence in Pakistan was secured not by virtue of judicial sanction but a vibrant democratic culture, which challenged acts of a military dictator.

As pointed out in oral argument during the latest cases and also in individual opinions, the structure of our Constitution has undergone radical changes since its promulgation. Whether one looks at judicial appointments mechanism, powers of the President, Fundamental Rights, or provincial autonomy, our Parliament has over time changed the structure of the Constitution through successive amendments. Over time, the powers of the President vis-à-vis the Parliament started growing but were then cut down to facilitate substantive democracy—empowering people’s representatives instead of the Executive. Similarly, the Chief Justice of Pakistan could earlier be appointed by the President of Pakistan without consulting with anyone—compare this with the position today where the senior most Supreme Court Justice is now appointed. The matter of appointments of other Judges of the High Courts and the Supreme Court have also undergone substantial change with the insertion of Article 175-A²³ into the Constitution.

Should all constitutional amendments, therefore, be checked now on the touchstone of ‘salient features’? And who decides when something becomes a ‘salient feature’ of the Constitution? The right to a fair trial was incorporated through the 18th Amendment with the addition of Article 10-A. However, the superior courts

²² Paula Newberg, *Judging the State* (Cambridge University Press, 1995) 13.

²³ As per the new procedure, a Judicial Commission of Pakistan (‘JCP’) now sends recommendations to a constitutionally created Parliamentary Committee—manned by legislators from both Treasury and Opposition—which can accept or reject name of any candidate proposed by the JCP. If accepted by the Committee, the name is sent to the Prime Minister who then sends it to the President for appointment. Any reasons for rejection of a name are justiciable, i.e. can be challenged before the superior courts. A most relevant judgment is *Munir Hussain Bhatti, Advocate v Federation of Pakistan* PLD 2011 SC 308 and PLD 2011 SC 407.

have long interpreted the chapter on Fundamental Rights as well as Article 4 to mean that natural justice and a fair hearing was an essential requirement. Was the right to a fair trial always a ‘salient feature’ or did it become salient only after being expressly incorporated into the Constitution? This is not a rhetorical question. The plurality’s opinion in the 18th and 21st Amendment cases holds that ‘salient features’ are obvious from a reading of the Constitution and one need not look outside the Constitution to decipher them.²⁴ But there is always an invisible or ‘unwritten constitution’ that the courts are applying—general principles of law of constitutional importance, for instance, the general rule requiring natural justice. This tension is likely to come to the forefront in the coming years—unless the Court re-visits the latest enunciation of the ‘salient features’ doctrine.

A clear majority of the opinions in these cases also held that the Constitution is a document intended to cater to our needs for all times to come.²⁵ This language is, of course, based on precedent but this view of the Constitution deserves serious engagement and debate. Should we even see our Constitution as a document intended to cater to our needs for all times to come? What happens if these needs change and why should we not be able to re-arrange our priorities? Written constitutions of most nation-states have hardly proven to possess the virtue of longevity.²⁶ Pakistan itself is on its third constitution currently. Hence, why see the Constitution as something that is a ‘living breathing’ document, ever changing in its meaning? Our Constitution is not particularly difficult to amend, so why does its meaning need to change? Why can’t we change the words when needed? Why is it impermissible for the people’s representatives to re-write it from time to time? These questions must be debated, since part of the reason the ‘salient features’ doctrine of allowing courts to strike down constitutional amendments appeals to many people is the criticism that the Constitution can be amended too easily. Those championing the ‘salient features’ doctrine are often from the ‘living breathing document’ camp. Yet, the idea of the Constitution as a living, breathing document has been borrowed from the US—a written constitution that is particularly difficult to amend. So why see an easily amendable Constitution as ‘living breathing’? And, equally so, why not allow legislators to ensure that the substance of the Constitution can have different

²⁴ (n 10) Per Justice Azmat Saeed, para [180] of plurality’s ruling, sub-paras [(a) to (h)].

²⁵ Ibid, para [141], relying on *Sardar Farooq Ahmed Khan Leghari v Federation of Pakistan* PLD 1999 SC 57.

²⁶ *Lifespan of Written Constitutions*, Ginsburg, Elkins and Melton—available at <<http://www.yale.edu/macmillan/ruleoflaw/papers/Ginsburg-Lifespan-California.pdf>> accessed 24 August 2015.

conceptions of life breathed into it from time to time—as opposed to one decided by a largely unaccountable judiciary.

There is also the issue of the rhetorical discussion of how far the Parliament can go when amending the Constitution. Can it turn Pakistan into a monarchy, declare it secular, make military service compulsory, etc.? The judgments of Chief Justice Mulk, Justice Nisar and Justice Khosa decide these issues in clear terms by saying that there is no limitation on powers of the Parliament to amend the Constitution. Hence, they are asking us to turn to the political process and the politicians instead of unelected judges on the Supreme Court if we do not like a constitutional amendment. This view, no doubt, strengthens democracy.

The dissenting judgments, however, make much of the fact that the Attorney General could provide no satisfactory answer to the abovementioned questions about the potential extent of the Parliament's power to amend the Constitution. But while these questions have rhetorical appeal, they cannot be used to decide concrete cases. The question before the Supreme Court in these cases was not whether the Parliament's action of declaring Pakistan a monarchy was valid. That has not happened, and merely because of the political cost involved, no Parliament would probably do it. Reading the Constitution as a political document rather than just a legal one could have answered these questions. Was the court creating these strawmen to shoot them down so that it could expand its power? This is a charge that has been made and this is not entirely without merit. When an apex court changes the ground rules of politics, it will be seen as political. This is another likely fallout of the latest ruling and will affect the way the public sees the apex court.

One must also comment on the desirability of laying down the power to review constitutional amendments at this stage, even though the majority was not striking down any amendment. Why could the setting out of this power, if needed at all, not have waited? This is also an important question. I will, with respect, submit two possible reasons. One reason is that the apex court wanted to send out the message that while the judiciary will not become party to attempts to derail the democratic process, it will jealously guard its own turf. In this context, the new judicial appointments mechanism, as well as the trial of civilians before military courts, are particularly relevant. This was important from an institutional point of view and one can see force behind this reasoning. But this comes at a serious cost—the same institution that legitimised military dictators has now clipped the powers of the Parliament. That is the burden of history and will trigger debate. To be fair, however, the current Supreme Court cannot be expected to answer for all that their predecessors did. Hence they, from one perspective, have allowed the results of a

democratic process to stand while reserving an extraordinary power to be exercised in rare cases.

A second possible reason for setting out a power but reserving its use could be military courts. The Honourable Court could turn around and ask us, ‘What are you on about? We all know that the 21st Amendment happened because the military wanted it, not the civilians. And things may not stop here. What if they want these courts for Balochistan through a constitutional amendment? So, being realists we need an extra check in the system to ensure civilian supremacy. We do not love that we have to do it but so be it.’ From a hard-core realist’s point of view, this reasoning has serious merit. Of course, one could say that this is a slippery slope and where should the line be drawn? But everyone admits that the military’s push was the reason for the 21st Amendment. And keeping in view the civil-military imbalance, maybe this will be seen as an acceptable compromise for some. Furthermore, one could argue that by setting out the basics of the ‘salient features’ doctrine, the Supreme Court has arguably guarded against any tendency to push aside democracy and civilian form of government in the future. But we all know that Supreme Court judgments do not stop military dictators from tearing up the Constitution. Hence, it is important not to sugar-coat the serious erosion of the Parliament’s authority to amend the Constitution.

Conclusion

The 18th and 21st Amendment cases will be remembered in history for a number of reasons. One of them will be the re-defined notion of parliamentary sovereignty. Pakistan never had an unqualifiedly sovereign Parliament. Unlike England, our courts routinely strike down sub-constitutional legislation. However, the latest judgment means that even though the Constitution expressly excluded the judicial review of the substance of constitutional amendments, the superior courts can now examine them. Even if the people unanimously support an amendment, the Supreme Court has now assumed the power to review it. The debate does not end here and will continue. The existence of a doctrine will do no harm as long as the apex court exercises it tactfully to support democratic measures—even if it disagrees with the politics of such actions. But the existence of this doctrine will result in more litigation and many interesting, as well as potentially difficult, if not embarrassing, questions being raised about the legitimate scope of the judiciary’s power. The judgments of Chief Justice Nasir-Ul-Mulk, Justice Nisar and Justice Khosa should continue to remind us of the dangers of judicial supremacy.

The law before this judgment allowed the Parliament to have the final say as far as substance of constitutional amendments is concerned. After this ruling, it appears that the apex court will step in as a measure of last resort to guard against changes that fundamentally alter the bargain struck by the Constitution. In one way, the apex court gets to have the final say on what can go into or come out of the Constitution. Yet the standard for when the apex court will step in remains unclear. In terms of clarity, therefore, the plurality's ruling only tells us that there are limits but there is little guidance on the substance and reach of those limits. Those on the bench who disagreed with the court's assumption of such power are far clearer in their premise as well as guidance for the future. What is also clear is that the people, while having no way of holding the judiciary accountable, will look to the courts for the final word—with an uncertain standard.

How will governments in Pakistan now proceed with constitutional amendments? Will we see a referendum being called under Article 48(6) for important constitutional amendments? Will the President ask for an advisory opinion on whether any proposed amendments to the Constitution violate the 'salient features' doctrine? The answer lies in our politics and discourse. Only one thing is certain: as far as constitutional law is concerned, the debates will only get more exciting.