Amending Constitutional Standards of Parliamentary Piety in Pakistan? Political and Judicial Debates

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Introduction

Notwithstanding extensive engagement with so-called 'basic structure' jurisprudence, which the Supreme Court of India has used to strike down constitutional amendments seen as violating the essential features or implied basic structure of India's Constitution, the Supreme Court of Pakistan has never struck down any constitutional amendment duly promulgated by parliament. This chapter nevertheless considers an emerging debate regarding the possibility of unconstitutional constitutional amendments (UCA) in Pakistan. Focusing on what the Supreme Court of Pakistan has called the 'salient' features of Pakistan's Constitution, with particular reference to underpinning *Islamic* features, this debate has divided politicians and judges alike.

Among politicians, one strain of this debate has focused on a constitutional clause known as Article 62(1)(f). Part of an omnibus constitutional amendment known as the Eighth Amendment—introduced in 1985 by a parliament convened under Pakistan's third military dictator, General Zia-ul-Haq—this clause outlines some of the standards qualifying individuals to stand for election and serve as parliamentarians. Inter alia, it requires such individuals to remain *ameen* or trustworthy in a religious (Qur'anic) sense.[1] A July 2017 Pakistan Supreme Court decision disqualifying Prime Minister Nawaz Sharif for failing to qualify as ameen, however, reignited a debate about the possibility of removing what some described as a link between 'vague' Islamic norms and eligibility for parliamentary election.[2] Today, cross-party support for repealing Article 62(1)(f) is strong.

At the same time, turning to the judicial side of the debate, a number of questions have emerged regarding the *limits* of parliament's amending powers. These questions have intensified since an August 2015 Supreme Court judgment known as *District Bar Association Rawalpindi v Federation of Pakistan*.[3] This judgment did not strike down any constitutional amendments; it actually upheld Pakistan's Eighteenth, Nineteenth, and Twenty-First Amendments. But, for the first time ever, a Supreme Court majority held that any duly promulgated constitutional amendment seen as violating the salient features or basic structure of Pakistan's Constitution could and should be annulled. (In previous judgments, this was a minority view. And, in *District Bar Association*, the majority found no specific violation.) Inter alia, building on several previous judgments, the Supreme Court cited Pakistan's 'parliamentary form of government *blended with Islamic provisions*' as an unamendable salient feature of Pakistan's constitution. It may be that this reference linking a 'parliamentary' form of government to 'Islamic' provisions could limit the future amendability of Article 62(1)(f).

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[1] The term 'ameen' refers to someone who is honest, reliable, or trustworthy—see for example Qur'an 28:26.
[2] *Imran Ahmed Khan Niazi v Mian Muhammad Nawaz Sharif* (PLD 2017 SC 692).
[3] *District Bar Association Rawalpindi v Federation of Pakistan* (PLD 2015 SC 401).

With respect to parliament's power of constitutional amendment, including amendments touching on Article 62(1)(f), the tussle between parliamentarians and judges has been particularly fraught since one portion of Pakistan's Eighteenth Amendment, known as Article 175A, sought to shift control over the *appointment* of superior-court judges—that is, both Supreme Court and provincial High Court judges—from the superior judiciary to parliament. Just six months after the Eighteenth Amendment was promulgated in April 2010, however, a preliminary Supreme Court short order known as *Nadeem Ahmed v Federation of Pakistan* responded to Article 175A, citing 'judicial independence' with respect to judicial appointments as yet another unamendable salient feature of the constitution.[4] This in turn led the country's parliament to 'reconsider' its approach to Article 175A with a further amendment—Pakistan's Nineteenth Amendment—restoring a leading role for the Supreme Court vis-à-vis all superior-court appointments. As such, there was no practical need for the Supreme Court to strike down parliament's initial approach to Article 175A when its full judgment (*District Bar Association Rawalpindi* 2015) was issued five years later.

In effect, the Supreme Court of Pakistan has used its articulation of (unamendable) constitutional 'salient features' to craft an understanding in which (a) judges are empowered to assess the Qur'anic qualifications of individual parliamentarians (Eighth Amendment: Article 62(1)(f)) even as (b) parliamentarians are *not* empowered to assess the qualifications of individual judges (Eighteenth/Nineteenth Amendments: Article 175A). This understanding of the constitution's salient features—'judicial independence' on the one hand; a 'parliamentary form of government blended with Islamic provisions' on the other—has, in many ways, clarified the *institutional* underpinnings of an ongoing debate regarding the religious parameters of parliamentary democracy in Pakistan.

If, responding to the disqualification of Prime Minister Nawaz Sharif and several other politicians described as insufficiently ameen, Pakistani politicians were to amend or repeal Article 62(1)(f), would Pakistan's Supreme Court intervene to annul that amendment as a salient-feature violation of Pakistan's 'parliamentary form of government *blended with Islamic provisions*'? In what follows I combine the historical, political, and judicial elements of this question with a small set of interviews targeting senior political and judicial figures to illuminate the link between globally familiar forms of basic-structure jurisprudence and emerging debates regarding the parameters of Islamic constitutionalism in Pakistan.

Constitutional Basic Structure: From India to Islam

Even before India's Supreme Court clarified its notion of constitutional 'basic structure' in 1973, debates regarding the *relative* power of parliament and the courts, vis-à-vis constitutional amendments, were travelling back and forth between India and Pakistan.

Within India's Constituent Assembly (1947-49), the dawn of these debates can be found in efforts to abandon British notions of unfettered parliamentary sovereignty in favour of a broadly American commitment to enumerated and enforceable rights. These efforts

[4] *Nadeem Ahmed v Federation of Pakistan* (PLD 2010 SC 1165).

prompted numerous questions about the degree to which parliament's power of constitutional amendment, enshrined in Article 368 of India's Constitution, might extend to amending or abrogating basic rights—and, then, how India's Supreme Court might respond to any such manoeuvre. In fact, India's first constitutional amendment, seeking to protect government land reforms from any form of judicial review based on claims of inconsistency with a fundamental right to property, was reviewed—and subsequently upheld—in a Supreme Court case known as *Shankari Prasad v Union of India* (1951).[5]

A later case known as *I.C. Golak Nath v State of Punjab* (1967), however, offered a different view.[6] In this case, the Supreme Court cited a Pakistan Supreme Court case known as *Fazlul Quader Chowdhry v Muhammad Abdul Haque* (1963), which considered the 'essential features' and 'basic structure' of Pakistan's constitution.[7] Specifically, *I.C. Golak Nath* held that, henceforth, even duly promulgated constitutional amendments could not 'take away' or 'abridge' the essential features of India's constitution, including fundamental rights.

India's parliament, however, did not embrace the Court's decision in *I.C. Golak Nath*. In fact, India's parliament promulgated the Twenty-Fourth Amendment (1971) asserting that parliament's amending power was *not* limited by any articulation of fundamental rights. Yet, two years later, this back-and-forth prompted India's landmark basic-structure decision in *Kesavananda Bharati Sripadagalvaru v State of Kerala* (1973).[8] In this case, India's Supreme Court held that, although India's parliament was empowered to 'amend' any provision of the constitution, the Supreme Court was empowered to strike down any amendment that might appear to 'abrogate' whatever the Court chose to define as the (implied) basic structure of India's constitution, including (a) federalism, (b) a parliamentary form of government, (c) fundamental rights (including a 'secular' approach to religion-state relations), and (d) judicial independence.

A similar debate emerged in Pakistan, but this time India's focus on *fundamental rights* was set aside in favour of a debate regarding the Supreme Court's power—possibly in conjunction with an associated 'Mulla Board'—to review parliamentary actions for their compliance with *Islamic injunctions*.[9] In fact, one member of Pakistan's first Constituent Assembly (1947-54), Abdulla al-Mahmood, criticised the Indian Supreme Court decision in *Shankari Prasad* (1951) for its claim to provide parliament with unfettered powers of constitutional amendment. Al-Mahmood argued that, in Pakistan, the Federal Court (later, Supreme Court) must be empowered to review even duly promulgated

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[5] *Shankari Prasad v Union of India* (AIR 1951 SC 450).
[6] *I.C. Golak Nath v State of Punjab* (AIR 1967 SC 1643).
[7] *Fazlul Quader Chowdhry v Muhammad Abdul Haque* (PLD 1963 SC 486) nullified an order issued by Pakistan's first dictator, General Ayub Khan, allowing cabinet members to serve as parliamentarians despite the 'presidential' form of government Ayub introduced in Pakistan's second constitution (1962: Article 104).
[8] *Kesavananda Bharati Sripadagalvaru v State of Kerala* (AIR 1973 SC 1461).
[9] See Leonard Binder, *Religion and Politics in Pakistan* (California, 1961), 104, 169, 236, 265, 279, 289-91, 324, 337-8, 342.

constitutional provisions to ensure they were not 'repugnant' to the injunctions of the Qur'an and *sunnah* (i.e. prophetic tradition).[10]

In Pakistan, this link between notions of constitutional basic structure and 'Islam' is often associated with a feature of the constitution known as the Objectives Resolution. Approved by Pakistan's first Constituent Assembly in 1949, then preserved as a preamble in Pakistan's first (1956), second (1962),[11] and third (1973) constitutions, this Resolution was recast as a substantive article (Article 2A) via Pakistan's Eighth Amendment under General Zia-ul-Haq in 1985. The Resolution states that, while 'sovereignty over the entire universe belongs to Almighty Allah' and the authority of Pakistan's people will be exercised within 'the limits prescribed by Him' (as 'a sacred trust'), the citizens of Pakistan will nevertheless exercise their authority via 'chosen representatives' working alongside an 'independent judiciary'. Within this Resolution, the balance between Pakistan's 'parliamentary form of government' and its commitment to 'Islamic provisions' is clear.

Even apart from this Objectives Resolution, however, Pakistan's Constitution contains several references linking parliamentary authority to Islam. Its list of non-justiciable 'Principles of Policy' notes that 'steps shall be taken to enable … Muslims … to order their lives in accordance with the fundamental principles … of Islam' (1956 'Directive Principles': Article 25; 1962 'Principles of Policy': Article 8(1)(1); 1973: Article 31). A further portion entitled 'Islamic Provisions' states that legislation considered 'repugnant' to the injunctions of Islam will be barred—although, having said this, a strictly *advisory* Council of Islamic Ideology was established by the President to support the country's National and Provincial Assemblies with compliance (1956: Article 198; 1962: Article 204; 1973: Articles 227-30). Pakistan's president and prime minister are, in turn, constrained by a series of oaths ensuring that they must be 'Muslims' (1956: Article 32; 1962: Article 19; 1973: Article 41)—indeed, after 1973, when Islam was finally specified as Pakistan's state religion (Article 2), that neither the president nor the prime minister would belong to a heterodox minority known as the Ahmadiyya.[12]

In 1985, the terms of Article 62 were also adjusted via Pakistan's Eighth Amendment to stipulate that Muslim parliamentarians must have 'adequate knowledge of Islamic teachings' and 'practice [the] obligatory duties prescribed by Islam' while 'abstain[ing] from major sins' (Article 62(1)(e))—indeed, that *any* parliamentarian facing a court judgment regarding dishonesty would stand disqualified for failing to meet the required standard of being 'ameen' (Article 62(1)(f)).

The Eighth Amendment also moved beyond parliamentary to judicial power, supplementing the advisory work of Pakistan's Council of Islamic Ideology with *binding*

[10] *Constituent Assembly Debates* (22 October 1953), 317.

[11] The language of the preambular Objectives Resolution was diluted in Pakistan's second Constitution (1962) but restored to its original form in a First Amendment one year later.

[12] The Ahmadiyya see themselves as Muslims; they recognise a late-nineteenth-century religious reformer named Ghulam Ahmad who claimed to receive revelations like a prophet, but in 1974 Pakistan's Second Amendment followed the constitution's Third Schedule in defining a 'Muslim' as one who 'does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet … after Muhammad' (Article 260).

powers for a new Federal Shariat Court and a 'Shariat Appellate Bench' of the Supreme Court (Article 203D/E). Both courts were empowered to decide whether any law—apart from Muslim personal laws, various fiscal and financial laws, and, crucially, *the constitution itself*—might be deemed 'repugnant' to Islam, rendering such laws ineffective until an alternative could be framed by Pakistan's elected representatives on the orders of the president or, in the case of provincial laws, the president's appointed governor.

Again, Abdulla al-Mahmood urged Pakistan's first Constituent Assembly to ensure that Pakistan's highest court was empowered to test for Islamic repugnancy up to and including the Constitution itself. But, when Pakistan's first constitution emerged in 1956, this view was set aside. Instead, recalling the views articulated by the Indian Supreme Court in *Shankari Prasad* (1951), Pakistan's first Constitution stipulated that any amendment duly promulgated by parliament would 'not be questioned in any court' (Article 216).[13]

This clause regarding unfettered parliamentary powers of constitutional amendment was removed in Pakistan's second and third constitutions (1962: Articles 208-209; 1973: Articles 238-239). But, in 1985, Pakistan's Eighth Amendment imported two provisions directly from India's constitution to restore and strengthen it. Article 239(5)—in India, Article 368(4)—specified that 'no amendment of the Constitution shall be called in[to] question by any court'. Article 239(6)—in India, Article 368(5)—noted that, 'for the removal of doubt, … there is no limitation whatever on the power of … parliament to amend any of the provisions of the Constitution'.[14] It is worth noting that India's Forty-Second Amendment (1976), which introduced these two provisions, was struck down by the Indian Supreme Court in a case known as *Minerva Mills Ltd v Union of India* (1980).[15] Specifically, *Minerva Mills* read these provisions as a violation of 'judicial independence' (and, thus, a violation of India's constitutional 'basic structure'). But, in Pakistan, both provisions remain in place.

In Pakistan, however, these two provisions prompted a number of questions regarding the degree to which parliament's 'unlimited' powers of constitutional amendment might extend to Islamic provisions. These questions are particularly interesting insofar as (a) parliamentary considerations of Islamic repugnancy are *not* bound by the advice of Pakistan's Council of Islamic Ideology and (b) the binding power of Pakistan's Federal Shariat Court does *not* extend to an assessment of constitutional provisions. As such, parliament's power to shape and reshape ostensibly 'Islamic' constitutional provisions would appear to remain quite unlimited, both with respect to the Council of Islamic

[13] Pakistan's second Constituent Assembly featured a sovereign parliament informed by an advisory Council of Islamic Ideology (Binder, 371). See also G.W. Choudhury, 'Constitution-Making Dilemmas in Pakistan', *Political Research Quarterly* 8:4 (1955), 589-600; I.H. Qureshi (then Education Minister) noted that 'the legal Sovereign shall be the Muslim Law, but its definition shall be in the hands of a legislature representing the people', 591.
[14] In the Constitution of India (1950), Article 368 stated that 'parliament may, in exercise of its constituent power, amend … any provision of this Constitution'. India's Forty-Second Amendment added that '[n]o amendment of this Constitution … shall be called in[to] question in any court on any ground' (Article 368-4) and, '[f]or the removal of doubts, … there shall be no limitation whatever on the constituent power of parliament to amend … the provisions of this Constitution' (Article 368-5).
[15] *Minerva Mills Ltd v Union of India* (1980 2 SC 591).

Ideology and with respect to Pakistan's Federal Shariat Court. In fact, even *after* the 1962 removal of Article 216 (amendments will 'not be questioned in any court'), but *before* the 1985 introduction of Article 239(6) (there is 'no limitation' whatsoever on parliament's amending power)—Pakistan's Supreme Court continued to respect parliament's power to shape Pakistan's Constitution, including its Islamic provisions.[16]

In the Lahore High Court case of *Zia-ur-Rahman v The State* (1972), for instance, followed by a Supreme Court appeal known as *The State v Zia-ur-Rahman* (1973), the courts considered whether parliament was empowered to introduce changes in Pakistan's third Constitution (1973) that might be described as 'repugnant to Islam'.[17] In this context, Justice Afzal Zullah of the Lahore High Court focused on Pakistan's Objectives Resolution, describing it as a 'supra-constitutional instrument' that was 'so fundamental' it '[could] not … be repealed or abrogated'.[18] But, on appeal, the Supreme Court Chief Justice, Hamood-ur-Rahman, held that, while the Objectives Resolution could be said to provide some type of constitutional *grundnorm*, it was still just a constitutional preamble. As such, Rahman noted that this (non-justiciable) Resolution could *not* be used to strike down or test any other part of the constitution. In fact, departing from *I.C. Golak Nath* (1967) and the impending logic of *Kesavananda* (1973) in India, Chief Justice Rahman went out of his way to stress that, in Pakistan, the Supreme Court had 'never claimed … the right to strike down any provision of the constitution'.[19]

This deference to parliamentary power vis-à-vis constitutional amendments, including amendments pertaining to Islam, was further reiterated in cases like *Islamic Republic of Pakistan v Abdul Wali Khan* (1976) ('this court [remains] committed to the view that "the judiciary cannot declare any [constitutional] provision …to be invalid or repugnant"') as well as *Fauji Foundation v Shamimur Rehman* (1983) (parliament's 'amending power, unless it is restricted, can amend, vary, modify or repeal any provision of the Constitution').[20] It also appeared in cases like *Federation of Pakistan v United Sugar Mills* (1977), which reviewed Pakistan's Fourth Amendment (regarding, inter alia, reserved parliamentary seats for non-Muslims) before accepting it precisely insofar as it was duly promulgated by parliament.[21] In fact, until the Supreme Court's preliminary short order reviewing Pakistan's Eighteenth Amendment in *Nadeem Ahmed* (2010) and, then, its final decision in *District Bar Association Rawalpindi* (2015), the Supreme Court consistently deferred to parliament's amending power.

Even in *District Bar Association Rawalpindi* (2015), the Court's majority did not strike down any amendment duly promulgated by parliament. Instead, the majority simply indicated that, henceforth, such amendments could and should be struck down if, in the eyes of the

[16] See the Second Amendment to Pakistan's third constitution, which removed state recognition for Ahmadis' fundamental right of religious self-identification as 'Muslims' (1974), as well as the Fifth and Sixth Amendments, which altered patterns of judicial appointment (1975).
[17] *Zia-ur-Rahman v The State* (PLD 1972 Lahore 382); *The State v Zia-ur-Rahman* (PLD 1973 SC 49).
[18] *Zia-ur-Rahman v The State* (1972).
[19] *The State v Zia-ur-Rahman* (1973).
[20] *Islamic Republic of Pakistan v Abdul Wali Khan* (PLD 1976 SC 57); *Fauji Foundation v Shamimur Rehman* (PLD 1983 SC 457).
[21] *Federation of Pakistan v United Sugar Mills* (PLD 1977 SC 397).

Court, they were found to alter the constitution's essential features or abrogate its basic structure, including its 'parliamentary form of government blended with Islamic provisions'.

Constitutional Amendments: From the Eighth (1985) to the Eighteenth (2010)

Within Pakistan, debates regarding unconstitutional constitutional amendments are not rooted in a history of judicial annulments. Instead, they grow out of enduring questions regarding the degree to which parliament's amending power might extend to 'Islamic' provisions and, then, whether a parliamentary push to *amend* those provisions might lead Pakistan's Supreme Court to move away from its traditional deference to parliament's amending powers, effectively abandoning its 'descriptive' account of the constitution's salient features in favour a more robust 'proscriptive' approach in which amendments seen as *violating* those features are annulled.[22] So far this has not occurred. But, since 2015, politicians and judges have begun to consider whether it might.

Two closely related amendments have shaped the emerging debate. The first is Pakistan's Eighth Amendment (1985), which recast the Objectives Resolution as a substantive constitutional article (Article 2A) and indemnified several executive orders introduced by General Zia-ul-Haq after his military coup in 1977. This amendment also incorporated several provisions seeking to check the power of Pakistan's parliament—for example, Article 58(2)(b), which endowed Pakistan's president with discretionary powers to dissolve Pakistan's parliament as a whole,[23] as well as provisions affecting individual parliamentarians, including Article 62(1)(f).

In an effort to stem the anti-democratic effects of this Eighth Amendment, however, the second relevant amendment is the Eighteenth Amendment (2010), which removed Article 58(2)(b) but left several references to Islam, including Article 62(1)(f), intact. As such, the constitutional threat facing Pakistani parliamentarians has shifted: from the discretionary power of Pakistan's head of state or president under Article 58(2)(b) (1947-1973, 1985-2010) to specific 'Islamic' standards adjudicated by Pakistan's courts via Article 62(1)(f) (1985-present).

The Eighth Amendment, the Eighteenth Amendment, and Islam

To place these elements in context, it is important to note that Pakistan's third Constitution (1973) was suspended following a military coup led by General (later President) Zia-ul-Haq in 1977. Zia ruled by decree until 1985, when non-party elections ushered in a new parliament that, in exchange for ending martial law, restored Pakistan's third Constitution alongside an omnibus Eighth Amendment. Inter alia, this amendment recast Pakistan's preambular Objectives Resolution as Article 2A while restoring Article 58(2)(b) and adding Article 62(1)(f). In fact, to protect these alterations from any judicial review, the Eighth

[22] See Waqqas Mir, 'Saying Not What the Constitution Is … But What It Should Be: Comment on the Judgment on the 18th and 21st Amendments to the Constitution' (2015) 2 *LUMS Law Journal* 64, 69.

[23] Article 58(2)(b) was derived from Article 19(2)(c) of the Government of India Act (1935), which allowed Britain's colonial Governor-General to dissolve India's Federal Assembly at his 'discretion'. After independence, this power was transferred to Pakistan's president in the country's first and second constitutions (1956: Article 50; 1962: Article 23). It was removed in 1973 but restored in 1985 (58(2)(b)).

Amendment also imported Articles 239(5) and 239(6) from India. These articles clarified that, henceforth, no amendment should be 'called in[to] question by any court' as there was 'no limitation' whatsoever on the amending power of parliament (at that time, a non-party parliament still dominated by General/President Zia).

During the late-1980s and 1990s, however, even *after* the death of General Zia, Pakistan's presidents routinely exercised the discretionary powers in Article 58(2)(b). Zia himself dissolved the government of Prime Minister Mohammad Khan Junejo in 1988. And, in 1990, Zia's successor President Ghulam Ishaq Khan dissolved the government of Pakistan People's Party (PPP) Prime Minister Benazir Bhutto. In 1993, President Khan went on to remove Pakistan Muslim League (PML-N) Prime Minister Nawaz Sharif. And, in 1996, Khan's successor Farooq Leghari removed Benazir Bhutto (again). When Nawaz Sharif returned to power in 1997 with a huge single-party majority, however, he used that majority to repeal Article 58(2)(b) via Pakistan's Thirteenth Amendment. Unfortunately, having repealed Article 58(2)(b), he was not removed by constitutional means but ousted in a military coup led by General Pervez Musharraf two years later. After cobbling together a new parliament in 2002, however, General (President) Musharraf pushed through a Seventeenth Amendment restoring Article 58(2)(b).

General (President) Musharraf later tried to sack Pakistan's Supreme Court Chief Justice, Iftikhar Muhammad Chaudhry, after Chaudhry entertained a case challenging Musharraf's bid to stand for re-election as president without first holding National and Provincial Assembly elections to create a fresh Electoral College for that purpose. Chaudhry successfully challenged Musharraf's attempt to remove him.[24] But, just a few months later, anticipating an adverse Supreme Court judgment regarding an element of the Seventeenth Amendment allowing Musharraf to serve, simultaneously, as president and Chief of the Army Staff (COAS), Musharraf declared a state of emergency (November 2007). Suspending the Constitution and postponing elections scheduled for January 2008, Musharraf removed Chief Justice Chaudhry and several other judges from their posts.

Protests led by district lawyers subsequently prompted Musharraf to resign as COAS. And, following the assassination of Benazir Bhutto (December 2007), elections were finally held in February 2008. Led by Benazir Bhutto's widower, Asif Ali Zardari, the PPP emerged from these elections as the leader of a ruling coalition alongside PML-N leader Nawaz Sharif, with both parties vowing to impeach Musharraf (still serving as president) and reinstate the judges he had sacked. Unfortunately, fearing that Chief Justice Chaudhry might revive a set of corruption cases targeting Zardari, the government proceeded with its impeachment campaign against Musharraf (prompting Musharraf to resign from the presidency in August 2008, after which Zardari was sworn in as president) *without* reinstating Chaudhry. This failure to reinstate Chief Justice Chaudhry, however, led the PML-N to abandon the PPP-led governing coalition and support a further round of protests until Chaudhury was finally reinstated in March 2009.[25]

In an enduring push to shore up the power of Pakistan's parliament after several years of military dictatorship, however, both the PPP and the PML-N came together in April 2010 to

[24] *Chief Justice of Pakistan v President of Pakistan* (2007 PLD SC 578).
[25] Iftikhar Muhammad Chaudhry continued to serve as Chief Justice until his retirement in December 2013.

support Pakistan's Eighteenth Amendment, which, as noted above, removed Article 58(2)(b) even as it enhanced parliament's power vis-à-vis the appointment of judges (Article 175A). Steering clear of the Constitution's 'Islamic' features, however, the Eighteenth Amendment did *not* remove or substantially alter Article 62(1)(f).[26] In fact, even as it sought to restore key features of Pakistan's 1973 constitution, the final text appeared to accommodate an increasingly religious strand of public opinion. Specifically, PML-N leader Nawaz Sharif and Islamist parties like the Jama'at-e-Islami positioned themselves as defenders of religious values, resisting any alteration of Zia's ostensibly 'Islamizing' amendments.[27] In short, the Eighteenth Amendment removed a threat posed by the discretionary powers of Pakistan's president (Article 58(2)(b)) even as it retained a broadly 'Islamic' threat tied to the power of the judiciary (Article 62(1)(f)).

Political versus Judicial Power: 'District Bar Association Rawalpindi'

Mindful of the role that Pakistan's Supreme Court had played in accepting earlier military coups,[28] as well as previous civilian efforts to massage the appointment of judges,[29] one key part of the Eighteenth Amendment sought to clarify parliament's role in the appointment of both High Court and Supreme Court judges.[30] Specifically, Article 175A created a Judicial Commission with a mix of judicial and non-judicial members to prepare a list of nominees for consideration by an eight-member Parliamentary Committee.[31] This Parliamentary Committee was empowered to *reject* the Judicial Commission's recommendations—citing reasons that were, nevertheless, justiciable.

Alongside a Twenty-First Amendment (2015) introducing time-limited military courts to try civilians accused of religious terrorism,[32] however, judicial concerns regarding this appointment process—and its implications for 'judicial independence'—prompted the landmark basic-structure decision known as *District Bar Association Rawalpindi* (2015). As the Supreme Court pointed out, both the Eighteenth Amendment and the Twenty-First Amendment raised 'a common … question', namely, 'whether there are any limitations on the powers of the Parliament to amend the Constitution' and, faced with a challenge to the independence of the judiciary (read as a constitutional 'salient feature'), 'whether the Courts possess jurisdiction to strike down a constitutional amendment' (Page 10, Para 5; Page 78, Paras 67, 69). Previously, the Supreme Court had responded to such questions with

[26] In their 'Notes of Reiteration on the Constitutional Reform Package' (Annex D-II, 21 March 2010), Awami National Party leaders Haji Mohammad Adeel and Afrasiab Khattak argued that, within Article 62, 'Sub Clauses (d), (e), (f), and (h) shall be omitted'.

[27] 'Nawaz Himself Supported Article 62: Khursheed', *Business Recorder*, 14 April 2018.

[28] See *The State v Dosso* (1958 PLD SC 533); *Begum Nusrat Bhutto v Chief of the Army Staff and Federation of Pakistan* (1977 PLD SC 657); *Zafar Ali Shah v Pervez Musharraf* (PLD 2000 SC 869).

[29] See fn17, above.

[30] Article 175A responded to a case known as *Al-Jehad Trust* (PLD 1996 SC 324) wherein the Supreme Court tied the process of superior-court appointments to judicial independence as a 'salient feature' of the constitutional 'basic structure'.

[31] The Judicial Commission included the chief justice, two further Supreme Court justices, and a retired chief justice or Supreme Court justice plus the Federal Law Minister, the Attorney General, and a senior lawyer nominated by the bar. The Parliamentary Committee included four members from Pakistan's National Assembly and four from the Senate distributed evenly between the government and opposition benches.

[32] The Twenty-First Amendment's military courts were subject to renewal every two years (renewed in 2017; lapsed in 2019).

a definitive 'no'.[33] But, in *District Bar Association Rawalpindi*, the Court began to modify this view.

To understand the Court's change of focus, it is necessary to revisit the preliminary short order known as *Nadeem Ahmed* (2010), which urged parliament to 'reconsider' its approach to Article 175A by expanding the Judicial Commission with two further Supreme Court justices (thus creating an absolute Supreme Court majority). Issued unanimously by a full bench of the Supreme Court on 30 September 2010, *Nadeem Ahmed* was led by Chief Justice Chaudhry, who, according to one senior lawyer, was 'at the peak of his powers' having just been reinstated with support from a nationwide grassroots protest movement.[34]

In fact, two of the retired Supreme Court chief justices I interviewed explained that, for nearly three days before its *Nadeem Ahmed* order, the Court seriously considered striking down Article 175A; but, instead, it returned to its traditional focus on parliament's power of constitutional amendment and urged the parliament to avail its privileges under a special provision *within* the Eighteenth Amendment (Article 267A) allowing members to 'reconsider' their work to remove any difficulties with a simple majority of both houses. In other words, the Court opted to avoid an annulment in favour of a staged approach—one that, according to both former chief justices, recognised (a) the importance of reinforcing parliamentary power after nearly ten years of dictatorship as well (a) the broad parliamentary consensus underpinning the Eighteenth Amendment. If parliament had *refused* to heed the Court's recommendations, however, both chief justices suggested that Pakistan's first-ever basic structure annulment was very much in play.

It is impossible to know whether this historical, political, and judicial push in the direction of basic structure jurisprudence, underpinned by a popular chief justice with an activist judicial personality (i.e. Chief Justice Chaudhry), would have emerged without the momentum surrounding the 2007-09 Lawyers Movement. However, we do know that parliament's Nineteenth Amendment accommodated the unanimous recommendation in *Nadeem Ahmed*, thus removing any need to nullify Article 175A when the Eighteenth Amendment was fully reviewed in *District Bar Association Rawalpindi* five years later. As Khurshid Ahmad from the Jama'at-e-Islami—another member of the Parliamentary Committee on Constitutional Reforms in 2010—told me, 'the tone and temper of the judiciary during that period, particularly [that of Chief] Justice Chaudhry, was such that we didn't want a clash'. As a result, he explained, parliament simply 'conceded'.[35]

It is, in many ways, difficult to read this pivotal moment as a simple clash of institutions: legislature vs. judiciary. Politically, the case of *Nadeem Ahmed* that prepared the ground for *District Bar Association Rawalpindi* was clearly underpinned by a powerful pro-democracy protest movement—a movement focused not only on the authority and independence of

[33] In *Pakistan Lawyers Forum* (2005 PLD SC 719), the Court stressed 'almost three decades of settled law to the effect that even though there were certain Salient Features of the Constitution, 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' (Para 57).

[34] Interview, Feisal Naqvi, 29 September 2020.

[35] Interview, Khurshid Ahmed, 31 October 2020. One of the Supreme Court judges I intervened described this parliamentary 'concession' as a moment of 'political sagacity', recognising that, in case we don't defer to the Supreme Court reference, it could be challenged [i.e. annulled]'.

the judiciary, but also, on the restoration of a charismatic chief justice. The politics, as such, were not merely principled; they were also highly personalised.

Essential Features: From 'District Bar Association Rawalpindi' to Islam

The decision in *District Bar Association Rawalpindi* ran to more than 900 pages. Four Supreme Court justices stressed the presence of Articles 239(5) and 239(6) and maintained that there was *no constraint whatsoever on parliament's power to amend Pakistan's constitution*: in short, neither the Eighteenth nor the Nineteenth Amendment (nor the Twenty-First) could be struck down.[36] In fact, responding to those who asked whether parliament could go so far as to amend 'constitutional provisions regarding [an] Islamic way of life and Islam being the State religion', Justice Asif Saeed Khosa wrote that 'Islam is not just … a salient feature of the Constitution' but 'a matter of faith transcending any constitutional dispensation', before immediately pivoting to a specific defence of parliament's unfettered amending powers: 'if at some future stage the people of this country have a change of heart or mind' with respect to such provisions, he noted, 'the will of the people will have its way and the aspirations of yore … may not be able to shackle it' (Para 6).

Still, others embraced a new approach. Justice Jawwad S. Khwaja, for instance, noted that while Articles 239(5) and 239(6) might oust the 'courts' from any review of duly promulgated amendments, they did not prevent the country's *highest* court, that is, the Supreme Court, from defending the constitution's 'basic structure' (Para 18). In fact, *rejecting* the Court's history of deference to parliament's power of constitutional amendment, Justices Ejaz Afzal Khan, Ijaz Ahmed Chaudhry, and Dost Muhammad Khan built on Khwaja's view to support an annulment of the Eighteenth Amendment, the Twenty-First Amendment, or both. Justices Ejaz Afzal Khan and Ijaz Ahmed Chaudhry were particularly keen to stress the 'Islamic' underpinnings of Pakistan's constitutional basic structure.[37]

In the end, however, eight justices speaking for the Court's majority sought to carve out a certain middle ground. While recognising the Court's power to annul amendments that appeared to conflict with the constitution's salient features, they chose to uphold the Eighteenth/Nineteenth and Twenty-First amendments as duly promulgated changes that were *consistent* with the constitution's salient features: 'Parliament, in view of Articles 238 and 239, is vested with the power to amend the Constitution as long as the Salient Features of the Constitution are not repealed, abrogated, or substantively altered', they noted.[38] But, having said this, they stressed that the Court was still empowered 'to examine … any Constitutional Amendment so as to determine whether any of the Salient Features … ha[d] been repealed, abrogated or substantively altered'. And, then, turning to the case at hand, they argued that, 'in view of the provisions of the 19th Constitutional Amendment', Article 175A 'd[id] not offend against the Salient Features'.[39]

[36] The four justices were Asif Saeed Khosa, Nasir-ul-Mulk, Mian Saqib Nisar, and Hameed-ur-Rehman.
[37] See also the *District Bar Association Rawalpindi* opinion by Justice Sarmad Jalal Osmany.
[38] The eight justices were Shaikh Azmat Saeed, Umar Ata Bandial, Sarmad Jalal Osmany, Gulzar Ahmed, Mushir Alam, Maqbool Baqar, Anwar Zaheer Jamali, and Amir Hani Muslim.
[39] See the *District Bar Association Rawalpindi* opinion by Justice Jawwad S. Khwaja (Para 96).

Before *District Bar Association Rawalpindi* (2015), a majority within the Court had never favoured striking down a duly promulgated constitutional amendment. But in 2015 this changed, prompting numerous questions regarding future constitutional amendments—including those touching on Islamic provisions. If, in keeping with the constituent powers and procedures outlined in Article 239(5) and 239(6), Pakistan's parliament were to move beyond the realm of 'judicial independence' (Article 175A) to consider an amendment touching on 'Islamic provisions' (Article 62(1)(f)), would Pakistan's post-2015 Supreme Court consider nullifying that amendment as an essential-features violation of the constitution's parliamentary form of government '*blended with Islamic provisions*'?

'Islamic' Constraints on Parliament's Amending Power?

Decades before, in the case of *Zia-ur-Rahman* (1973), Pakistan Supreme Court Chief Justice Hamood-ur-Rahman noted that preambular references to Islam in Pakistan's Objectives Resolution could *not* be used to test other parts of the constitution. But, then, as a result of this judgment, Pakistan's Eighth Amendment (1985) elevated the Objectives Resolution to the status of a substantive article within the constitution itself (Article 2A), leading Justice Tanzil-ur-Rahman of the Sindh High Court to hold, in *Bank of Oman Ltd v East Trading Co. Ltd.* (1987 Karachi), that '[a]ny provision of the constitution … found repugnant to [Article 2A]' could be 'declared … as void'.[40] In fact, Rahman went even further in the case of *Irshad H. Khan v Parveen Ijaz* (1987), noting that Article 2A's reference to 'the sovereignty of Almighty Allah' should be seen as controlling the rest of the constitution.[41]

Still, this high court push for a 'proscriptive' basic structure reading of Article 2A rooted in references to the 'sovereignty' of Allah and the 'limits' prescribed by Him invariably failed in the Supreme Court. In *Hakim Khan v Government of Pakistan* (1992), for instance, the Supreme Court considered Pakistan's Qisas and Diyat Ordinance (1990), which provided for an 'Islamic' approach to retribution in cases of physical injury as well as monetary compensation for murder.[42] In Islamic law, those who suffer injury, in addition to the heirs of murder victims, are empowered to pardon offenders. But in Pakistan, some argued that Article 45 of the constitution, which gave the president unlimited powers of pardon, cut against Article 2A's references to injunctions 'set out in the Holy Qur'an and Sunnah'. In fact, pointing to a possible clash between Article 45 and Article 2A, some argued that Article 45 should be annulled. But, in *Hakim Khan*, the Supreme Court disagreed, noting that Article 2A was merely equal to every other constitutional provision. Specifically, Justice Nasim Hasan Shah noted that, where two articles appeared to clash, the only remedy lay in a duly promulgated constitutional amendment reconciling or correcting that clash.

Indeed, the same view resurfaced with reference to Article 58(2)(b). As allegations emerged that military elites and opposition parties had conspired with various presidents to bring down elected governments rather than waiting for fresh elections in 1988, 1990, 1993, and 1996, the dissolution of Prime Minister Bhutto's second government by President Farooq Leghari in 1996 was challenged in a basic structure case known as *Mahmood Khan Achakzai*

[40] *Bank of Oman Ltd v East Trading Co. Ltd.* (PLD 1987 Karachi 404, 445).
[41] *Irshad H. Khan v Parveen Ijaz* (PLD 1987 Karachi 466).
[42] *Hakim Khan v Government of Pakistan* (PLD 1992 SC 595).

v Federation of Pakistan (1997).[43] This case looked beyond the president's discretionary actions under Article 58(2)(b) to consider the constitutionality of the Eighth Amendment as a whole. Specifically, it examined the degree to which a focus on 'presidential' powers in Article 58(2)(b) might be seen as a distortion of Article 2A's description of the Constitution's 'parliamentary' basic structure.

Still, Supreme Court Chief Justice Sajjad Ali Shah returned to the reasoning articulated by Justice Nasim Hasan Shah in *Hakim Khan*. Dismissing the case, the Chief Justice noted that, although Article 2A 'when read with other provisions' could be said to reflect 'salient features' of the constitution—including (for the first time) '[a] parliamentary form of government blended with Islamic provisions'—Article 58(2)(b) also gave certain powers to the president as a matter of 'checks and balances' (ostensibly, 'to forestall a situation in which martial law could be imposed').[44] In fact, Shah read *both* Article 2A *and* Article 58(2)(b) as amendments duly promulgated by parliament that could not be struck down precisely insofar as their mix of parliamentary, presidential, and religious checks-and-balances did not irredeemably alter 'a parliamentary form of government blended with Islamic provisions' (Para 27). As Justice Saleem Akhtar went on to declare in his concurring opinion, 'the theory of basic structure' had been 'completely … rejected' in Pakistan (Para 34): Article 58(2)(b) could be altered or removed, but only by a further amendment.

In short, there was no indication during the late-1980s, 1990s, or 2000s that Pakistan's Supreme Court might nullify a duly promulgated constitutional amendment as an essential-features or basic-structure violation rooted in the Islamic features of Article 2A (or, for that matter, any other Islamic provision). Departing from the Court's traditional deference to parliament's amending power, that step emerged in conjunction with a series of cases tied to the 'Islamic' features of Article 62(1)(f).

Debating Article 62(1)(f): Judges versus Parliamentarians

Embracing a broad interpretation of Article 62(1)(f), some judges sought to frame a rather expansive sense of the requirement that parliamentarians must be 'ameen'. But, while agreeing that such religious terms were obscure, vague, or subjective (*Ishaq Khan Khakwani v Mian Nawaz Sharif* PLD 2015 SC 275),[45] the Supreme Court generally saw fit to disqualify parliamentarians found guilty by a court of dishonesty.[46] In fact, politicians from all major parties were disqualified for bogus academic credentials, false declarations regarding their dual citizenship, and so on.

The most important case, by far, was *Imran Ahmed Khan Niazi v Mian Muhammad Nawaz Sharif* (2017), which removed Prime Minister Nawaz Sharif for withholding information in an

[43] *Mahmood Khan Achakzai v Federation of Pakistan* (PLD 1997 SC 426).
[44] See *Achakzai* short order (Para 3).
[45] Khosa described Article 62(1)(f) as 'a feast of legal obscurities' (Para 3(f)) based on the ideal qualities of a Prophet rather than a practical standard for a government of 'sinful mortals'.
[46] See *Mudassar Qayyum Nahra v Ch. Bilal Ijaz* (2011 SCMR 80); *Malik Iqbal Ahmad Langrial v Jamshed Alam* (PLD 2013 SC 179); A*bdul Ghafoor Lehri v Returning Officer PB-29* (2013 SCMR 1271); *Muhammad Khan Junejo v Federation of Pakistan* (2013 SCMR 1328); *Allah Dino Khan Bhayo v Election Commission of Pakistan* (2013 SCMR 1655). The Court refused to disqualify individuals where clear evidence was not established: *Waqas Akram v Dr. Tahir-ul-Qadri* (PLJ 2003 SC 9); *Rana Aftab Ahmad Khan v Muhammad Ajmal* (PLD 2010 SC 1066).

application to stand for re-election—information regarding unaccrued payments (read as an 'asset') for his service as the chairman of a Dubai-based company owned by his son. Already, a related judgment regarding unclear funding for four flats with a rather complex ownership structure in London had cited an expanding body of caselaw treating legal evidence of dishonesty as a breach of Article 62(1)(f).[47] But, even then, the precise meaning of 'ameen' remained unspecified. In fact, a frustrated Supreme Court Justice Khosa noted in the case of *Imran Ahmed Khan Niazi* that, in the absence of any clarifying amendment, the Court itself was obliged to intervene and suggest a meaning for such terms. In particular, and despite his own earlier comments regarding the 'obscurity' of terms like ameen, Khosa explained that, although Article 62(1)(f) applied to Muslims and non-Muslims alike,[48] its meaning should be clarified with reference to Qur'anic sources (Para 115).[49]

Justice Azmat Saeed responded that the Court should not 'arrogation [sic.] unto itself the power to vet candidates on moral grounds' (Para 37)—a view he reiterated in a related judgment known as *Sami Ullah Baloch v Abdul Karim Nowsherwani* (2018),[50] wherein he argued that the constitutionally unspecified *duration* of any Article 62(1)(f) disqualification should be clarified, not by the Court, but by parliamentarians. Overall, however, the Court's majority in *Sami Ullah Baloch* disagreed. The majority returned to Khosa's claim that, in the absence of any amendment clarifying the duration of Article 62(1)(f) disqualifications, the judiciary was compelled to intervene. In particular, returning to Islamic standards rooted in the Qur'an and sunnah (Paras 3, 14-19), the Court built on several prior cases to declare that a ban for 'illegal' dishonesty was permanent so long as the judgment finding that dishonesty remained in place (Para 23). 'If at all the period of embargo … is to be relaxed', noted Justice Umar Ata Bandial, writing for the majority, this would follow 'only from a Constitutional amendment by the Parliament' (Para 3).

In short, parliament was empowered to amend the constitution*, including Article 62(1)(f)*. But, until it exercised that power, the Court was obliged to define the constitutional meaning of terms like ameen and, then, to define the duration of any disqualification for those judged 'not ameen' within the (Qur'anic) parameters set by the Court. Historically, in India, basic structure jurisprudence has been used to remove elected legislators for a failure to reflect the terms of 'secularism' (as defined by India's Supreme Court).[51] In *Imran Ahmed Khan Niazi* and *Sami Ullah Baloch*, Pakistan simply embraced a similar approach, disqualifying parliamentarians seen as insufficiently ameen in an 'Islamic' sense (as defined, again, by the Supreme Court).

'There is no cavil with the fact that Article 62(1)(f)—introduced by a dictator—should be repealed/amended,' noted Saad Rasool (2018), 'because it holds the possibility of becoming a tool for moral witch-hunts'. Still, Rasool felt that any repeal should be treated as 'a choice

[47] See *Constitution Petitions 29* and *30* (2016) as well as *Constitution Petition 03* (2017).
[48] Previously, in *Raja Muhammad Afzal v Muhammad Altaf Hussain* (1986 SCMR 1736), the Court noted that, because Article 62(1)(f) applied to non-Muslims, its 'spiritual' and 'religious' content had to be 'ignored' (Para 14).
[49] Khosa endorsed (Para 121) the Qur'anic verses highlighted by Justice Qazi Faez Isa while Isa was serving as Chief Justice in Balochistan (*Molvi Muhammad Sarwar v Returning Officer PB-15* 2013 CLC 1583).
[50] *Sami Ullah Baloch v Abdul Karim Nowsherwani* (PLD 2018 SC 405).
[51] See *S.R. Bommai v Union of India* (3 SCC 1 1994).

[for the] … legislature'.[52] And, yet, with Article 62(1)(f) increasingly tied to the Islamic elements of a constitutional basic structure that was, itself, tied to 'a parliamentary form of government blended with Islamic provisions', one might reasonably ask: was a repeal of Article 62(1)(f) really an option for the legislature?

Debating Article 62(1)(f): Parliamentarians versus Parliamentarians

By 2018, the cases of *District Bar Association Rawalpindi*, *Imran Ahmed Khan Niazi*, and *Sami Ullah Baloch* had revitalised an important debate regarding the degree to which Pakistani parliamentarians were empowered to promulgate amendments touching on Islamic provisions—specifically, provisions concerning the Qur'anic qualifications of individual parliamentarians as a marker of Pakistan's parliamentary form of government 'blended with Islamic provisions'.

With headlines like '[PML-N] Government Reveals Plans to Amend Articles 62, 63' (2017) and '[PML-N] PM Abbasi Hints at Scrapping 62(1)(f) with Help of Political Parties' (2017), it is clear that, although initial efforts to repeal Article 62(1)(f) were rebuffed by the PML-N during parliamentary debates surrounding the Eighteenth Amendment, such a step was still under discussion even within the PML-N.[53]

During an October 2020 interview with PPP Senator Raza Rabbani, the Chairman of the Committee on Constitutional Reforms that formulated Pakistan's Eighteenth Amendment (2010), I was told that, with respect to Article 62(1)(f), the Committee initially faced 'resistance from the PML-N and … Islamist parties'.[54] But 'now, … most if not all of the political parties', especially opposition parties hounded by periodic campaigns for 'accountability', perceive 'a misuse … [of] this provision'. In fact, referring to 'the overall tone and tenor' of ongoing efforts to promote greater accountability for individual parliamentarians in Pakistan, Rabbani felt that current trends would produce '[an] amendment in that [provision]'.

Former Jama'at-e-Islami Senator Khurshid Ahmed, however, disagreed. Ahmed did not see any interest in repealing Article 62(1)(f) at all. '[I]t was introduced in the Eighth Amendment … and with great debate it was retained in the Eighteenth Amendment', he noted, 'and now it has the support of all the parties'. Even the secular Pashtun-nationalist Awami National Party, which initially 'opposed it,' he added,[55] 'they [have] also accepted it, so now it is a unanimous part of the constitution'. 'It is', he stressed, 'an integral part of the Islamic rules of the constitution'.

Indeed, former Council of Islamic Ideology Chairman and ad hoc Shariat Appellate Bench member Khalid Masud agreed that Pakistan's religious parties would 'not ally with other

[52] Saad Rasool, 'The Promise of Democracy' (Common Many Initiative, 2018) http://commonman.org/wp-content/uploads/2018/10/The-Promise-of-Democracy.pdf
[53] APP, 'PM Abbasi Hints at Scrapping 62(1)(f) with Help of Political Parties', *DAWN*, 9 August 2017, <https://www.dawn.com/news/1350368>; Iftikhar A Khan, 'Government Reveals Plans to Amend Articles 62, 63' *DAWN* (Karachi, 23 August 2017) <www.dawn.com/news/1353269>.
[54] Interview, Raza Rabbani, 28 October 2020.
[55] See fn27.

political parties to amend this … provision'.[56] 'Opening this box', he explained, could 'mean repealing the whole Islamization process' associated with General Zia. And, politically, he argued, 'I do not believe this article would be amended', even if, broadly speaking, the Supreme Court 'would not and should not annul a constitutional … amendment'. In short, Masud argued, the barriers to repeal were neither constitutional nor judicial, but political.

Everyone I interviewed expected the level of support for repealing Article 62(1)(f) to falter among religious activists. In fact, returning to the views of Senator Ahmed, all felt that, if a constitutional amendment were introduced to remove the word ameen, street protests led by religious activists would follow. Some religious parties 'just want … an excuse to come out in protest', noted one retired Supreme Court Chief Justice, adding that an amendment targeting Article 62(1)(f) would almost certainly amount to 'a very good excuse'. In fact, Ahmed himself confirmed this, noting that, if parliament took steps to repeal Article 62(1)(f), he would expect 'an uproar'. '[The] Qur'an says it in clear terms: give your authority … to people who are honest', he noted. 'Politicians cannot say anything … against [the Holy] Qur'an'.

Still, only Ahmed felt that religious protests would (or should) deter specific constitutional reform efforts initiated by parliamentarians. Protests can be 'awkward, even for semi-secular parties [like the PPP]', noted Senator Rabbani. But, in the end, he felt, such protests would not be 'fatal' for any legislative majority.

Debating Article 62(1)(f): Principles versus Personalities

If a repeal of Article 62(1)(f) were supported by most parliamentarians while remaining broadly unobjectionable to most voters, however, there is still a chance that such a repeal might fail at the hands of Supreme Court justices concerned about their relative authority vis-à-vis individual parliamentarians. Indeed, this institutional tussle might be cast as an 'essential-features' problem focused on the *judiciary's* power to defend the constitution's 'parliamentary form of government blended with Islamic provisions'.

Recalling views articulated by Syed Abul ala Maududi and Muhammad Asad targeting Pakistan's first Constituent Assembly,[57] this position was clearly expressed by Senator Ahmed: 'If anything has been done which violates the constitution, then [the] judiciary has a right to rule on [it]', he noted. '[P]arliament has powers', he clarified, but 'even the parliament cannot legislate against the Qur'an and sunnah'. Pakistan has '[a] democratic constitution', he argued, but 'not absolutely as in the other secular democratic constitutions'. Indeed, returning to Pakistan's first Constituent Assembly, he echoed the views of Abdulla al-Mahmood, who favoured a 'religious' check on parliament's power vis-à-vis the constitution.

[56] 'If you remove ameen', noted Senator Rabbani, 'that would be difficult for [religious party constituencies] to live with'. But, then, adopting a more cynical tone, he added, 'the actual question as to whether the Islamic parties would kick up a storm' will hinge on 'how they come into the net of accountability' (that is, the degree to which their own members might be disqualified). Khurshid Ahmad from the Jama'at-e-Islami dismissed such concerns: Jama'at candidates, he insisted, were 'spotless'.

[57] See fn9.

Returning to a plain reading of Articles 239(5) and 239(6), however, Senator Rabbani disagreed. 'I have a lot of questions [about] the essential features doctrine', he said. 'I believe … parliament is sovereign', and 'parliament can amend the constitution in whatever manner … it wants'. 'I'm sure … there may be ordinary citizens or other vested interests who would put in an appeal challenging [an amendment repealing Article 62(1)(f)]', so the Supreme Court 'may examine [that] on the touchstone of the constitution and the general atmosphere [favouring] accountability [for individual parliamentarians]'. But, in the end, Rabbani did not believe there would be 'much of a fuss … from the Court'. '[M]ore than the Supreme Court', he felt, resistance to any repeal of Article 62(1)(f) 'may come from the … [military] establishment'. After all, he noted, Article 62(1)(f) was introduced by a parliament acting at the behest of General Zia to be 'as ambiguous as possible', so as to 'serve as … a tool for allowing or disallowing the candidature of any one whom [the establishment might see as] working against … their ideology'.

Faced with a constitutional amendment repealing Article 62(1)(f), however, none of those I interviewed felt that the work of Pakistan's Supreme Court would be shaped by core constitutional *principles* referring to broad institutional priorities, including parliamentary sovereignty (Articles 239-5 and 239-6). In particular, they argued, earlier patterns of judicial deference to parliamentary authority vis-à-vis constitutional amendments could no longer be taken for granted; instead, all focused on the case of former Chief Justice Muhammad Iftikhar Chaudhry and stressed that any future reference to basic-structure jurisprudence would depend on the *personality* of the chief justice: 'I think the personality [of the Chief Justice will] matter', noted one of the former Supreme Court chief justices I interviewed. Whereas basic-structure jurisprudence elsewhere in the world might be tied to stable constitutional principles or broad institutional priorities, in other words, my respondents felt that relevant patterns in Pakistan were now more closely tied to historically specific personalities and the politically contingent patterns of judicial activism (or reticence) attached to them.

'Judicial activism is very much there', noted Senator Rabbani. 'But … it has had its ups and downs'. In particular, he added, 'it … depends upon the temperament of the chief justice'. 'Obviously, nobody would like to see a waning of their [institutional] power', Rabbani added. But 'the degree varies [with each chief justice]'. Or, as Senator Ahmed noted, 'the whole trend is towards judicial activism … [and Chief Justice] Saqib Nisar … and Iftikhar Chaudhry, they were sometimes overstepping'. But even so, he stressed, it always depends on the views of individual jurists. 'Every judge is independent', noted one former chief justice. So 'it depends on … who are the judges at that particular time'. Specifically, noted another former chief justice, 'the judiciary … has become [more] assertive' since 'Chaudhry'. So 'I think … there may be a [broader] change'. 'The past pattern' of judicial deference 'may not continue', he added, not only with respect to military regimes, but also with respect to civilian regimes and even 'hybrid' civilian-military regimes like that of Prime Minister Imran Khan. Still, he concluded, echoing the views of both Rabbani and Ahmed, 'a lot depends on the composition of the bench'. 'When it comes to religious issues [in particular]', he argued, it 'depends on individual judges'.

Focusing on the intersection of basic-structure jurisprudence and religious issues, these comments reiterate the special link between two key salient features, namely 'judicial independence' as this relates to judicial appointments and, then, Pakistan's 'parliamentary form of government blended with Islamic provisions'. The institutional politics, however, are often highly personal. *Who* controls who sits on the courts? *Which* judges determine which parliamentarians are 'ameen'?

Conclusion

Descriptions of judicial activism are often associated with broad notions of public interest: judges encroach on the policy-making domain to protect—of their own accord (e.g. via *suo motu* powers)—the interests of ordinary citizens. With reference to constitutional 'basic structure', however, judicial activism is also associated with broad *institutional* interests: judges encroach on parliament's constituent power to protect the interests of the judiciary. In Pakistan, however, patterns of judicial activism rooted in basic-structure jurisprudence are often more idiosyncratic than institutional.

According to one retired Supreme Court chief justice, the future of basic-structure jurisprudence in Pakistan should be framed as a choice between (a) broad constitutional *principles* tied to an institutional balance-of-power and (b) specific judicial *personalities*. He saw little evidence supporting an entrenched commitment to principles; after all, he noted, eight of the thirteen justices who asserted that Pakistan's Supreme Court was empowered to strike down duly promulgated constitutional amendments in *District Bar Association Rawalpindi* did *not* agree on a list of constitutional salient features. In fact, he saw occasional references to constitutional 'salient features' as little more than passing *obiter dicta*. Specifically, turning to the historical contingencies surrounding basic-structure jurisprudence in Pakistan, he noted that, with reference to 'religious issues' like Article 62(1)(f), the role of 'individual judges' was crucial.

Given this focus on historical and political contingencies alongside the idiosyncratic work of individual judges, one might ask whether assertive forms of basic-structure jurisprudence will persist in Pakistan *without* an unusually assertive chief justice backed by a popular protest movement. This is a hypothetical question. But, after the short order in *Nadeem Ahmed* was handed down under Chief Justice Chaudhry in 2010, the fact that thirteen out of seventeen justices in *District Bar Association Rawalpindi* (2015) endorsed a 'proscriptive' understanding of basic-structure jurisprudence two years *after* Chaudhry retired in 2013 is telling. The vastly different personnel associated with *District Bar Association Rawalpindi* (2015) might suggest that, while individual judges are important, the Court as a whole still matters.

Precisely insofar as individual judges *underpin* the pursuit of institutional interests, however, it is difficult to overlook the importance (indeed, the judicial politics) surrounding judicial appointments—arguably the most common and contentious area within the realm of basic structure jurisprudence worldwide. Indeed, what might be described as the 'curation' of Supreme Courts—in Pakistan, a Court empowered to frame the legal parameters of Islam within which the careers of individual parliamentarians are defined—is crucial. As I have

noted elsewhere, the link between basic structure jurisprudence and religion often unfolds *via* debates regarding the appointment of individual judges.[58]

Few in Pakistan believe the state should avoid articulations of religious standards for public life. The question is merely which branch of the state, and which individuals within that branch, might have the *final* word when articulating these standards? Historically, parliamentarians have been too divided to meet the threshold for amendments touching on Islamic provisions (not only with respect to constitutional amendments but also ordinary legislation).[59] Cross-party coalitions face special hurdles. But, even when single-party governments have succeeded in securing the majorities needed for constitutional amendments—for example, after 1997—those governments have come to power on a platform stressing 'Islamic' credentials, making them even *less* likely to amend (let alone repeal) the constitution's Islamic provisions.

Indeed, notwithstanding widespread political interest in repealing 'obscure' terms like ameen, Justice Khosa noted that Pakistan's parliament was 'most unlikely' to 'amend the Constitution for achieving something which may offend against any express Divine [i.e. Qur'anic] command'. In Pakistan, he noted, doing so could 'negate the raison d'être of the country's conception, creation, and existence'. But, he added, returning to his own focus on parliament's constituent power, if Pakistan's parliament *were* to proceed in this direction, the Supreme Court would not be in a position to 'shackle it'.

In Pakistan, familiar controversies regarding the possibility of 'unconstitutional constitutional amendments' are closely tied to debates regarding the meaning of Islamic constitutionalism. Justice Khosa's view, regarding the unfettered power of parliament, is broadly in keeping with the position of Pakistan's Supreme Court before 2010. But, since 2015, Justice Khosa's view is no longer the majority view.

[58] Nelson, 'Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion', *Asian Journal of Comparative Law* 13:2 (2018), 333-57.
[59] Matthew J. Nelson, 'Inheritance Unbound: The Politics of Personal Law Reform in Pakistan and India' in *Comparative Constitutionalism in South Asia*, S. Khilnani, V. Raghavan, and A. Thiravengadam, eds. (Oxford, 2012), 219-46.