THE CONSTITUTIONAL AMENDMENTS IN THE ORIGINAL CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973 IT'S EFFECTS & LEGAL CHALLENGES: A COMPARATIVE STUDY

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FINAL APPROVAL

It is certified that we have read the dissertation submitted by Mr. Muhammad Waseem Tariq titled ***"The Constitutional Amendments in the Original Constitution of The Islamic Republic of Pakistan, 1973, It's Effects & Legal Challenges: A Comparative Study"*** as a partial fulfillment for the award of degree of Doctorate of Law. We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of degree.

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DEDICATION

THIS WORK IS DEDICATED TO:

The sake of ALLAH, my Creator and my Master,
My great teacher and the messenger MUHAMMAD (SAW), who taught us the purpose of life.

To My homeland (Pakistan); to my beloved Institution i.e., The International Islamic University, Islamabad & the beloved Members of the Faculty of Shariah & Law for working very hard in teaching and guiding me in the completion of the course work as well as during the course of my research work.

To My great parents Muhammad Tariq Nadeem & Ulfat Jabeen Tariq (Late); my dearest wife Sana Waseem, beloved Sisters Zill-e-Huma, Sumaira Gul Tariq, Hina Khan Tariq, Hira Khan Tariq & beloved Kids Muhammad Sameer Khan, Ujala Khan and Muhammad Shaheer Khan.

Last but not least to my all class fellows & friends who have encourage and support me from time to time.

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All praise to Allah, the Most Beneficent the Most Merciful. For Him is all that is on the Earth and all that is in the Heavens. All wisdom and all knowledge belong to Him. Whom Allah wants to do good, He grants him wisdom. With His infinite mercy and bounty, He bestows as much of the wisdom and knowledge upon His such creatures, as strive for it.

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MUHAMMAD WASEEM TARIQ
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CONSTITUTIONAL AMENDMENTS

IN
THE ORIGINAL CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973

IT'S EFFECTS & LEGAL CHALLENGES: A COMPARATIVE STUDY

(ABSTRACT)

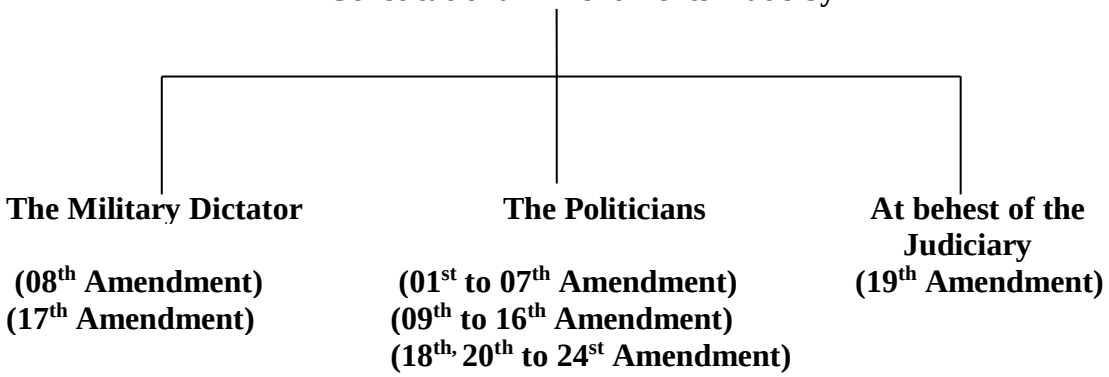
Pakistan whose history since the day of independence (i.e., 1947), is replete with dismissal of the elected governments and impositions of martial laws that ruled the country for over a period of 30 years, under Ayub Khan (1958-1969); Yahya Khan (1969-1971); Zulfiqar Ali Bhutto [as Civilian Martial Law Administrator] (1971-1972); Zia-ul-Haq (1977-1988) and Parvez Musharraf (1999-2008), respectively. It is undeniable historical fact that in all these unfortunate scenarios, the matters relating to imposition of martial laws, whenever came under discussion before the honorable apex Courts, in most of those cases, the judicial verdicts, pronounced from time to time, not only seems to be leaned towards upholding the imposition of Martial Laws but also self-contained elements of the injustice therein too; whereby prima facie the honorable apex Court(s) while over stepping their prescribed constitutional limits unfortunately allowed the military dictator(s) to effect the constitutional amendments as per their own sweet whims and desire.

The matter does not end here, rather, whenever the issue relating to the dictatorial Act's, Ordinances, Martial Law Regulations or Amendments etc., if came before the successive Parliament(s) of its time, the constitutional history of Pakistan again reveals an ugly image of its kinds, whereby not only all those Acts, Ordinances, Martial Law Regulations or Amendments as the case may be; which were either made or introduced into the Constitution as such got indemnified/validated by the Parliamentarians or subsequently

given the legal shelter/protections through cover of Constitutional Amendment Acts; that too, without introduction of even a slightest change therein. It is worth to mention here, that while focusing the military expeditions; endure would also be made in examining all those Constitutional Amendments too, which had/have purely been brought into the Constitution by the Politicians (ruling parties) themselves, with their hidden object to strengthen their respective offices, while shifting the centre of powers from the office of Parliament to that of the office of a Sole Party Head (who may even be a non-elected member too) of the ruling party. Besides above, endeavors would also be made to put light on those Constitutional Amendments too, which has been made part of the Constitution in order to serve/protect the interest of Judiciary as well.

In nut shell the thesis would be examining the effects of all such amendments, which had particularly de-shaped/disfigured the overall Constitutional Schemes of the Constitution of Islamic Republic of Pakistan, 1973. Most importantly, the relevant constitutional and legal issues would be highlighted and discussed in its chronological orders vis-a-vis the Constitutional Amendments made from day one till so far; besides above efforts would be made to pinpoint the circumstances which had actually given an unbridled license to the military dictators *(i.e., through the judgments rendered by the apex Courts)* or to the politicians or likewise to the apex Courts, as the case may be, to put their personal wishes/whims over the wishes/whims of the general masses, particularly, when the Social Binding Contract (i.e., Constitution) to which they subjugated is grossly mutilated by such military/civilian usurper's commands. At last the research would be concluded with solution to settle down the dilemma which cropped up due to mutual connivance of the Judicial, Military and Politicians understandings, while risking the social & legal norms of the society at large.

Flow Chart


In the
Constitution of Islamic Republic of Pakistan
1973
Following
Constitutional Amendments made by
The Military Dictator
(08th Amendment)
(17th Amendment)
The Politicians
(01st to 07th Amendment)
(09th to 16th Amendment)
(18th, 20th to 24st Amendment)
At behest of the Judiciary
(19th Amendment)

LIST OF ABBREVIATIONS

1.	CEC	Chief Election Commissioner
2.	ECP	Election Commission of Pakistan
3.	CoD	Charter of Democracy
4.	COAS	Chief of Army Staff
5.	LFO	Legal Framework Order
6.	PATA	Provincially Administered Tribal Area
7.	FATA	Federally Administered Tribal Area
8.	MMA	Mutahida Majlis-e-Ammal
9.	NAP	National Awami Party
10.	NRO	National Reconciliation Ordinance
11.	NWFP	North-West Frontier Province (now Khyber Pakhtoonkhwa)
12.	PNA	Pakistan National Alliance
13.	RCO	Revival of the Constitution of 1973, Order
14.	PO	Presidential Order
15.	AIR	All Indian Report.
16.	CLC	Civil Law Cases
17.	MLD	Monthly Law Digest.
18.	NLR	National Law Report
19.	PLD	Pakistan Law Digest.
20.	PCrL.J	Pakistan Criminal Law Journal
21.	LN	Law Notes
22.	SC	Supreme Court
23.	SCMR	Supreme Court Monthly Review.

24.	AD	Appellate Division
25.	HAC	High Court Appellate Division
26.	DLR	Dhaka Law Report
27.	BLD	Bangladesh Legal Digest

THESIS STATEMENT

The Constitution of Islamic Republic of Pakistan, 1973, as it stands today, does not represent the will of the people of Pakistan, as it lost its originality through the abuse of various Constitutional Amendments.

STATEMENT OF THE PROBLEM

It is historically known fact that since 1947 i.e., the day of its independence, Pakistan adopted the Government of India Act, 1935 as its interim Constitution, which served as the working Constitution of Pakistan.[1] The First Constitutional Assembly entrusted with a task under Act ibid, in order to frame a Constitution for the newly born state of Islamic Republic of Pakistan, while passing through the Constitutional Crises of 1954[2] took almost (09) nine years to finally approve/give a Constitution to the country in the year 1956[3] which was based on Parliamentary System of Government, but unfortunately short lived for a smallest span of time i.e., (02) two years, swiped away completely pursuance to the Martial Law of 07th October, 1958 imposed by the then President Iskandar Mirza[4] while appointing General Ayub Khan as the Chief Martial Law Administrator.

Subsequently, upon political turmoil within the country, the powers of state affairs finally vests in hands of General Ayub Khan, who while imposing full fledge military Coup d'etat deposed incumbent in office by declaring he to be the President of Pakistan.[5] This matter of the imposition of Martial Law when came up before the august Supreme Court of Pakistan; the learned Court under the leadership of its Chief Justice Muhammad Munir,

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[1] Constitutional Documents (Pakistan), *The Indian Independence Act, 1947*, (Volume-III, 1964) page 1

[2] *"Moulvi Tamizuddin Khan vs. Federation of Pakistan":* (PLD 1955 Sindh 96) and *"Federation of Pakistan vs. Moulvi Tamizuddin Khan"* (PLD 1955 FC 240)

[3] Constitutional Documents (Pakistan), *The Constitution of Pakistan, 1956* (Volume-III, 1964), page 171

[4] Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2011), Page118

[5] Article-2, Clauses 1, 4 & 7 and Article 4 to the Laws (Continuance in Force) Order, 1958, President's Order (Post Proclamation) No. 1 of 1958: (PLD 1958 Central Statutes 497)

validated the Military Coup while invoking the Hans Kelsen Theory of "revolutionary legality"[6].

Upon lifting of martial law the Constitution of 1956; given by a civilian government was superseded with that of the Constitution of a Non-State Actor *(i.e., Muhammad Ayub Khan as Military Dictator)* commonly known as the Constitution of 1962, framed through newly constituted Commission, headed by head of the Federal Court namely Justice Muhammad Shahabuddin, envisaging therein the Presidential Form of Government; but again this Constitution unfortunately survived for 07 years only, whereof it was suspended once again in the year 1969. In the meantime events like political turbulence within the country, war with India and separation of the Eastern Limb of Pakistan (now Bangladesh); lead the Western Limb of Pakistan (now Pakistan) to face the music of second military adventurism at the hands of the then incumbent in office i.e., General Yahya Khan[7], consequent upon of which the Constitution of 1962 was superseded with that of the interim Constitution of 1972.[8] However, during the course of time when the legality of the Martial Law was once again came under discussion before the honorable Supreme Court of Pakistan, this time the honorable Court deviating from its earlier precedents in Dosso Case (i.e., PLD 1958 SC 533), declared the martial law as illegal and the Chief Martial Law Administrator as a usurper by holding that Kelsen Theory had been wrongly applied earlier.[9]

Pakistan once again witnessed further Constitutional developments in the year 1973 when its constituent assembly, elected directly by the people on the basis of adult franchise of

[6] *State vs. Dosso and another*: (PLD 1958 SC 533)

[7] Proclamation of Martial Law, Paragraph 5: (PLD 1969 Central Statute 42)

[8] Interim Constitution of the Islamic Republic of Pakistan, 1972: (PLD 1972 Federal Statutes at Page 515)

[9] *Miss Asma Jillani vs. The Government of Punjab and other*: (PLD 1972 SC 139)

1970[10] deriving the mandate of framing of Constitution, originally from Legal Framework Order of 1970 of the Non-State Actor (Military Dictator) while subsequently from the Presidential Order, 1972 of the Civilian Martial Law Administrator; firstly by way of an interim contract[11] and finally while inking in a permanent Federal Contract[12] thereto; restoring thereby the Parliamentary Form of Government with balance of power tilted towards the office of Prime Minister[13]. However, the interestingly development therein was the incorporation of two Articles which still hold field even today; were Article(s) 269 & 270, where through all Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders and all other laws made in between 20th December, 1971 till 20th April, 1972 (both days inclusive) of the Civilian Martial Law Administrator, i.e., Zulfiqar Ali Bhutto; while that of the similarly, all Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders and all other laws issued/made in between 25th March, 1969 till 19th December, 1971 (both days inclusive) of the Non-State Actor i.e., military dictator's regime of General Yahaya Khan, were given permanent and temporary validation, respectively. Again, while ignoring the glaring fact in view that *(in the latter case)* almost a year before making and promulgation of the Constitution of 1973, the Supreme Court through *Asma Jillani's* Case (i.e., PLD 1972 SC 139) had already declared the regime of military dictator (General Yahaya Khan) as one of a usurper and all laws enacted during his regime were similarly declared as illegal, however they were all condoned under the doctrine of state necessity.

[10] "Preamble" to *The Constitution of Islamic Republic of Pakistan, 1973*

[11] The Interim Constitution of 1972: Published in [PLD 1972 (Central Statute) 505]

[12] National Assembly of Pakistan (Constitution-Making) Debates: Official Report (Volume-I-III/No.I)

[13] *The Constitution of Islamic Republic of Pakistan, 1973*

Coming back to the issue under discussion, the Constitution of 1973, soon after its inception and at the hands of its mentor (i.e., Zulfikar Ali Bhutto) received Seven Amendments[14] in between May, 8, 1974 and May 16, 1977, in whom of them most of the amendments were incorporated either to serve his personal interest or screwing the apex Judiciary, which will be examined in detailed at relevant point of time. History, took twist when soon after a short interval of the incorporation of Constitution (Seventh Amendment), Act 1977; on 05th July 1977, the Bhutto's government was removed under the Martial Law imposed by the then General Zia-ul-Haq, who instead of following the footsteps of the past military dictators, of abrogating the Constitution, held it in abeyance.[15] The imposition of the martial law was once again went in legal battle before the Supreme Court of Pakistan, which under the leadership of Mr. Anwar-ul-Haq the Chief Justice of Pakistan as he then was, while validating the military coup on the principle of *"Salus populi suprema lex (i.e., Necessity makes prohibited things permissible)"*, beside additionally authorizing him to inculcate necessary amendments into the Constitution, as well.[16] In return of the license of Court the military dictator effected numerous Constitutional Amendments in between Feb 1979 till Mar 1985,[17] the most notorious and of significance importance among was one being of the

[14] See Constitution (First Amendment) Act 1974 to Constitution (Seventh Amendment) Act, 1977, i.e., Constitution (First Amendment) Act, 1974: Published (PLD 1974 Central Statute 252), Constitution (Second Amendment) Act, 1974: Published (PLD 1974 Central Statute 425), Constitution (Third Amendment) Act, 1975: Published (PLD 1975 Central Statute 109), Constitution (Fourth Amendment) Act, 1975: Published (PLD 1975 Central Statute 337), Constitution (Fifth Amendment) Act, 1976: Published (PLD 1976 Central Statute 538), Constitution (Sixth Amendment) Act, 1976: Published (PLD 1977 Central Statute 46) and Constitution (Seventh Amendment) Act, 1977: Published (PLD 1977 Central Statute 304)

[15] PLD 1977 Central Statutes 326

[16] *Begum Nusrat Bhutto vs. Chief of Army Staff and Federation of Pakistan:* (PLD 1977 SC 657)

[17] Constitution (Amendment) Order, 1979, [President's Order. 3 of 1979] : (PLD 1979 Central Statutes 31), Constitution (Second Amendment) Order, 1979, [President's Order. 21 of 1979] : (PLD 1979 Central Statutes 567), Constitution (Amendment) Order, 1980, [President's Order. 1 of 1980] : (PLD 1980 Central Statutes 89),

introduction of the *"Revival of Constitution of 1973 Order, 1985 (President's Order. 14 of 1985)"*; where through he has not only altered the very form of the original Constitution but also hijacked the inbuilt Constitutional Scheme of the *"Parliamentary System of Government"* with that to the *"Presidential System of Government"*; while practically

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Constitution (Second Amendment) Order, 1980, [President's Order. 4 of 1980] : (PLD 1980 Central Statutes 124), Constitution (Third Amendment) Order, 1980, [President's Order. 14 of 1980] : (PLD 1981 Central Statutes 89),
Constitution (Fourth Amendment) Order, 1980, [President's Order. 16 of 1980] :PLD 1981 Central Statutes 232, Constitution (Amendment) Order, 1980,[President's Order. 5 of 1981] : (PLD 1981 Central Statutes 251),
Provisional Constitution Order, 1981,[C.M.L.A's Order. 1 of 1981] : (PLD 1981 Central Statutes 183),
Provisional Constitution (Amendment) Order, 1981,[C.M.L.A's Order. 2 of 1981]:(PLD 1981 Central Statutes 183),
Provisional Constitution (Second Amendment) Order, 1981,[C.M.L.A's Order. 3 of 1981] : (PLD 1981 Central Statutes 250),
Provisional Constitution (Third Amendment) Order, 1981,[C.M.L.A's Order. 4 of 1981] : (PLD 1981 Central Statutes 275),
Provisional Constitution (Amendment) Order, 1982,[C.M.L.A's Order. 1 of 1982] : (PLD 1982 Central Statutes 153),
Provisional Constitution (Second Amendment) Order, 1982,[C.M.L.A's Order. 3 of 1982]: (PLD 1982 Central Statutes 349),
Constitution (Second Amendment) Order, 1981,[President's Order. 7 of 1981] : (PLD 1981 Central Statutes 275), Constitution (Third Amendment) Order, 1981,[President's Order. 12 of 1981] : (PLD 1982 Central Statutes 3),
Constitution (Fourth Amendment) Order, 1981,[President's Order. 13 of 1981] : (PLD 1982 Central Statutes 8),
Constitution (Fifth Amendment) Order, 1981, [President's Order. 14 of 1981] : (PLD 1982 Central Statutes 3),
Federal Council (Majlis-eShura) Order, 1981, [President's Order. 15 of 1981] : (PLD 1982 Central Statute 123),
Federal Council (Majlis-eShura) (Amendment) Order, 1982, [President's Order. 7 of 1982] : (PLD 1982 Central Statute 158),
Federal Council (Majlis-eShura) (Second Amendment) Order, 1982, [President's Order. 9 of 1982] : (PLD 1982 Central Statute 165),
Constitution (Amendment) Order, 1982, [President's Order. 2 of 1982]PLD 1982 Central Statutes 153,
Constitution (Second Amendment) Order, 1982,[President's Order. 5 of 1982] : (PLD 1982 Central Statutes 155),
Constitution (Third Amendment) Order, 1982, [President's Order. 12 of 1982] : (PLD 1982 Central Statutes 344),
Constitution (Fourth Amendment) Order, 1982, [President's Order. 13 of 1982] : (PLD 1982 Central Statutes 352,
Constitution (Amendment) Order, 1983 [President's Order. 4 of 1983] : (PLD 1983 Central Statutes 71),
Constitution (Second Amendment) Order, 1983 [President's Order. 7 of 1983] : (PLD 1983 Central Statutes 86),
Constitution (Third Amendment) Order, 1983 [President's Order. 9 of 1983] : (PLD 1983 Central Statutes 123),
Constitution (Amendment) Order, 1984 [President's Order. 1 of 1984] : (PLD 1984 Central Statutes 86),
Constitution (Second Amendment) Order, 1984 [President's Order. 2 of 1984] : (PLD 1985 Central Statutes 1),
Constitution (Amendment) Order, 1985 [President's Order. 6 of 1985]: (PLD 1985 Central Statutes 550),
Constitution (Amendment) Order, 1985 [President's Order. 11 of 1985] : (PLD 1985 Central Statutes 569),
Referendum Order, 1984 [President's Order. 11 of 1984] : (PLD 1985 Central Statutes 449).
Revival of the Constitution of 1973, Order (1985), [President's Order. 14 of 1985] : (PLD 1985 Central Statutes 456),

making the system of governance subservient to his absolute commands[18] besides having permanent endorsement over all deeds of his autocracy, from the office bearers of his own elected Parliament (i.e., on non-party basis), finally culminating such ill-designed plot with a drop scene in the introduction and passage of the Constitution Eighth Amendment[19], which has not only indemnified the entire President's Orders, Ordinances, Martial Law Regulations and Martial Law Orders, including the Referendum Orders which were made or issued in between the period from July 5, 1977 to that to the September 13, 1985 (both days inclusive), while making major surgery of the entire Constitution but also tilted the discretionary powers into the hands of President absolutely, where through he could easily show doors to the elected Parliament (i.e., National Assembly) while invoking his presidential powers under Article 58(2)(b) to the Constitution, as well. Again, the later historical event proved that it was the result of the exercise of Presidential powers of Article 58(2)(b), which has put the country into Major Constitutional Crises; by way of the dismissal of 03 subsequent democratic Governments, firstly on 6th August 1990, by the then President of Pakistan Mr. Ghulam Ishaq Khan against the then Prime Minister Benazir Bhutto[20]; then on 18th April 1993, by the same President against the then Prime Minister Mian Muhammad Nawaz

[18] Ibid,
Note: The above referred Order empowered the military dictator with more discretionary powers such; to dissolve the National Assembly by virtue of Article 58(2)(b); with the right, to nominate the Prime Minister, Governors of the Provinces, the Judges & Chief Justice(s) of High Courts and Supreme Court, as the case may be; to ask Prime Minister to get vote of confidence from the Assembly; issue Ordinances; set dates for Elections of National Assembly and to appoint Care Taker Government; to appoint Service Chiefs and other important Federal Officers; to call for referendum on issues of National Importance.

[19] Constitution (Eight Amendment) Act, 1985: (PLD 1986 Central Statutes 1)

[20] Though the decision of the dissolution of National Assembly was challenged before the Lahore High Court, i.e., *Ahmad Tariq Rahim vs. Federation of Pakistan*:(PLD 1990 [Lahore] 505), *Ahmad Tariq Rahim vs. Federation of Pakistan* : (PLD 1991 [Lahore] 78) and Sindh High Court, i.e., *Khalid Malik vs. Federation of Pakistan* : (PLD 1991 [Karachi] 1) and appealed before the Supreme Court, i.e., *Khwaja Ahmad Tariq Rahim vs. Federation of Pakistan* : (PLD 1992 SC 646), respectively, but all the three Courts upheld the dissolution order accordingly

Sharif[21] again on 04th November 1996, by the President of Pakistan Mr. Farooq Ahmed Laghari against Mrs. Benazir Bhutto[22], respectively. Surprisingly, the Constitution Eighth Amendment, which was the main bone of contention of the fall of successive democratic governments in between the period of Constitutional Crises (i.e., 1990 to 1996), finally got judicial validation through the famous Mahmood Khan Achakzai's Case,[23] wherein one of the reasons which prevailed upon the findings of the Court was that since 1985, i.e., the incorporation of Constitution Eighth Amendment and thereafter; 3 successive democratically elected Governments did not touched upon these amendments, that's why they are impliedly treated it to be ratified.

Upon the end of military rule, later on the Constitution of 1973 was once again put to further amendments[24] by the civilian governments of its time; through which they had seems *(either successful or unsuccessful)* to safe guard their autocracy, personal interests or hidden agendas, which will be discussed in detailed in the relevant chapter here in below. Needless to state here that these amendments remained safe from being challenged in judicial scrutinizes so far.

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[21] Though the Government of Mian Nawaz Sharif was reinstated by the Supreme Court, see, *Mian Muhammad Nawaz Sharif vs. Federation of Pakistan* : (PLD 1993 SC 473) , but the resulting stalemate ended with the resignations of both Ghulam Ishaq Khan and Prime Minister Mian Nawaz Shari.

[22] This time too the Supreme Court upheld the dissolution of National Assembly, see, *Benazir Bhutto vs. Farooq Ahmad Leghari* : (PLD 1998 SC 27)

[23] *Mehmood Khan Achakzai vs. Federation of Pakistan* : (PLD 1997 SC 426)

[24] S. A. Rabbani, Additional Secretary, National Assembly of Pakistan, District & Sessions Judge, "*Amendment in the Constitution of Pakistan, 1973*" :(http://nationalassembly.tripod.com/ammend1.htm) lastly visited on 23.11.2018; Constitution (Ninth Amendment) Bill, 1985; Constitution (Tenth Amendment) Act, 1987: (PLD 1987 Central Statutes 23); Constitution (Eleventh Amendment) Bill, 1989; Constitution (Twelfth Amendment) Act, 1991: (PLD 1991 Central Statutes 461); Constitution (Thirteenth Amendment) Act, 1997: (PLD 1997 Central Statutes 323); Constitution (Fourteenth Amendment) Act, 1997: (PLD 1997 Central Statutes 324); Constitution (Fifteenth Amendment) Bill, 1998, http://en.wikipedia.org/wiki/Fifteenth_ Amendment _ to _ the _Constitution_ of_ Pakistan, lastly visited on 23.11.2018; Constitution (Sixteenth Amendment) Act, 1999: (PLD 1999 Central Statutes 413).

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The Constitution of 1973, again witnessed another setback on 12th October, 1999, when the democratic government of Mian Muhammad Nawaz Sharif was dismissed pursuance to an attempt by the former to fire the then Army Chief (i.e., General Pervez Musharraf); this civil military tension finally ended in imposition of the Martial Law and holding of the Constitution in abeyance.[25] The matter relating to imposition of martial law again went in legal battle before the Supreme Court of Pakistan, whereby the learned Court under the leadership of Mr. Irshad Hassan Khan the then Chief Justice of Pakistan; while following the footsteps of the head of judicial institution *(Justice Anwar-ul-Haq the Chief Justice as he then was)*and by relying on the Nusrat Bhutto's Case (PLD 1977 SC 657), again validated the action on the ground *"Salus populi suprema lex (i.e., Necessity makes prohibited things permissible)"*, surprisingly, this time while giving its findings on those issues too, which had neither been taken nor raised as the point in issues before it; by additionally authorizing the military dictator to remain in office, initially for a period of 03 years enabling him to carry out his 07 point agenda as disclosed by him at the time of his military coup[26], amazingly while taking oath under the Provisional Constitutional Order, ceasing its identity as of a Constitutional Court and stepping further by un-authorizedly delegating the powers of amending the Constitution into the hands of a usurper, ignoring thereby the admitted fact, that under the Constitutional Scheme in addition to the legal dictums laid down by itself (i.e., apex Court) from time to time, it had itself categorically held that the apex Courts do not enjoy any such powers at all.[27]

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[25] Proclamation of Emergency, 1999: (PLD 1999 Central Statutes 448)

[26] *Zafar Ali Shah vs. General Pervez Musharaf*: (PLD 2000 SC 869)

[27] *The State vs. Zia-ur-Rahman and others*: (PLD 1973 SC 49)
Mrs Habiba Jilani vs. The Federation of Pakistan: (PLD 1974 [Lahore] 153)
Muhammad Suleman vs. Islamic Republic of Pakistan: (PLD 1976 [Lahore] 1250)
Dewan Textile Mills Ltd. vs. Pakistan and others: (PLD 1976 [Karachi] 1368)

Later on, the military dictator under the garb of legal cover given to him by the judgment of Supreme Court, strengthened his office, by introducing various Provisional Constitutional Orders, Chief Executive Orders, with the help of which he introducing various amendments to the Constitution of 1973, while de-shaping/dis-figuring the entire Constitutional Scheme, as per his own personal agenda, which includes but not limited to the paving ways for his own accession to the office of Presidency as a President of the Country[28] to that of ousting his bitter opponents (i.e., *Prime Minister, Chief Minister*) from the political screen[29], as well. However, finally, before holding of the general elections to the National & Provincial Assemblies, the Military converted President, while following the footsteps of the earlier military dictator *(i.e., General Zia-ul-Haq, as he then was)* with the help of his Legal Framework Order of 2002[30] and additionally of similarly other amending Statutes[31], had introduced numerous amendments in various Articles/Chapters attached to the Constitution of 1973. By this way a badly mutilated Constitution of 1973 was restored in peace meals[32], as is evident from perusal of the Constitutional Amendments introduced through the Legal Framework Order; amending/adding thereby 29 Articles in toto out of which 20 Articles remained un-touched and as such were made part of the original Constitution while remaining 9 Articles were either amended, altered or substituted in its final shaped of the

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Ch. Zahur Ilahi MNA vs. The State: (PLD 1977 SC 273)
Jehangir Iqbal Khan vs. Federation of Pakistan: (PLD 1979 [Peshawar] 67)
Muhammad Bachal Memon vs. Government of Sindh: (PLD 1987 [Karachi] 296)
Malik Ghulam Mustafa Khar and others vs. Pakistan and others : (PLD 1988 [Lahore] 49)

[28] Referendum Order (2002): (PLD 2002 Central Statute 212)

[29] Qualification to Hold Public Offices, Order (2002): (PLD 2002 Central Statute 258)

[30] Legal Framework Order (2002): (PLD 2002 [Supplement-Part III] Federal Statutes 1604)

[31] Legal Framework (Amendment) Order (2002): (PLD 2002 [Supplement-Part III] Federal Statutes 1698)
Legal Framework (Amendment) Order (2002): (PLD 2003 [Supplement-1, Part I] Federal Statutes 331)

[32] Legal Framework Order (2002) (Date of coming in force of provisions of the Constitution): (PLD 2003 [Supplement-1, Part I] Federal Statutes 952

Constitutional (Seventeenth Amendment), Act 2003[33]. Again the matters of challenges to the vires of Legal Framework Order, 2002, the Constitution (Seventeenth Amendment) Act, 2003 and of the President to Hold Another Office Act, 2004, when went in legal battle before the Supreme Court of Pakistan, the learned Court under the leadership of Mr. Nazim Hussain Siddiqui the then Chief Justice of Pakistan, dismissed all petitions vide a consolidated Judgment dated: 13th April, 2005, while upholding the Seventeenth Amendment as a valid piece of legislation[34].

Similarly, the black pages of our Constitutional history had again witnessed an un-precedent Constitutional history of Pakistan, whereby pursuance to Military versus Judiciary's Confrontations the then incumbent Military Dictator cum President of Pakistan (i.e., General Pervaiz Musharraff), while holding the Constitution in abeyance, once again imposed Partial Martial Law to the extent of Superior Judiciary only.[35] It is again an unfortunate event of our Constitutional history as well, that when the issue, relating to the imposition of Emergency & Status of PCO Judges came in judicial review before the Supreme Court, the learned Court under the leadership of Mr. Abdul Hameed Dogar, again validated the same inter alia on the Principle of *"Salus populi suprema lex"* besides entrusting illegal powers of amending the Constitution as well, vide its Judgment dated: 23rd November, 2007.[36] By this way the Constitution of 1973 once again swallowed mutilation of various Constitutional amendments of this military era too.

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[33] Constitution (Seventeenth Amendment) Act, 2003: (PLD 2004 Federal Statutes 65)

[34] *Pakistan Lawyers Forum vs. Federation of Pakistan*: (PLD 2005 SC 719)

[35] Proclamation of Emergency Order (2007): (PLD 2008 Federal Statutes 108) and Provisional Constitution Order (2007): (PLD 2008 Federal Statutes 110)

[36] *Tikka Iqbal Muhammad Khan vs. General Pervaiz Musharraf* : (PLD 2008 SC 6)

Subsequently the 09 years of Military Rule came to an end, initially pursuance to the conduct of general elections of 18th February, 2008 and practically upon tendering of the resignation by the then military dictator cum President, from his office of president ship on 18th August, 2008. Later on the political government formed in pursuance to the general elections of 2008 decided to undo all those Constitutional Amendments which were either incorporated through the Legal Framework Order, 2002; the Chief Executive Orders 29 & 32; or as such were have/had been validated through the Constitution (Seventeenth Amendment), Act, 2002, as the case may be. Hence, by this way the Constitution of 1973 was again put to further amendments by introduction and passage of the Constitution (Eighteenth Amendment) Act, 2010.[37] A unique Act of its kind in the entire Constitutional history, which had not only repealed the Legal Framework Order, 2002 (LFO's) duly validated by the Supreme Court of Pakistan in Tikka Iqbal Muhammad Khan's Case (i.e., PLD 2008 SC 6) but also repealed the earlier Constitutional Amendment (i.e., 17th Constitutional Amendment) as well, which was based on the amendments introduced through Legal Framework Order, 2002 and as such passed by the elected assembly, during his regime[38], as is evident from perusal of Article 270AA to the Constitution which existed before its substitution through the Constitutional Eighteenth Amendment. Interestingly too, that this amendment had only removed the name of earlier military dictator i.e., General Zia-ul-Haq from the pages of the Constitution, while allowing the amendments made during his regime to be continued therein even till todate. Even, this fact of the Judicially backed up cum Martial Law Dictator's cum

[37] Constitution (Eighteenth Amendment) Act, 2010: (PLD 2010 Federal Statutes 1)

[38] Article 2 to the Constitution (Eighteenth Amendment) Act, 2010: (PLD 2010 Federal Statutes 1)

Politician's incorporated/endorsed/validated Constitutional Amendments, were also made in writing by the Parliamentarian's[39] besides the Judges[40] of apex Courts, thereto.

Similarly the bald claim of the originators of 18th Amendment as to restoring the original Constitution also do not find any place in realty, as such the very draft of the 18th Amendment contains almost the ditto copied version of the amendments introduced by the military regimes, which were not only confusing one[41], but also creates big confusion over the legislative powers of Federation and the Provinces with regard to their mutual relations, inter se[42], which will be discussed in due course of time herein below. When 18th Constitution Amendment was put to judicial scrutiny before the Supreme Court of Pakistan; the learned Court under the leadership of Justice Iftikhar Muhammad Chaudhry the Chief Justice (as he then was), surprisingly without deliberation on its merits; and above all, by its interim order

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[39] Preamble, Article 4 to the Constitution (Eighteenth Amendment) Act, 2010: (PLD 2010 Federal Statutes 1)

[40] Article XI to the Code of Conduct for Judges of the Supreme Court and High Courts, Notification No: F-SECRETARY-01/2009/SJC, dated: Islamabad, 2nd September, 2009: (PLD 2009 Journal 181), also available at Supreme Court of Pakistan Official website (www.supremecourt.gov.pk), lastly visited on 23-02-2016

[41] Justice S. A. Rabbani, Ex-Judge, Sindh High Court and Federal Shariat Court of Pakistan, "*18th Amendment to the Constitution of Pakistan*": (PLD 2011 Journal 06)

Mohsin Abbas Syed, Director, Legislation & Parliamentary Affairs Government of Punjab, Lahore "*A Technical Review of the Constitution (Eighteenth Amendment) Act, 2010*": (PLD 2011 Journal 14)

[42] M. S. Jamal Advocate, Lahore,"*Effect of 18th Amendment on the Legislative Powers of the Federation and Provinces"*: (PLD 2011 Journal 115)

Shahid Hamid Sr. ASC *"Impact of the 18th Constitutional Amendment on Federation-Provinces Relations"* by, PILdAT Briefing Paper No: 39 (July 2010), (Islamabad: Pakistan Institute of Legislative Development And Transparency Press, 2010) and

Babar Sattar ASC *"18th Constitutional Amendment and Devolution of Labour Ministry"* PILdAT Briefing Paper No: 40 (June 2011), (Islamabad: Pakistan Institute of Legislative Development And Transparency Press, 2010)

Ahmer Bilal Soofi, Article on *"Ownership of Oil & Gas"*, Islamabad: The Daily Dawn, December 31, 2013

remanded the matter back to the parliament for its reconsideration, that too to the extent of Articles *(i.e., 175A)* which affected its own jurisdiction only.[43]

Later on pursuance to the observations made in the Nadeem Ahmed Advocate case supra (PLD 2010 SC 1165) the Parliament in compliance to the Court's order was forced to introduce the Constitution (Nineteenth Amendment), Act 2010, which was finally passed while amending, total 06 Articles to the Constitution of 1973 i.e., Articles 81, 175, 175A, 182, 213 and 246[44]. Quite amazingly one has seen, for the first time in our Constitutional history that the apex Court did not agree over its power sharing or losing its domain viz-a-viz the powers of legislature in the process of the appointment of the Apex Court's Judges, that's why this amendment could be rightly termed as the Court's Recommended Amendment.

Similarly, Twentieth Constitution Amendment which was floated by the Parliament to develop the consensus over the appointment of caretaker Government and in order to strengthen the Election Commission of Pakistan, in respect of financial and administrative autonomy, but in reality it did not achieve its desired goals.[45] Likewise the Twenty-First Constitution Amendment with a shorter life time stretching over a period of two years was brought into the Constitution to cater with the sad incident of Army Public School Peshawar, which necessitated the establishment of Military Courts, in order to deal with wide spread menace of terrorism through out of the country.[46] As usual when the vires of 18th and 21st Constitutional Amendment were put to challenge before the Supreme Court; again the

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[43] *Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others* : (PLD 2010 SC 1165)

[44] The Constitution (Nineteenth Amendment) Act, 2010: (PLD 2011 Federal Statutes 19)

[45] The Constitution (Twentieth Amendment) Act, 2012: (PLD 2012 Federal Statutes Supplementary-I at page 355)

[46] The Constitution (Twenty-First Amendment) Act, 2015: (PLD 2015 Federal Statutes 1)

learned apex Court under the leadership of Chief Justice Nasir-ul-Mulk by the Majority of 14 to 03 and 11 to 06 the petitions challenging the same were dismissed, while validating the establishment of military Courts impliedly by invoking the doctrine of State necessity[47], buried by itself earlier in addition to admitting indirectly the failure of the Normal Administration of Criminal Justice System of our country, as well.

Likewise, Twenty-Second Constitution Amendment[48] which was set in motion to bring positive reforms with respect to the eligibility criteria for key appointments in Election Commission of Pakistan both at Federal and Provincial Levels; including that of enhancing its domain to local authorities at gross root level of the society; besides giving to it the administrative and financial independence as well, but it also failed in delivering fruitful results. Again, Twenty-Third Constitution Amendment[49] was floated to give more oxygen to the sinking military Courts established earlier under Twenty-First Constitution Amendment, for a further period of two years. Lastly, Twenty-Fourth Constitution Amendment[50]removed bottle neck of the Constitutional problem in allocation of seats in Parliament & its federating units in the light of population census halted since 1998, in order to achieve the desired election reforms within the country. In brief all constitutional amendments including the pros & cons of judgments rendered in this respect by the apex Courts of our country will be examined deeply besides critically analyzing their effects on the original Constitutional Schemes.

[47] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401)

[48] The Constitution (Twenty-Second Amendment) Act, 2016: (PLD 2016 Federal Statutes 183)

[49] The Constitution (Twenty-Third Amendment) Act, 2017: (PLJ 2017 Federal Statutes 323)

[50] The Constitution (Twenty-Fourth Amendment) Act, 2017: (PLJ 2018 Federal Statutes 167)

Now coming towards the basic structure theory which is an academic thesis of German jurist Professor Dietrich Conray who coined the theory years ago and now countries that have written Constitutions, they debate over as to whether to have a basic structure of constitution or not? As far the application of this theory in our constitutional system is concern, one do not find any such express provision therein, however on the conversely the judicial verdicts of Supreme Court right from the case of Fazlul Quader Chowdhry (PLD 1963 SC 486) till that case of the District Bar Association, Rawalpindi case (PLD 2015 SC 401) do have made several discussions in respect of the fundamentals of Constitution (i.e., salient features) through its non-authoritative views, but at the same time it never dared to struck down even a single Constitutional Amendment on such criteria so far.[51] On the contrary, this doctrine has been adopted by the Supreme Court of India in "Kesavananda Bharati" case and as such affirmed it in its later cases[52]. Likewise, Bangladesh while following the Indian suit had also adopted the doctrine of basic structure initially in "Anwar Hussain Chawdhry's" case[53] and followed the same in successive case laws, besides incorporating it permanently by insertion Article 7B to its Constitution thereof. However, in contrast, the debate as to the existence of the Basic Structure is still open ended in our legal system, so as to answer the daring question that mostly cropped up in the given scenario such

[51] See., *Fazlul Quader Chowdhry vs. Muhammad Abdul Haque* : (PLD 1963 SC 486), *Islamic Republic of Pakistan vs. Abdul Wali Khan* : (PLD 1976 SC 57), *Fauji Foundation v. Shamimur Rehman* : (PLD 1983 SC 457), *Hakim Khan v. Government of Pakistan* : (PLD 1992 SC 595), *Mst. Kaniz Fatima v. Wali Muhammad and another* : (PLD 1993 SC 901), *Sabir Shah v. Federation of Pakistan* : (PLD 1994 SC 738), *Mehmood Khan Achakzai vs. Federation of Pakistan* : (PLD 1997 SC 426), *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* : (PLD 1998 SC 1263), *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc.,* : (PLD 2015 SC 401)

[52] *Kesavananda Bharti vs. The State of Kerala*: (AIR1973 SC 1461), Indira *Nehru Gandhi v. Shri Raj Narain :* (AIR 1975 SC 2299), *Sajjan Singh v. The State of Rajasthan* : (AIR 1965 SC 845), *Golak Nath and others v. State the Punjab and other* : (AIR 1967 SC 1643), I. C.*Minerva Mills Ltd. v. Union of India* : (AIR 1980 Supreme Court 1789), *Waman Rao v. Union of India* : (AIR 1981 SC 271), I.R. Coelho v. State of Tamil Nadu : (AIR 2007 SC 861)

[53] *Anwar Hussain Chawdhry v. Government of the People's Republic of Bangladesh* : (1989 BLD (Supplement) 1)

as *"whether there is any legal need to have a basic structure of the Constitution of Pakistan or not"?* & *"What are their legal implications over the legislative powers of Parliament?"*, therefore instant thesis will also explore the answers to these queries as well.

Now focusing towards the power of Judicial Review of such Constitutional amendments by the apex Courts, we do not find any provision in the Original Constitution of Pakistan 1973, until when the times comes, when finally the then military dictator through his Constitutional Amendment Order, put a permanent clog over the powers of such Judicial Review, while substituting the original Article 239 with that of the amended one[54], which now expressly debars the apex Courts from judicial scrutiny. But inspite of such express clog and while making its clear and loud that the Majlis-e-Shoora (Parliament) enjoys full powers to amend any provision of the Constitution[55], the apex Courts of our country are continuously exercising its power of the Judicial Review as apparent from perusal of the catena judgments rendered by its from time to time.[56]There is another interesting aspect of the said

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[54] Subs. by the Constitution (Second Amendment) Order, 1985 (P.O No 20 of 1985)

[55] Article 239 (5) & (6) to the Constitution of Islamic Republic of Pakistan, 1973

[56] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc.*: (PLD 2015 SC 401),
Rao Naeem Sarfarz vs. Election Commission of Pakistan and others: (PLD 2013 [Lahore] 675),
Arshad Mehmood vs. Commissioner/Delimitation Authority, Gujranwala and others : (PLD 2014 [Lahore] 221),
High Court Bar Association and others vs. Government of Balochistan through Secretary, Home and Tribal Affairs Department and 6 others : (PLD 2013 [Balochistan] 75),
Federation of Pakistan through Secretary Defence and others vs. Abdul Basit : (2012 SCMR 1229),
Munir Hussain Bhatti, advocate and others vs. Federation of Pakistan and another : (PLD 2011 SC 407),
Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry vs. President of Pakistan through Secretary and other : (PLD 2010 SC 61),
Intesar Hussain Bhatti vs. Vice-Chancellor, University of Punjab, Lahore and others : (PLD 2008 SC 313),
Malik Muhammad Mukhtar through L.R's vs. Province of Punjab through Deputy Commissioner Bahawalpur and others : (PLD 2005 [Lahore] 251),
Khan Asfandyar Wali and others vs. Federation of Pakistan through Cabinet Division, Islamabad and others: (PLD 2001 SC 607),
Sardar Farooq Ahmed Khan Leghari and others vs. Federation of Pakistan and others: (PLD 1999 SC 57),
Wukula Mahaz Barai Tahafaz Dastoor vs. Federation of Pakistan and others : (PLD 1998 SC 1263),
Mr. Shahida Zahir Abbasi and 4 others vs. President of Pakistan and others : (PLD 1996 SC 632),
Pir Sabir Shah vs. Federation of Pakistan and others : (PLD 1994 SC 738),
Federation of Pakistan and others vs. Malik Ghulam Mustafa Khar and others : (PLD 1989 SC 26),
The State vs. Zia-ur-Rehman and others: (PLD 1973 SC 49),

Constitutional provision is as well, that is, the amendment substituted in the above cited Article (i.e., Article 239), whereby if on the one hand the judiciary was ousted from questing the legality of such amendment on the other Parliament was given free hand to amend any of the provisions of the Constitution, was actually the idea floated from the corridors of the regime of former military dictator, which being permanently incorporated into the Constitution of 1973, through the introduction of Provisional Order No: 20 of 1985, and since then, it is continuously being respected by all the stake holders right from parliamentarian till that to the judiciary, even without raising any objection(s) as to its legality, from either side. But inspite of this the overall constitutional scheme of the Constitution of our country, do commands every pillar of the state to remain in their respective independent sphere of the trichotomy of powers; subjecting all of them to the Constitution only. But, unfortunately, right from the judiciary till that of the legislature including the Non-State Actors (i.e., Military Dictators), did not obeyed their respective constitutional commitments (i.e., oath of offices as per third schedule) thereof. That's why the thesis will also highlight the due role of our apex judiciary in the light of the case law developed by it from time to time, which also pave way for the Non-State Actor(s) including the Legislature, who have badly mutilate the Will of People thereof.

SIGNIFICANCE OF RESEARCH

By answering the research questions, this research will, INSHALLAH explains that how much the Social Binding Contract *(i.e., the Constitution of 1973 to which the people of Pakistan subjugated at the time of its very inception)* has been badly mutilated at the hands of the Non-State's and the State's Actor(s) who either by hook or crook made the Constitution

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Miss Asma Jillani vs. The Government of Punjab and others : (PLD 1972 SC 139),

of 1973 as subservient to their individual goals rather than to serve the desired national goals, for which consensus was built by its founding members, way back in 1973.

Significantly the abuse of the process of the introduction & incorporation of Constitutional Amendments would be examined vis-à-vis the original constitutional scheme provided in the Original Constitution of 1973, which will be examined further keeping it in juxtaposition with that to the schemes introduced for the adaptation of such amendments practically while taking shelters under the judicial verdicts; on claim of majority in Parliament or sometimes under the pressure from the apex judiciary, as the case may be.

The research with core aim of having comparison of the Constitutional Systems of the Asian Sub-continent countries; particularly of the neighboring countries like Pakistani, Indian and Bangladesh; is being carried out, to pinpoint the loopholes which exist in our legal system and to plug them via suitable solutions which are ultimately demand of the present day.

Furthermore this research will also tackle the ticklish legal issues behind all those Constitutional Amendments which were not kept in sight at the time of impugned legislation. In this context the instant research would be a valuable addition for the law-makers to re-think, re-visit their prescribed policy of personal agenda and to mold it towards the common policy of Public Agenda, so as to make our country a truly Islamic Republic of Pakistan.

In view of the above, the scheme of my thesis will be as follows, i.e., the **First Chapter** focusing on the Constitutional Amendments will explore the true meaning of Constitutional Amendments coupled with its brief historical background. It will then outline various Constitutional Amendment Theories by exploring its phases of the existence, evolution and development, in view of its legal & constitutional position vis a vis of the

practical applicability in respective countries of the Sub-Continents. This is followed by a **Second Chapter** which will comparably analyse the scheme of amending provision as originally incorporated in previously applicable Constitutions (i.e., of 1956, 1962, 1972) in our country with trail of its development till that to the present day Constitution of 1973, which was again subjected to substantial changes, from time to time vis a vis additionally its similar comparison with that to the constitutional provisions existing originally with their gradual development and their legal and constitutional implications within the constitutional framework of the Asian Subcontinent Countries, i.e., Pakistan, India and Bangladesh, respectively. The **Third Chapter** will be examining the nature, limitation and legislative competence of the institution(s)/forum(s) that are competent to bring/effect the Constitutional Amendments primarily keeping in view the constitutional commands as contained in the present day Constitution of 1973 in our part of the country vis a vis of the legitimacy of the judicial review of such amendments in view of the authoritative verdicts/precedents pronounced so far. In next one i.e., in the **Fourth Chapter**, the original Constitution of Islamic Republic of Pakistan, 1973 would be overviewed/examined in the light of various Constitutional Amendments which were effected therein so far, i.e., right from the very First Constitutional Amendment till that of the Twenty Four Constitutional Amendment; which has/had to a great extent, disfigured the whole constitutional scheme, while underlying the root causes that have led to introduction of such Constitutional Amendments, particularly, there has been little rigorous inquiry into why and how far the judicial transgression, overstepping from its prescribed constitutional limits, while allowing the military dictators to effect the Constitutional Amendments at his sweet will, backed by the endorsement of politicians which had to great extent disfigured the overall Constitutional framework besides above those amendment would also be critically examined which were brought into the

Constitution of 1973, by the Politicians during the civilian rule(s) which had also brought substantial changes therein; for serving their personal vested interest vis a vis initially by the deletion while subsequently by the reincorporation of the wishes of the military dictator's in ditto version; on the pretext of restoration of the Constitution of 1973 to its original position thereof. **Fifth Chapter** will examine the exclusive role of apex Judiciary of our country vis a vis of the Judicial Review of all the case laws relating to Constitutional Crises and Constitutional Amendments which facilitated the Non-State Actor(s) and State Actor(s) to badly mutilate the constitutional fabric, while **Sixth Chapter** will conclude the issue with recommendations and giving viable solution to this effect.

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CHAPTER-I

A. INTRODUCTION

The Constitution being an important document of the civilized nations of the world, based on disciplinary rules and regulations of the daily affairs of the government, with an ultimate objective in sight of achieving the daring goals of Social, Economic & Equitable Justice for its subjects, in addition to strengthening brotherhood among Muslim and Non-Muslim States and to ensuring international peace and harmony of the world at large[57]. When that being so, one can rightly term it to be the MOTHERS of all the laws, as such it is the constitutional mandate which gives birth to domestic legislations, thereof.

However inspite of enjoying such an important status, the researchers do not find any concrete definition of the term *"Constitution"* in the written constitutions of the countries of world at large, even this fact also got missing in our own jurisdiction too, when we do not find any such reference in the definitions clause contained under Article 260 to the Constitution of Islamic Republic of Pakistan, 1973 as well, likewise is the unfortunate aspect of the case towards the judicial interpretation of the term *"Constitution"* in the available case laws; as most of them confines itself to the areas of constitutional function, form, scope, extent, nature and other characteristics of the Government[58] only, that's why we have to borrow the definition from foreign jurisdiction, which reads as follows:-

AI. <u>Constitution Definition</u>:

Constitution as per Professor K.C. Wheare is *"a selection of the legal rules which governs the Government of that country and which have been embodied in a document or*

[57] Preamble to the Constitution of Islamic Republic of Pakistan, 1973

[58] *Raja Muhammad Afzal Advocate vs. Government of Pakistan :*(NLR 1998 Civil SC 340) &
Mst. Nasreen Riaz and another vs. Lahore Development Authority through Director General L.D.A, Plaza, Egerton Road, Lahore and 02 others:, (1998 CLC [Lahore] 1099)

collection of documents".[59] Hence, the Constitution of a country being a Social Binding Contract inter se the state and its citizen stands on a higher pedestal than the other ordinary state legislation(s), which sets out complete code of life for the civilized nations.

Therefore, one cannot deny the importance of law and the governance of the subjects under the *"rule of law"*, because in absence of law there can be no order and if that being so then without an order there can be no peace and progress in the society as a whole. Let us look, for a moment at the codified system of universe wherein right from the tiny particle that to the heavenly bodies all objects are being regulated and governed by certain given rules as prescribed by divine laws, in which even a slightest slip of the rule(s), may earn a big catastrophe or destruction of the world, accordingly. Perhaps this was the prime motivating factor, which compelled the Blackstone to define the term *"law"* in the following sense, *"law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational"*.[60]

Thus every animate or inanimate object in the universe which is currently being governed by the laws of nature since time immemorial has to conform its moment and behavior according to those laws, which is *sine qua non* for the survival of the life on this planet. This universal principle of acceptance conversably also applicable to the actions of human beings as well, whereby their unguarded acts may ends in great chaos. Therefore, while realizing the importance of law, the human civilizations started to regulate the human conduct through codified instruments, whereby the subjects to it (i.e., human beings) were

[59] *The State vs. Zia-ur-Rahman and others*: (PLD 1973 SC 49 (b)) and also see Mehreen Anwar Raja *The Constitution of Islamic Republic of Pakistan, 1973*", (Lahore: Eastern Law Book House, Volume-I, 2010): page 6

[60] Dr. V. D. Mahajan *Jurisprudence and Legal Theory*, (Lahore: Civil & Criminal Law Publications, Seventh Edition, 2011) at page 28

being made subservient to the universal principles of the Supremacy & Rule of Law. This trend gives birth to framing of the codified systems for a civilized society which is commonly known as the Constitution in present day parlance.

In this respect when the task of framing of the Constitution for our beloved country came before the First Constituent Assembly, we find that the vision of our founding father Quaid-e-Azam Muhammad Ali Jinnah *(when he talks about the prosperity of the country and of its citizens while delivering his Presidential Speech of 11th August 1947*[61] *to the First Constituent Assembly of Pakistan),* were in the following words:

> *".....Now, if we want to make this great State of Pakistan happy and prosperous we should wholly and solely concentrate on the well-being of the people, and especially of the masses and the poor. If you will work in co-operation, forgetting the past, burying the hatchet, you are bound to succeed, if you change your past and work together in a spirit that everyone of you, no matter to what community he belongs, no matter to what relations he had with you in the past, no matter what is his colour, caste or creed, is first, second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make....."*

[61] Niaz Ahmad, *Quaid-i-Azam Mohammad Ali Jinnah Speeches as Governor-General of Pakistan 1947-1948, i.e.* Presidential Address of to the Constituent Assembly of Pakistan at Karachi dated: 11th August, 1947 (Lahore: Sang-e-Meel Publication, 2004) at page 16 and also available in Government of Pakistan Archives under reference DFP 1989: 42-47.

AII. Genesis of our Country

In support of the ideas of our forefather discussed hereinabove, it will be equally important here to put some light on the very genesis of the creation of an independent Muslim State as well, which emerged on the map of world pursuance to the Iqbal's emphatic proposal about desirability of a Muslim State and Jinnah's political role in espousing Iqbal's dream in reality as Pakistan.

A study of Jinnah's pronouncements based on his speeches and letters brings its readers into three tiers development in his concept of Muslim self-determination. At the first stage (from 1906 to 1916) he advocates the cause of his community before the Crown; At the second stage (1916 to 1938) he demands freedom while pleading the Muslim cause before the Hindu Community; and at the last stage (1938 to 1948), when he gives up the ideal of Hindu-Muslim unity and advocates the exclusive cause of Muslim India before the world.[62]

Admittedly, the genesis of this advocacy of our founding father find its roots way back 1400 years in the ancestral Islamic Values, but when we specifically talk about the advent of Muslim Nationhood in the subcontinent, we find that the researchers/writers do agree on the point that it actually get started initially from the day when Muhammad Bin Qasim made his first entry into this part of the land being a conquer, while particularly from the date of the start of nationalist movement in India in the year 1885, respectively.[63] What to talk about the nationhood here, even we do have evidence of the territorial demarcation of the districts of present day Pakistan, as were presented way back in 1920, through an open letter of Mr. Abdul Qadir Bilgrami addressed to Mr. Gandhi which is Published in *Zul Qarnain*,

[62]Saleem M.M. Qureshi, *The Politics of Jinnah* (Karachi: Royal Book Company, First Edition, 1988) at page 57

[63] Ibid page 77

suggesting division of Indian territory into two separate states.[64] Even, the name suggested for such Muslim State as "Pakistan" was advance through a pamphlet of Mr. Chaudhry Rehmat Ali, being a student of Cambridge, in the year 1933.

Jinnah's Political experience also led him initially from advocating the interest of Muslim Community as being one of the several other communities living in subcontinent, so as to get rid of the colonial rule[65], but later on the researchers do find gradual shift in his political thinking, when he was found being actively involved in advancing/protecting the interest of Muslim Community alone, though this change was not an abrupt one rather pursuance to the reactions shown to number of events, such like upon the victories of Congress in 1937, the hostile attitude of Nehru while ignoring completely the very existence of Muslim League and declaring that India had only two representative forces i.e., the British Government and the Congress, so on and so forth.[66]

However, the above cited hostile attitude of the opponents were clearly responded to, through the Jinnah's advocacy of nationhood, based on "Two Nation Theory" as expounded in the Objective Resolution of March 23, 1940[67] and the events like treating the Muslims of India as not being a minority but a nation as is clearly depicts itself from reading of his (i.e., Jinnah's) presidential address to the All India Muslim League on March 22, 1940, while declaring therein unequivocally that:

> *"The problem in India is not a an inter-communal but of international character and must be treated as such if the*

[64] Ibid page 100

[65] Ibid page 56

[66] Ibid page 17

[67] Ibid page 65

> *British Government really sincere to secure peace and happiness of the people of subcontinent, the only course open to us all is to allow the major nations separate homelands by dividing India into autonomous national States".*[68]

Interesting aspect of the case is that this firm stand (i.e., two nation theory) of Mr. Jinnah, despite of the persistent refutation from the Hindu Community, had already been suggested/approved by our opponents too, which admittedly find its place in the historical record of the year 1924, in the series of newspapers articles such as "From Ravi to Brahmaputra" written by Mr. Lala Lajpat Rai, being the founder of Hindu Mahasabah suggesting the partition of India between Hindu and Muslims while subsequently in the year 1937 in the presidential address of Mr. V. B. Svarkar *(delivered to the Hindu Mahasabha)*, admitting therein the existence of two nations, respectively.[69] Even, similar views were also expressed by Lord Acton when he states in the following words:

> *"Thenceforward there was a nation demanding to be united in a State-a soul, as it were, wandering in search of a body in which to begin life again; and, for the first time, a cry was heard that the arrangement of States was unjust-that their limits were unnatural, and that a whole people was deprived of its right to constitute an independent community".*[70]

Hence, keeping in view the above, one cannot deny the tireless achievement of Mr. Jinnah as compare to any other liberation leader, which not only led his people to

[68] Ibid page 17

[69] Ibid pages 100 to 102

[70] Ibid page 103

independence but secured for them a separate and distinct national identity in a homeland exclusively meant for their own, without needing an army or a guerrilla group to back him. Because others struggled for liberation within the states already in existence, but it was the unique privilege of Mr. Jinnah that he all alone sought a separate state where none had existed for more than two thousand years[71], with vision in sight to go by Parliamentary System with federal structure, as depicts from the Lahore Resolution of 1940, thereof.

After getting independence from the colonial occupation & Hindu opposition, respectively, the vivid task before the first constituent assembly was to frame future Constitution for the new born state of Pakistan[72] as depicts from the contents of the speech of our founding father when he was found stating as:-

> *"In the very nature of things it will take eighteen months to two years before the new constitution of Pakistan is ready but we cannot wait until that works is completed and, therefore, I have made a small beginning, as I have said but a very important one and if as they say small beginning, but a very important one, after consulting various interests in Baluchistan, namely, I have decided to set up Governor General's Advisory Council. I am at it and perhaps very shortly the constitution, rules and procedure of that body will be announced. This Council will enable people to associate themselves, no doubt as an advisory body, with administration - its executive and legislative side. That is the first step that I have taken because I cannot wait until we have a final constitution of Pakistan ready".*

[71] Ibid page 26

[72] Niaz Ahmad, *Quaid-i-Azam Mohammad Ali Jinnah Speeches as Governor-General of Pakistan 1947-1948, i.e.* Presidential Address of Quaid-i-Azam to the Constituent Assembly of Pakistan at Karachi dated: 11th August, 1947 (Lahore: Sang-e-Meel Publication, 2004) at page 14 and also available in Government of Pakistan Archives under reference number DFP 1989: 42-47

but unfortunately, soon after 13 months of the birth of our beloved country, the entire nation witnessed a tragic incidence of the death of its founding father, due to which the constitution making process held in halt. In the mean while the country was mainly governed through two British adopted enactments, i.e., The Government of India Act, 1935 and Indian Independence Act, 1947, former dealing with the powers and functions relating to the office of Governor General while the later with the legislative functions of the legislative assembly, respectively; but the tug of war inter se the bureaucratic turn politician government & office of the Governor General, for gaining complete control/power over the government's affairs, actually putted serious challenges to constitution-making and law-making processes, till the time when we succeeded in framing of our first shortly lived Constitution in the year 1956.

Unfortunately, this lust of power *(i.e., since the day of inception, 1947)*, has created an ugly face of our constitutional history, wherein the researchers will find that the process of replacement of the Colonial Constitution with that of the unified Code of life *(i.e., Constitution 1973)* for the independent state of Pakistan, went through various surgical operations in the years 1956, 1962, 1972, during which there is replete dismissal of the elected governments and impositions of martial laws that ruled the country for over a period of 30 years, under Ayub Khan (1958-1969); Yahya Khan (1969-1971); Zulfiqar Ali Bhutto [as Civilian Martial Law Administrator] (1971-1972); Zia-ul-Haq (1977-1988) and Parvez Musharraf (1999-2008), respectively. It is also undeniable historical fact that in all these unfortunate scenarios, the matters relating to imposition of martial laws or civilian martial laws as the case may, whenever came under discussion before the honorable apex Courts, in most of those cases, the judicial verdicts, pronounced from time to time, not only seems to be leaned towards upholding the imposition of such Martial Laws but also self contains the elements of injustice therein too; whereby prima facie the honorable apex Court(s) while over

stepping/usurping their/other elements of the States' prescribed constitutional limits unfortunately allowed the military dictator(s) to effect the constitutional amendments as per their own sweet whims and desire.

The matter does not end here, rather, whenever later on the issue relating to the dictatorial Act's, Ordinances, Martial Law Regulations or Amendments etc., if came before the successive Parliament(s) of its time, the constitutional history of Pakistan again reveals an ugly image of its kinds, whereby not only all those Acts, Ordinances, Martial Law Regulations or Amendments as the case may be; which were either made, introduced or incorporated into the Constitution, were as such got indemnified/validated by the Parliamentarians or subsequently given legal shelter/protections through cover of Constitutional Amendment Acts; that too, without introduction of even a slightest change therein that too in deviation to the Constitutional mandate as envisaged under Article 237 as well.

It is worth to mention here, that while focusing the military expeditions; fair endeavor would also be made in examining all those Constitutional Amendments too, which had/have purely been brought into the Constitution by the Politicians (ruling parties) themselves, with their hidden object to strengthen their respective offices, while shifting the centre of powers from the office of Parliament to that to the office of a Sole Party Head (who may even be a non-elected member too) of the ruling party, respectively.

Besides above, endeavors would also be made to put light on those Constitutional Amendments too, which has been made part of the Constitution in order to service/protect the interest of Judiciary as well.

In nut shell the thesis would be examining the effects of all such amendments, which had particularly de-shaped/disfigured the overall Constitution's Schemes of the Constitution of Islamic Republic of Pakistan, 1973. Most importantly, the relevant constitutional and legal issues would be highlighted and discussed in its chronology orders vis-a-vis the Constitutional Amendments made from day one till so far; besides above efforts would be made to pinpoint the circumstances which had actually given an unbridled license to the military dictators *(i.e., through the judgments rendered by the apex Courts)* or to the politicians or to the apex Courts, as the case may be, to put their personal wishes/whims over the wishes/whims of the general masses, particularly, when the Social Binding Contract (i.e., Constitution) to which they subjugated is grossly mutilated by such military/civilian usurper's commands. At last the research would be concluded to settle down the dilemma which cropped up due to mutual connivance of the Judicial, Military and Politicians understandings, while risking the social & legal norms of the society at large.

1.1 What is a Constitutional Amendment, its Importance & Scope?

A constitutional amendment refers to the modification of the constitution of a nation or a state. It is necessary to keep up with the time and to cater future challenges, when time and tide dictates a change there to. In many jurisdictions either the text of the constitution is altered itself or change its' effect only. This method of modification is typically written into the constitution itself, which makes the constitution being either a flexible or rigid one. The best example of such a country which is having the former set up is that of the Newzealand, while the later system is being followed in the countries like Pakistan India, USA, Switzerland so on and so forth. Needless to state here that the later class can be further subdivided into two categories i.e., the More Rigid *(i.e., which is passed through Special Procedure only)* and the Less Rigid *(i.e., which is passed through Normal/Ordinary Procedure only)*, thereof.[73]

Conversely, the scope and criteria of amending the written constitution also find its place in detail into the respective constitutions of each country, such as the Constitution of Islamic Republic of Pakistan, 1973, in Part-XI, prescribed the method, scope and procedure of effecting Constitutional Amendments[74], likewise, Part-XX to the Constitution of India of 1949[75] and similarly Part-X to the Constitution of the People's Republic of Bangladesh of 1972, prescribed the detail procedures in this regard[76].

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[73] Hamid Khan & Muhammad Waqar Rana, *Comparative Constitutional Law*, (Karachi: Zaki Sons, Second Revised Edition, 2014) Pages 4 & 5

[74] Articles 238 & 239 to *The Constitution of Islamic Republic of Pakistan, 1973*, (Islamabad: National Assembly of Pakistan, 2012) at page 141

[75] Article 368 to *The Constitution of India, 1949,* (Dehli: Eastern Book. Company, Twelfth Edition, 2013) at page 1070

[76] Article 142 to *The Constitution of the People's Republic of Bangladesh*, 1971, downloaded from http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=367, copy available in Judges Library, Supreme Court of Pakistan, Islamabad, at pages 66-67

As we know, that the need for amendments to a constitution arises when its provisions are found to be too weak or too ambiguous to implement the social contract. A constitution also needs to be amended to keep abreast of the changes in a people's vision or their search for higher forms of political organization or to purge the basic law of the undesirable features that it may have acquired through accidents of history, such as fits of authoritarianism. Perhaps this is the reason, when while realizing the application of the principle of flexibility within the Constitution in mind, Mr. Zulfiqar Ali Bhutto the then Prime Minister of Pakistan, in his an essay on *"The Essentials of Constitution"* found to be quoting the attributes of an ideal Constitution in the following words, such as[77]:

> *"....it is impossible, however for a Constitution to retain the national will and personality for long if it is rigid. People's values are subject to incessant modifications, and it is incumbent upon a good Constitution to register the changes accordingly or it cannot maintain its vigour and remain the true embodiment of community's will. Indeed it is essential for a Constitution to be a judicial mirror of changing realities, reflecting the shifts in community's mood s and power relations....."*

Having admitted the afore noted position, all constitutional amendments if any, are tested or ought to be tested for legitimacy, i.e.,, they should be constitutionally valid. More importantly, whether such constitutional amendment(s) do promote the interest of the people? For that matter, various regimes' claims to governance in the interest of the people can be judged in terms of the direction of their amendments to the Constitution — but the crucial question which need to be addressed here, is as to whether these amendments advanced the

[77] Muhammad Saad Khan, Lecturer, Punjab Law College, Lahore *"Ideology, Forefathers and Constitution of Pakistan"*, [PLD 2014 (Journal) page 87 at 89]

cause of democracy and public good or whether they merely increased the state's coercive powers? For that matter let us examine the issue in its historical perspective in detail.

1.2 Historical Background of the Constitutional Amendments in Pakistan.

As we know that India and Pakistan inherited the British Indian System of Governance, through the newly elected constituent assemblies of each of state under the Indian Independence Act, 1947 *(the only drawback of which was that it did not provide any time frame for completion of the Constitution)*, while the Government of India Act, 1935 served as the interim constitutional document for each of the independent domains, until they could have pass their own Constitutions. It is important to note here that during the year 1948 to 1955, the constituent assembly of Pakistan adopted more than 30 amendments[78] in the Government of India Act, 1935, in which the most controversial amendment remains, the revival of the governor-general's power of dismissal of a Provincial Government[79]; a provision which had already been deleted at time of independence[80].

However, during the afore referred period *(1948-55)*, the Constitution Making Process in our part of the domain unfortunately went through slow moving process[81] as compared to

[78] Constitution (Amendment) Act, 1950, [PLD 1950 (Part-2) page 424]; Constitution (Amendment) Act, 1951 [PLD 1951 (Part-2) page 210]; Constitution (Second Amendment) Act, 1951 [PLD 1952 (Part-3) page 2]; Constitution (Amendment) Act, 1953 [PLD 1953 (Part-2) page 110]; Constitution (Amendment) Act, 1954 [PLD 1954 (Part-3) page 154]; Constitution (Amendment) Act, 1956 [PLD 1956 (Part-4) page 35]

[79] Section 10(5) to the Government of India Act,1935; *Constitutional Documents Pakistan* Volume-II, 1964, Published by Manager of Publication, Government of Pakistan Karachi, at page I

[80] Justice (R) Dr. Munir Ahmed Mughal, *A Brief History of Constitutional Developments in Pakistan (1935-2004)*, (Lahore: Hammad Law Books House, Edition 2004) at Page 17

[81] As per the speech of Mr. Nurul Amin (who was member of the initially First Constituent Assembly, soon after partition as well) made at the time of the final adoption of the "Motion to pass the Constitution Bill, as amended", in whose opinion the lack of consciences on complicated questions and rigid stands of the fellow members (Opposition) couple with mis-adventurism of the then Governor General with collaboration and assurance of the then Army Chief, were the main reasons of such delays, for more detailes please see the National Assembly of Pakistan (Constitution Making) Debates Official Report (Volume 3) of dated 10th April 1973, at pages 2450 to 2452 and on wards, Printed at Ferozsons Ltd Lahore Published by the Manager of Publications, Karachi, available in Supreme Court of Pakistan Judges Library as well as on the official website of the National Assembly as well (i.e., www.na.gov.pk).

high pace constitution making process of our neighboring country (i.e., India), who after three years of the hectic debates & deliberations, finally succeeded in giving a Constitution to its nation on November, 1949 which was came into effect on 26th January, 1950. While on the other hands, Pakistan's two constituent assemblies[82], inspite of chalking out the broader structure of the future constitution through the passage of the Objective Resolution on 12th March, 1949, remained failed to discharge of their prime obligations/duties till passage of the 09 years in this regard, where after it had finally delivered its first short lived Constitution on February, 1956, with Parliamentary Form of Government, which was came into force on 23rd March, 1956, accordingly[83].

Then we see that General Ayub Khan during his tenure as the Second President of Pakistan appointed a Constitution Commission on 17th February, 1960[84], and it was pursuance to its report that a new Constitution with Presidential Form of Government was given to the nation on 1st March 1962[85]. During the period of interval i.e., in between 1963 to 1967, this Constitution was put to amendment process, whereof total 08 amendments were carried out therein.[86]

[82] The First one was created on 26th July, 1947 under Independence Act, 1947, while the Second one was created on 28th May 1955 under Governor General's Order No: 12 of 1955, *Parliamentary History*, available at www.na.gov.pk, lastly visited on 05-06-2018

[83] The Constitution of the Republic of Pakistan, 1956, [PLD 1956 (Part-4) page 54]

[84] Parliamentary History available at National Assembly of Pakistan's official website i.e., www.na.gov.pk, lastly visited on 05-06-2018

[85] The Constitution of the Republic of Pakistan, 1962, [PLD 1962 (Part-6) page 143]

[86] Constitution (First Amendment) Act, 1963 ; Constitution (Second Amendment) Act, 1964 [PLD 1964 (Part-6) page 195]; Constitution (Third Amendment) Act, 1965, [PLD 1965 (Part-6) page 165]; Constitution (Fourth Amendment) Act, 1965, [PLD 1966 (Part-6) page 5]; Constitution (Fifth Amendment) Act, 1965, [PLD 1966 (Part-6) page 76]; Constitution (Sixth Amendment) Act, 1966, [PLD 1966 (Part-6) page 147]; Constitution (Seventh Amendment) Act, 1966, [PLD 1967 (Part-6) page 65]; Constitution (Eighth Amendment) Act, 1967

Subsequently the reign of Government came into hands of General Yahya Khan who imposed Martial Law on 25th March, 1969 who again abrogated the Constitution of 1962 besides promulgating the Legal Framework Order (LFO) of 1970, for the purpose of electing a house having dual mandate thereby, one of framing the Constitution and second acting as Federal Legislature, respectively. Thereafter, elections on direct franchise and the principle of one-man one-vote paved way for the formation of Constituent Assembly but debacle of our Eastern Wing in 1971 halted the process of Constitution making until the time of the transfer of powers and governance of the Western Wing (i.e., present day Pakistan) finally came into hands of the civilian government Mr. Zulfiqar Ali Bhutto, who as a President of Pakistan and Civilian Martial Law Administrator via the Legal Framework Order 1970, was also been elected as the President of the Constituent Assembly, which was consisting on the remaining members of the then Constituent Assembly elected from the Provinces of West Pakistan and two from East Pakistan, in order to complete the task as a constitutional machinery[87].

As a result thereof the President of Constituent Assembly in the capacity of Chief Martial Law Administrator had promulgated an interim Constitution, setting Presidential Form of Government, which came into force on 21st April 1972[88], the interesting thing of the instrument referred above was that it vests the power to amend the constitution with the office of President[89]. Soon after of which the same was got amended 07 times either through the Presidential Orders or by Pre & Post Constitution Amendments Orders, respectively.[90]It is

[87] S. M. Zafar Senior Advocate, *"Constitutional Development [Fifty Years of Pakistan: Achievements and Failures and the Way out]"* Published in PLD 2002 [Journal] page 249 at 254

[88] The Interim Constitution 1972 published in PLD 1972 [Central Statute] page 505

[89] Article 279 (1) (c), The Interim Constitution 1972: [PLD 1972 (Central Statutes) 505 at page 583]

[90] Interim Constitution of the Islamic Republic of Pakistan (Approval by the National Assembly) PLD 1972 [Part-5] page 622; Interim Constitution of the Islamic Republic of Pakistan (Order by the President under Article 139) PLD 1972 [Part-5] page 625; Post Constitution P.O 1 of 1972, PLD 1972 [Part-5] page 631;

also worth to mention here that among these amendments the notorious one was the Presidential Order of dated: 30th April 1972, through which the President has suspended the Fundamental Rights besides placing a further clog over the Right of Citizen to move to the Apex Courts i.e., High Courts and Supreme Court, against any injustice in this regard.

What to state here about the sad state of affairs of the citizens of our country, when unfortunately the Constituent Assembly which was set forth to frame the Constitution of 1973, had actually derives its mandate of framing the new Constitution from the Legal Framework Ordinance 1970, introduced by the then Military Dictator i.e., General Yahya Khan, which even sets fundamental principles of the future constitution besides setting time frame of 120 days, for the Constituent Assembly to complete the task of framing & authentication of the new Constitution from the date of its first meeting thereof, failing of which the Assembly was deemed to be dissolved accordingly[91]. Hence, it was the then joint Opposition Parliamentary Party which nominated a Constitution Committee headed by Ghous Bukhsh Bazinjo[92], who finally replaced the interim Constitution of 1972 with that of the permanent Constitution of 1973, setting up the Parliamentary Form of Government, with balance of power, tilted towards the office of Prime Minister[93]. But, irony of the fate is that soon after its inception and at the hands of its mentor (i.e., Zulfiqar Ali Bhutto) the

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Interim Constitution of the Islamic Republic of Pakistan (Suspension of Fundamental Rights) PLD 1972 [Part-5] page 704; Interim Constitution of the Islamic Republic of Pakistan (Powers of Federal Legislature to enact laws with respect to drugs) PLD 1972 [Part-5] page 747; Post Constitution Presidential Order 4 of 1972, PLD 1972 [Part-5] page 765; Interim Constitution of the Islamic Republic of Pakistan (Consolidated corrigenda issued by the Authority) PLD 1972 [Part-5] page 768;

[91] Articles 20, 24, to 26 of the Legal Framework Order, 1970, Published in PLD 1970 (Central Statute) Page 229

[92] S. M. Zafar Senior Advocate, *"Constitutional Development [Fifty Years of Pakistan: Achievements and Failures and the Way out]"* Published in PLD 2002 [Journal] page 249 at 257

[93] The Constitution of Islamic Republic of Pakistan, 1973

Constitution of 1973 had received as many as **Seven Amendments**[94] in between the period of **May 8, 1974** and **May 16, 1977**, in whom of them, most of the amendments were incorporated to serve his personal interest which includes the imposition of complete ban on political activities, including those which curtailed the powers of the Superior Courts in the country as is evident from perusal of the 1st , 4th , 5th, and 7th Amendments to the Constitution of 1973, which will be examined in detailed at the relevant point of time herein below.

It is also important to note here that the focus of my research in this respect would not be confine to examine the issue in its political aspect; rather it would be restricted to its constitutional and legal aspects only. So, while leaving aside the motivating factors of above cited events for a moment it would be worth to highlight here, the twist which has been seen in the history pages, when after a short interval of the incorporation of Constitution (Seventh Amendment), Act 1977; on 05th July 1977 the Bhutto's government was suddenly removed under the Martial Law imposed by the then General Zia-ul-Haq, who pursuance to the license given to him by the Supreme Court[95]effected numerous Constitutional Amendments in between the period of February 1979 till March 1985, thereof.[96] Unfortunately, these

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[94] See Constitution (First Amendment) Act 1974 to Constitution (Seventh Amendment) Act, 1977, i.e., Constitution (First Amendment) Act, 1974: Published (PLD 1974 Central Statute 252), Constitution (Second Amendment) Act, 1974: Published (PLD 1974 Central Statute 425), Constitution (Third Amendment) Act, 1975: Published (PLD 1975 Central Statute 109), Constitution (Fourth Amendment) Act, 1975: Published (PLD 1975 Central Statute 337), Constitution (Fifth Amendment) Act, 1976: Published (PLD 1976 Central Statute 538), Constitution (Sixth Amendment) Act, 1976: Published (PLD 1977 Central Statute 46) and Constitution (Seventh Amendment) Act, 1977: Published (PLD 1977 Central Statute 304)

[95] *Begum Nusrat Bhutto vs. Chief of Army Staff and Federation of Pakistan:* (PLD 1977 SC 657)

[96] Constitution (Amendment) Order, 1979, [President's Order. 3 of 1979] : (PLD 1979 Central Statutes 31), Constitution (Second Amendment) Order, 1979, [President's Order. 21 of 1979] : (PLD 1979 Central Statutes 567), Constitution (Amendment) Order, 1980, [President's Order. 1 of 1980] : (PLD 1980 Central Statutes 89), Constitution (Second Amendment) Order, 1980, [President's Order. 4 of 1980] : (PLD 1980 Central Statutes 124), Constitution (Third Amendment) Order, 1980, [President's Order. 14 of 1980] : (PLD 1981 Central Statutes 83),
Constitution (Fourth Amendment) Order, 1980, [President's Order. 16 of 1980] :PLD 1981 Central Statutes 232, Constitution (Amendment) Order, 1980,[President's Order. 5 of 1981] : (PLD 1981 Central Statutes 251), Provisional Constitution Order, 1981,[C.M.L.A's Order. 1 of 1981] : (PLD 1981 Central Statutes 183),

amendments backed by the seal of the Parliament of Mr. Muhammad Khan Junejo's lead Government has not only changed the entire inbuilt constitutional scheme[97], but also laid foundations for the dissolution of the coming Civilian Governments of its time as well[98], until

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Provisional Constitution (Amendment) Order, 1981,[C.M.L.A's Order. 2 of 1981]:(PLD 1981 Central Statutes 183),
Provisional Constitution (Second Amendment) Order, 1981,[C.M.L.A's Order. 3 of 1981] : (PLD 1981 Central Statutes 250),
Provisional Constitution (Third Amendment) Order, 1981,[C.M.L.A's Order. 4 of 1981] : (PLD 1981 Central Statutes 275),
Provisional Constitution (Amendment) Order, 1982,[C.M.L.A's Order. 1 of 1982] : (PLD 1982 Central Statutes 153),
Provisional Constitution (Second Amendment) Order, 1982,[C.M.L.A's Order. 3 of 1982]: (PLD 1982 Central Statutes 349),
Constitution (Second Amendment) Order, 1981,[President's Order. 7 of 1981] : (PLD 1981 Central Statutes 275), Constitution (Third Amendment) Order, 1981,[President's Order. 12 of 1981] : (PLD 1982 Central Statutes 3),
Constitution (Fourth Amendment) Order, 1981,[President's Order. 13 of 1981] : (PLD 1982 Central Statutes 8),
Constitution (Fifth Amendment) Order, 1981, [President's Order. 14 of 1981] : (PLD 1982 Central Statutes 3),
Federal Council (Majlis-e-Shura) Order, 1981, [President's Order. 15 of 1981] : (PLD 1982 Central Statute 123),
Federal Council (Majlis-e-Shura) (Amendment) Order, 1982, [President's Order. 7 of 1982] : (PLD 1982 Central Statute 158),
Federal Council (Majlis-e-Shura) (Second Amendment) Order, 1982, [President's Order. 9 of 1982] : (PLD 1982 Central Statute 165),
Constitution (Amendment) Order, 1982, [President's Order. 2 of 1982]PLD 1982 Central Statutes 153,
Constitution (Second Amendment) Order, 1982,[President's Order. 5 of 1982] : (PLD 1982 Central Statutes 155),
Constitution (Third Amendment) Order, 1982, [President's Order. 12 of 1982] : (PLD 1982 Central Statutes 344),
Constitution (Fourth Amendment) Order, 1982, [President's Order. 13 of 1982] : (PLD 1982 Central Statutes 352,
Constitution (Amendment) Order, 1983 [President's Order. 4 of 1983] : (PLD 1983 Central Statutes 71),
Constitution (Second Amendment) Order, 1983 [President's Order. 7 of 1983] : (PLD 1983 Central Statutes 86),
Constitution (Third Amendment) Order, 1983 [President's Order. 9 of 1983] : (PLD 1983 Central Statutes 123),
Constitution (Amendment) Order, 1984 [President's Order. 1 of 1984] : (PLD 1984 Central Statutes 86),
Constitution (Second Amendment) Order, 1984 [President's Order. 2 of 1984] : (PLD 1985 Central Statutes 1),
Constitution (Amendment) Order, 1985 [President's Order. 6 of 1985]: (PLD 1985 Central Statutes 550),
Constitution (Amendment) Order, 1985 [President's Order. 11 of 1985] : (PLD 1985 Central Statutes 569),
Referendum Order, 1984 [President's Order. 11 of 1984] : (PLD 1985 Central Statutes 449).
Revival of the Constitution of 1973, Order (1985), [President's Order. 14 of 1985] : (PLD 1985 Central Statutes 456),

[97] Constitution (Eighth Amendment) Act, 1985: (PLD 1986 Central Statutes 1)

[98] Ibid,
Note: The above referred Order empowered the military dictator with more discretionary powers such as; to dissolve the National Assembly by virtue of Article 58(2)(b); with the right, to nominate the Prime Minister, Governors of the Provinces, the Judges & Chief Justice(s) of High Courts and Supreme Court, as the case may be; to ask Prime Minister to get vote of confidence from the Assembly; issue Ordinances; set dates for Elections

the reigns of military dictators rules were shifted by Nature to the Civilian Government's pursuance to the tragic incidence of the air crash of 17th August 1988, in which the military dictator was killed along with other high officials boarded on flight.

Later on, due to political unrest among various pillars of the states, the affairs of the country were being forced to run under the shadow of mistrusts among head of the State (the President) and head of the Government (the Prime Minister) that's why we have been seeing again an ugly pages on our political history, of the rise and falls of the Civilian Governments one after another, due to the ongoing game of the musical chairs, which was "ON" at that time. Needless to state here that the credit of such turmoil's definitely goes to the constitutional amendments introduced during the dictatorial regime of General Zia-ul-Haq, which will be dilated upon in detail in Chapter-IV herein below.

When the Civilian Government of Miss Benazir Bhutto came into powers in 1988, a Constitutional Amendment was floated in the Upper House (i.e., the Senate), which was later on stand withdrawn[99]. However, when Mr. Nawaz Sharif came into power in 1990s, he made six attempts of making amendments into the Constitution but succeeded in introducing only five, while one of such attempt was later on withdrawn.[100].

Again due to the coup d'état of Oct 12, 1999, the reigns of political government came into the hands of General Parvez Musharraf, who as a military dictator and in pursuance to

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of National Assembly and to appoint Care Taker Government; to appoint Service Chiefs and other important Federal Officers; to call for referendum on issues of National Importance.

[99] Constitution (Eleventh Amendment) Bill, 1989, Published in Mazhar Ilyas Nagi Advocate *"The Constitution of the Islamic Republic of Pakistan, 1973"*, By, Vol.II Edition 2013, at page 1855

[100] Constitution (Twelfth Amendment) Act, 1991, Published in [PLD 1991 Central Statute 461]; Constitution (Thirteenth Amendment) Act, 1997, Published in [PLD 1997 Central Statute 323]; Constitution (Fourteenth Amendment) Act, 1997, Published in [PLD 1997 Central Statute 324]; Constitution (Fifteenth Amendment) Bill, 1998; Constitution (Sixteenth Amendment) Act, 1999, Published in [PLD 1999 Central Statute 413]

the license given to him by the Supreme Court[101] paved his entrance into the corridors of Presidency besides effecting numerous Constitutional Amendments in between October 1999 till August 2002[102], while brutally amending the Constitution by saving his personal interest thereof. Sad enough that the Parliament of its time had also duly endorse his entire misdeed by incorporating them in shape of the permanent constitutional amendment[103] which was likewise also re-endorsed as a valid piece of legislation through a judicial verdict of apex Court as well[104]. Similar was the case of the Constitution Amendments[105] affected during the period of Mini Martial Law of 2007[106] imposed by the same military dictator against the institution of apex Judiciary only which also receive Judicial[107] and political endorsement as well.

It was pursuance to the conduct of the general elections of 18th February, 2008 that finally President Musharraf's step down from the corridors of Presidency and the reigns of the affairs of the government were given to the civilian government of Mr. Yousaf Raza Gillani, who in obedience to the political understanding arrived at between his Government

[101] *Zafar Ali Shah vs. General Pervez Musharaf*: (PLD 2000 SC 869)

[102] Referendum Order (2002): (PLD 2002 Central Statute 212); Qualification to Hold Public Offices, Order (2002): (PLD 2002 Central Statute 258); Legal Framework Order (2002): (PLD 2002 [Supplement-Part III] Federal Statutes 1604) ; Legal Framework (Amendment) Order (2002): (PLD 2002 [Supplement-Part III] Federal Statutes 1698); Legal Framework (Amendment) Order (2002): (PLD 2003 [Supplement-1, Part I] Federal Statutes 331); Legal Framework Order (2002) (Date of coming in force of provisions of the Constitution): (PLD 2003 [Supplement-1, Part I] Federal Statutes 952

[103] Constitution (Seventeenth Amendment) Act, 2003: (PLD 2004 Federal Statutes 65)

[104] *Pakistan Lawyers Forum vs. Federation of Pakistan* : (PLD 2005 SC 719)

[105] Constitution (Amendment) Order, 2007, [Presidents' Order No: 5 of 2007] of dated: 20th November, 2007, published in [PLD 2008(Federal Statutes) 114] & Constitution (Second Amendment) Order, 2007, [Presidents' Order No: 6 of 2007] of dated: 14th December, 2007, published in [PLD 2008(Federal Statutes) 117]

[106] Proclamation of Emergency (2007) of dated: 3rd November, 2007, published in [PLD 2008(Federal Statutes) 108]

[107] *Tikka Iqbal Muhammad Khan vs. General Pervaiz Musharraf*: (PLD 2008 SC 6)

and that of the other political parties was forced to inked the Charter of Democracy (CoD) by accepting the demand of constituting a Constitutional Reform Committee, with an object to restore the democratic setup in the country and also to remove the dictatorial amendments from the Constitution, which were incorporated in it from time to time. Finally, the political consensus referred above drove the Parliament to lead the Constitution of 1973 once again on the path of further amendments[108], which also failed to fulfill its due promises in respect of restoring the Parliamentary System within the country and of the Provincial autonomy over various overlapping jurisdictional and other important issues etc., besides further creating legal confusion with respect to the effect of the repeal of earlier constitutional amendment (17th Amendment) as well which will be dilated upon in detail at the relevant point of time.

The Constitution of 1973 once again went through further surgical operation in the year 2011 not because of the license given to the military dictator or at the sweet whims of the politicians but only pursuance to an interim order[109] passed by the Supreme Court remanding the matter back to Parliament for reconsideration to the extent of Article 175A to the Constitution only, whereof the legislature finally forced to endorse the will of judiciary in shape of the introduction of a new Constitution Amendment[110] as such the judiciary was found reluctant over the power sharing or losing its domain viz-a-viz the powers of legislature in respect of the mode and method of the appointment of the apex Court's Judges. Therefore, it could be rightly termed as the Court's Recommended Amendment.

Then again in need of developing the consensus over the appointment of caretaker Government and in order to strengthen the Election Commission of Pakistan, in respect of the

[108] Constitution (Eighteenth Amendment) Act, 2010: (PLD 2010 Federal Statutes 1)

[109] *Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others* : (PLD 2010 SC 1165)

[110] The Constitution (Nineteenth Amendment) Act, 2010: (PLD 2011 Federal Statutes 19)

financial and administrative autonomy, the Constitution of 1973 was put to further amendment by the civilian government lead by the Pakistan People Party; but in reality it also did not achieve its desired goals.[111]

Again, it was due to the extreme layer of terrorism through out of the country and particularly the sad incident of Army Public School Peshawar, which has necessitated the establishment of Military Courts, in order to root out the wide spread menace of terrorism out of the country; the Constitution of 1973 as such was again put to further amendment by the civilian government of Pakistan Muslim League (Nawaz Group), giving shorter period of the life line to the Military Courts for two years.[112] As usual when the vires of 18th and 21st Constitutional Amendment were put to challenge before judicial forum, again the learned Supreme Court under the leadership of Chief Justice Nasir-ul-Mulk, with the Majority of 14 to 03 and 11 to 06; dismissed the petitions while impliedly reviving the doctrine of State Necessity once again.[113]

Again in order to introduce election reforms and to overcome the previous monopolistic practice of the appointment of serving or retired judges of the apex Courts to be the Chief Election Commissioner or as being Members of the Election Commission of Pakistan; the civilian government of Pakistan Muslim League (Nawaz Group) has introduced further amendments[114] into the Constitution paving way for the bureaucrats, government officers and technocrats to become eligible for appointment as the Chief Election

[111] The Constitution (Twentieth Amendment) Act, 2012: (PLD 2012 Federal Statutes Supplementary-I , 355)

[112] The Constitution (Twenty-First Amendment) Act, 2015: (PLD 2015 Federal Statutes 1)

[113] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401)

[114] The Constitution (Twenty-Second Amendment) Act, 2016: (PLD 2016 Federal Statute Supplementary Part-I, 01)

Commissioner (CEC) and members of the Election Commission of Pakistan (ECP) at par with the serving or retired judges of the apex Courts, as well. Subsequently the same Government has once again floated another Constitution Amendment[115] which extended the life time of the Military Courts for a further period of two years.

Likewise, the Constitution of 1973 received further amendment[116] by way of the introduction of major shifts *(i.e., by increasing and decreasing)* in the allocation of seats meant for Parliament *(i.e., both for the Federation and Federating Units)*. In nutshell the overall effect of all the afore mentioned amendments would also be critically analyzed Article by Article in view of their effects on the Original Constitutional Schemes, as well.

So let us proceed further and to dig out the crucial question as to whether there exist any limitation for the institutions competent for effecting such amendments? And what are the kinds of theories which exist in the field, in this regard?

1.3 Limitations & Theories of the Constitutional Amendments?

The manner in which and by means of which the Constitution of Islamic Republic of Pakistan, 1973 is to be amended; is already provided in detail in Part-XI to the Constitution of Pakistan 1973. The relevant Articles 238 & 239[117] to the Constitution (as it stands today) in this respect is reproduced for ready reference, which read as follows:

> **238. Amendment of Constitution**:-
>
> Subject to this Part, the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).

[115] The Constitution (Twenty-Third Amendment) Act, 2017: (PLJ 2017 Federal Statute 323), also available at Senate of Pakistan official website (www.senate.gov.pk), lastly visited on 05.06.2018

[116] The Constitution (Twenty-Fourth Amendment) Act, 2017: (PLJ 2018 Federal Statutes 167)

[117] The Constitution of the Islamic Republic of Pakistan, Published by National Assembly of Pakistan, at page 141

239. <u>Constitution amendment Bill</u>:-

(1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.

(2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.

(3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had or originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions of clause (4), be presented to the President for assent.

(4) A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.

(5) No amendment of the Constitution shall be called in question in any Court on any ground whatsoever.

(6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

Perusal of the afore said articles reveals that under the Constitution of 1973, the power to amend the Constitution is given to the Majlis-e-Shoora (Parliament), with an express rider over the exercise of its such right, i.e., in the manner contemplated under Article 239's and according to the prescribed procedure mentioned therein only[118], i.e., two Houses of the Parliament can individually float & pass a Constitutional Amendment Bill by votes of two-third majority with the final assent of the President. However, where a Constitutional Amendment Bill which seeks to alter the limits of a Province, it must have backing of the

[118] *Baz Muhammad Kakar vs. Federation of Pakistan through Ministry of Law and Justice* : (PLD 2012 SC 923)

resolution from the provincial assembly concern, in similar terms. Except for this pre-condition, literally the Parliament is empowered to unilaterally amend every constitutional provision, without having any clog in its way, in this regard.

More importantly, if one looks at the original text of the Articles 238 & 239 as was incorporated by the then Constituent Assembly, it is observed that the amending power of the Parliament was absolute. Even, this state of affairs remained continued during the times, when the Constitution was subjected to dictatorial amendments in the year 1985 as well, wherein interestingly, per one of such a dictatorial amendment[119] *(i.e., by insertion of sub clause (6) to Article 239)*, it has been once again made crystal clear, that there exist no limitations whatsoever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution. However, on the contrary it has been judicially interpreted through various reported judgments that the exercise of such power of the amendment of the Constitution would not give an absolute power to the Majlis-e-Shoora (Parliament) either to completely abrogate the fundamental of the Constitution i.e., basic structure, framework and essential features[120] or replace it completely with a new Constitution[121], as the case may be. Hence, the Jurisprudence of our apex Courts developed so far, reveals that mostly it intervened into the question of the validity of the constitutional amendments (i.e., Political

[119] Constitution (Second Amendment) Order, 1985 (Presidential Order 20 of 1985)

[120] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401);
Wukala Mahaz Barai Thafaz Dastoor vs. Federation of Pakistan: (PLD 1998 SC 1263);
Mahmood Khan Achakzai vs. Federation of Pakistan : (PLD 1997 SC 426);
Darwesh M. Arbey Advocate vs. Federation of Pakistan and others: (PLD 1980 [Lahore] 206);
Jehangir Iqbal Khan vs. Federation of Pakistan : (PLD 1979 [Peshawar] 67);
Dewan Textile Mills Ltd vs. Pakistan and others : (PLD 1976 [Karachi] 1368

[121] *Wukala Mahaz Barai Thafaz Dastoor vs. Federation of* Pakistan: (PLD 1998 SC 1263;
Darwesh M. Arbey Advocate vs. Federation of Pakistan and others: (PLD 1980 [Lahore] 206)

Questions) on the touch stone of procedural premises only and not on the substantive side, thereof.

There is also no denying to this fact too, that the text of the provisions contained under Part-XI to the Constitution of Islamic Republic of Pakistan, 1973 generally prescribe the overview of the procedural method/process which is to be adopted by the concerned Majlis-e-Shoora (Parliament), in respect of the introduction and passage of the kind(s) of the constitutional amendments, thereof. However, the crucial issue under discussion of the instant thesis is not the examination of the articles empowering the concern legislature to effect formal constitutional amendments, but in reality is that whether there exists, any limitation over the exercise of such constituent powers? For that matter I must have to split my discussion in respect of the two tier basic concepts relating to interpretation of constitutional amendments which hold its field; one is the "Explicit Limitations" and the other one is the "Implicit Limitations". So let us apply the above cited concepts to our own constitution and see whether there exist any such limitations in our own jurisdiction or not?

1.3.1 Explicit Limitations

As already stated here in above, that although the original text of Article 239 as contained in the original Constitution of 1973 which traveled through its present day substituted shape; does not put any restrictions over the limits of the exercise of amending power of the Majlis-e-Shoor (Parliament); rather the dilemma to this effect if any *[in respect of the exercise of the Constituent Power by the Majlis-e-Shoor (Parliament) relating to the constitutional amendments]* had already been duly clarified through the dictatorially substituted amendments way back in the year 1985, by way of insertion of sub clauses (5) & (6) to the Article 239, whereby it was more specifically declared in unequivocal terms that neither a Constitution Amendment can be called in question before any Court on whatsoever

grounds nor there exists any limitations/restrictions in respect of the exercise of the Constituent Powers/making any amendment of any provision of the Constitution, as the case may be.

However, on the contrary, while examining the vires of various constitutional provision on the touch stone of another constitutional provision and also while interpreting the word *"Any Law"*[122] used under Article 8 to the Constitution of 1973 *(which pertains to inconsistency of the laws with or in derogation of fundamental rights)*, initially the Supreme Court of Pakistan was of the view that

> *"….the Provision of Article 8 will apply to all laws made by the Parliament be it general or any law to amend the constitution…… while certain factors which includes moral or political sentiment, pressure of public opinion which restricts and resists the unlimited power to amend the constitution…."*

But subsequently the Supreme Court changed its above cited views[123] with respect of the interpretation of the word *"Any Law"* by holding that

> *"….Words "Any Law" used in Art. 8(1) (2) of the Constitution do not include any provision of the Constitution…..although power to amend the constitution is absolute and unrestricted….but freedom of Parliament does not include power to alter the salient features of the Constitution"*

Hence, keeping in view the above, literally, it is proved beyond any shadow of doubt that the text of our Constitution does not prescribe any explicit limitations in respect of any kind/type of the Constitutional Amendment(s) since day one. However, the ratio of the above referred judgments reveals that although the verdicts of apex Court do recognize the

[122] *Mahmood Khan Achakzai vs. Federation of* Pakistan: (PLD 1997 SC 426)

[123] *Wukala Mahaz Barai Thafaz Dastoor vs. Federation of Pakistan*: (PLD 1998 SC 1263)

unrestricted power of the Parliament of making amendments into the constitution, but still it restricts it to certain judicially interpreted implied limitations, accordingly.

1.3.2 Implicit Limitations

While examining the case of explicit limitation herein above, now let us find the overall constitutional scheme of our country in the present heading. To begin with, as factually know that countries like India, Bangladesh and the US, our country too has a Federal Constitution, which distributes powers inter se the federation and its federating units. If we go by the Constitution, we came across with distributing legislative powers as detailed in Part-V, Chapter 1, whereby Majlis-e-Shoora (Parliament) is empowered to legislate on the subjects enumerated in the federal legislative list, within the territorial area falling within its domain, while the subjects matter and areas which falls outside of it, falls within the exclusive legislative domain of the Provincial Assembly, thereof[124]. The principle derived from above referred discussion is that neither Majlis-e-Shoora (Parliament) nor a Provincial Legislature can encroach upon the legislative powers of each other's.

Similarly, the Constitution also places some restrictions over the powers of both Federal and Provincial Legislatures, whereby it cannot make laws which are in conflict with any of the fundamental rights guaranteed by the Constitution to the citizens[125]. Likewise, restrictions were also placed on both of the Legislatures, that they cannot make a law which is repugnant to the injunctions of Islam.[126] Moreover, it is also made clear by the precedents of apex Courts, that both of them can also not make laws which are incompatible with

[124] Articles 141 to 144 Constitution of Islamic Republic of Pakistan, 1973

[125] Article 8 Constitution of Islamic Republic of Pakistan, 1973

[126] Article 227 Constitution of Islamic Republic of Pakistan, 1973

fundamental rights, Islamic injunctions and the basic character of the constitution, as the case may be.

It is from these restrictions, which are placed on the Legislative Competence of Parliament that one can reach to its presumptive conclusion that perhaps there exists an Implied Limitations over the exercise of Ordinary Legislative Powers *(Acts, Ordinances, Regulations etc.,)* of the Majlis-e-Shoora (Parliament), but in reality the whole Constitutional Scheme if examined in its totality with respect to effecting any Constitutional Amendment; one can easily finds that it does not put any restrictions over the exercise of Constituent Powers of the Parliament of its time.

This fact also find its legal support from a judgments of our apex Court's too, wherein the honorable Court while drawing distinction in between the Legislative Powers & Constituent Power of the Parliament held that the Parliament in Pakistan exercise Ordinarily Legislative Power vis a vis of its Constituent Power parallelly; under former it can ordinarily legislate/approves/passes Act(s), in respect of the items enumerated in the legislative list as contained in the Fourth Schedule to the Constitution, while in respect of the later, in exercise of its Constituent Power, it can amend the Constitution, thereof, it is further held that the Legislative Power of the Parliament is inferior to its Constituent Power, which are subject to constraints contained in Article 8 to the Constitution.[127] Even this principle has been reaffirmed in a recent judgment *(comprising on minority view)* rendered by the Supreme Court, wherein once again it has been held that while amending the Constitution the legislature exercised a Constituent Power and not mere Legislative Power[128]. Hence, it is

[127] *Wukala Mahaz Barai Thafaz Dastoor vs. Federation of* Pakistan: (PLD 1998 SC 1263)

[128] *District Bar Association Rawalpindi etc vs. Federation of Pakistan* : (PLD 2015 SC 401)

concluded from above said discussions that as far as the Constitution of Islamic Republic of Pakistan 1973 is concerned, there exists no express or implied limitation[129] over the exercise of the Constituent Powers of the Parliament, in respect of effecting any Constitutional amendment of any of the Constitutional Provision, as the case may be.

AIII. Theories of the Constitutional Amendments applied in Asian Sub-Continent Countries (India, Bangladesh & Pakistan)

Now let us examine the issue further more in the light of the existing theories, which are applied in the countries of Sub-Continents ; in this respect the prominent one is:-

1.3.2.1 Basic Structure Theory

The basic structure doctrine is basically the judge made doctrine where by certain features of a Constitution are held to be beyond the limit of the powers of amendment of a Parliament. Needless to state that, this doctrine applies only to constitutional amendments and not to the ordinary Acts of the parliament.

Historically, the legislative origin, of this doctrine rests in the Basic Law of Federal Republic of Germany, 1949. The text of which under Article 79, expressly bars the legislature from amending the *"division of the Federation into Laender", " the participation in principle of the Laender in legislation"*, and *"the basic principles laid down in Articles 1 and 20",* of the Basic Law of Germany.[130]

However, the judicial origin of the jurisprudence (i.e., Basic Structure Theory) in the subcontinent is established by the Indian Superior Courts, pursuance to the idea floated by

[129] *As is expressly provided in the Constitutions of [Algeria 1996 (Art-178)], [Brazil 1988 (Art-60(4)], [France 1958 (Art-89)], [Thailand 1997(Section 313(1))], [USA 1789(Art-V)], [Australia 1900 (Section 128 (5)].*

[130] Umer Gilani, *"Pakistani Constitution and the Basic Structure Theory"*, Lums Student Law Journal, April, 2010, https://lums.edu.pk/news/general-news/lums-law-journal-call-papers, lastly visited on 24.05.2017

Prof Dietrich Conrad, who being head of the law department at the South Asia Institute of the University of Heidelberg, and the author of the doctrine that "the basic structure" of a Constitution cannot be changed, enlightened the Indian Lawyers about the idea of Basic Structure of a Constitution, that made it an essential part of Indian jurisprudence nowadays. It is because of this that the Courts of India have time and again, decided on the issue as to whether the amending powers of Parliament are absolute or not, whereof right now, following is the position of this doctrine in the jurisprudence of India.

1.3.2.1.1 ***Indian Position***

But before starting of discussion on this issue, it is important to pinpoint here that there were three stages of the development of the jurisprudence of *"Basic Structure Theory"* in India, which can be characterized as follows:

(a). Pre-Kesavananda Bharati Position (No Mention of Basic Structure)

(b). Kesavananda Bharati Decision (Basic Structure Theory Floated)

(c). Post-Kesavananda Bharati (Basic Structure Strengthened and new dimensions added)

It is equally worth to mention here that before the decision of Kesavananda Bharati, 03 major decisions of the Supreme Court of India had played specific role in development of Basic Structure Doctrine, where the question of amending power of the Parliament (Article 368) under the Constitution of India, 1949 (hereinafter the "Indian Constitution") was discussed and dilated upon, in this respect the first one was of the case of *"Shakari Prasad Singh Deo"*[131], calling in question as to whether fundamental rights can be amended under Article 368? While answering the query rose above, the Supreme Court was of the view that the Parliament has power to amend fundamental rights and also the word "Law" as is used in

[131] *Shakari Prasad Singh Deo vs. Union of India*: (AIR 1951 SC 458)

Article 13 does not include amendment of Constitution and also that amendment by way of Article 368 done in exercise of the constituent power, not legislative power.

Later on, the principles laid down in Shankari Prasad Singh Deo were re-affirmed with the split of 3/2 majority, in the Second Case i.e., *"Sajjan Singh"* Case[132], wherein the validity of Constitutional (17th Amendment) Act, 1954 was questioned but the minority view was to the effect that in the Constitution certain basic features are sacred which could not be amended as such. Practically it was the minority view which has laid foundation of the implied restriction in respect to the constitutional amendments and exercise of the Constituent powers of the Parliament thereof.

Anyhow, the Third one was of the *"I.C. Golak Nath"* Case[133], wherein it was held that the Parliament cannot amend the fundamental rights' part of the Indian Constitution in a way that it curtails the ambit of these fundamental rights. The two prime issues which were discussed in the case of *I. C Golak Nath* were that, whether the act of Parliament, amending the Indian Constitution, fell within the definition of *"Law"* as provided under Article 13(2)[134] to the Indian Constitution? And whether the amending power of Parliament extends to amending the fundamental rights as well? To the first issue, the Court held that the any amendment to the Indian Constitution must be deemed *"Law"* as understood in Article 13(2), while for the second issues, majority of the judges ruled in favor of the Limited Amending Power of the Parliament.

It is important to note here that it was the *I.C Golak Nath* Case which has actually laid foundation to the introduction of the Basic Structure Doctrine in Indian Jurisprudence, as

[132] *Sajjan Singh vs. State of Rajasthan*: (AIR 1965 SC 845)

[133] *I.C. Golak Nath Vs. State of Punjab* : (AIR 1967 SC 1643)

[134] Article 13(2) to the Indian Constitution, 1949

such while interpreting the marginal note to the original Article 368 (i.e., *"Procedure to Amend"*), learned Chief Justice Subba Rao, was of the opinion, that the original Article 368 *(i.e., before it's amendment in 1971)* provides only "procedure to amend" and not the "power to amend" the Constitution. This confusion led to passage of the 24th Constitutional Amendment in 1971, whereby significant changes were brought into Articles 368 and13, which practically nullified the effect of Golak Nath Case, accordingly.

So, practically it was *"Kesavananda Bharati"*[135]Case, wherein the Supreme Court of India although recognized the Parliament's right to amend the Constitution but restricted it to the extent that it cannot take away the basic structure or frame work of the Constitution, which as per each judge drew different findings such as,

(As per Sikri-CJ) while interpreting the expression "amendment of this Constitution" the honorable Judge held that it does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article. According to him Supremacy of Constitution, Republican and Democratic form of Government, Secular Character of Constitution, Separation of Powers between three pillars of state (Legislature, Executive and Judiciary), Federal Character, Preamble and the basic inalienable rights guaranteed under Part-III of the Constitution are the implied restrictions on amendment powers of the Parliament;

(As per Shelat-J and Grover-J) in addition to the opinion expressed by Sikri-CJ, they added the following two i.e., Mandate to build Welfare State under Part-IV, Unity and Integrity of the nation in his list;

[135] *Kesavananda Bharti vs. The State of Kerala* : (AIR1973 SC 1461)

(As per Hegde-J and Mukherjea-J) they came down with a different list in this regard, such as, Sovereignty of India, Democratic character of polity, Unity of Country, Individual freedoms of citizens, Welfare state and egalitarian society;

(As per Jaganmohan Reddy-J) his views are that Basic Structure could be implied from the Preamble to the Constitution.

Needless to state here that with the passage of considerable time; this list has been gone so far exhaustive that now it identifies 27 numbers of items[136] as the basic structures of the Indian Constitution, which have been used by the apex Courts in India for scrutinizing and striking down various constitutional amendments thereof[137]. But, one thing is common in that, this doctrine has not only puts unnecessary burden on the amending process but also tied up the hands of Parliament as well, besides narrow down the justifiable scope of the amending power of the Parliament, with the absolute judicial dictation & whim of judiciary, which has taken over the place of the constitutional limit in respect of amending power of the Constitution, indirectly. Indeed this trend is dangerous for any democratic system in which amending powers vests with people or its chosen representatives and not to the judges/judiciary.

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[136] Dr. Ashok Dhamija *"Need to Amend a Constitution and Doctrine of Basic Features"*, (New Delhli/Agra/Nagpur, Wadhwa and Company, Law Publisher, First Edition 2007) at pages 525 to 528 and also see Daily The Dawn, Islamabad, of dated May 6, 2015, an observation of Justice Asif Saeed Khan Khosa while hearing 18th & 21st Constitutional Amendment.

[137] *Indra Nehru Gandhi vs. Raj Narain* : (AIR 1975 SC 2299); *Minerva Mills vs. Union of India*: (AIR 1980 SC 1789); *Waman Rao vs. Union of India*: (AIR 1981 SC 271); *Sanjeeve Coke Mfg. Co. Bharak Coking Coal Ltd*: (AIR 1983 SC 239); *S.P. Sampath Kumar vs. Union of India*: (AIR 1987 SC 386); *P. Sambamurthy and others vs. State of Andhra Pardesh and another*: (AIR 1987 SC 663); *Kumar Padma Prasad vs. Union of India*: (AIR 1992 SC 1213); *Shri Kihota Hollohon vs. Zachilhu*: (AIR 1993 SC 412); *Shri Raghunathrao Ganpatrao vs. Union of India*: (AIR 1993 SC 1267); *R.C. Poudyalvs. Union of India*: (AIR 1993 SC 1804); *I. Manilall Singh vs. Dr. H. Borobabu Singh and another*: (AIR 1994 SC 505); *L. Chandrakumar vs. Union of India*: (AIR 1997 SC 1125); *M. Nagaraj vs. Union of India*: [(2006) 8SCC 212]; *I. R. Chelho vs. State of Tamil Nadu*: (AIR 2007 SC 861); *State of West Bengal vs. Committee for Protection of Democratic Rights*: (AIR 2010 SC 1467); *Madras Bar Association vs. Union of India*: (**Un-reported Judgment**) Transferred Case (C) Nos. 150, 116, 117 and 118 of 2006, Civil Appeal Nos. 3850, 3862, 3881, 3882, 4051 and 4052 of 2006 and Writ Petition (C) Nos. 621 and 697 of 2007 (Under Article 139 of the Constitution), decided on 25.09.2014, available at www.manupatra.com under reference No: MANU/SC/0875/2014, lastly visited on 05.06.2018.

1.3.2.1.2 **Bangladeshi Position**

Influenced by the findings given in *Kesavananda Bharati's Case* by the Indian apex Court; the Supreme Court of Bangladesh for the first time adopted the Doctrine of *"Basic Structure"* in its constitutional structure in the year 1989, while deciding a case challenging the 8th Constitutional Amendment[138] into the Constitution of Bangladesh, 1972. In fact two identical writs were filled mainly to cast challenge to the amendment made in Article 100 of the Bangladesh's Constitution and in addition to above a separate challenge to the notification of Chief Justice, on the ground that High Court Division of the Supreme Court with judicial power over the republic is a basic structure of the Bangladesh Constitution, and therefore it cannot be altered or amended. The writ petitions were initially dismissed by the Division Bench of the High Court.

However, in appeal it was allowed by the Appellate Division along with the appeals of *Anwar Hussain Chowdhury*[139] which were filed before the Supreme Court of Bangladesh, and is popularly known as 8th (Eighth) Amendment Case. While striking down the 8th (Eighth) Amendment, Justice B. H. Chowdhury listed down 21 features, to be known as basic features of the Bangladesh Constitution, which according to him were unamendable. Likewise, another sitting member of the bench i.e., Justice Shahbuddin held that the constituent power to make the constitution lies wholly with the people and is adopted by the Parliament as a derivative power, and this derivative power cannot immune the amendment from challenge. As a result, through the case of *Anwar Hussain (supra)*, the Supreme Court

[138] Eighth Constitution (Amendment) Act 1988 actually amended Article 100 of the Constitution and thereby setting up six permanent Benches of the High Court Division exterior the capital and authorizing the President to fix by noticing the territorial jurisdiction of the permanent Benches. It also made 'Islam' as the state religion of Bangladesh, besides revising the word 'Bengali' into 'Bangla' and 'Dacca' into 'Dhaka' in Article 5 of the Constitution and also through Article 30 of the Constitution by eliminating acceptance of any title, honors, award or medal from any foreign state by any citizen of Bangladesh without the prior approval of the President.

[139] *Anwar Hussain Chowdhury vs. Bangladesh*: (1989 BLD Spl P.1= 41 DLR (AD) 165)

adopted the basic structure doctrine, which is also followed later on in various cases[140] as well.

Later on it was in the year 2005, when the High Court Division of the Supreme Court delivered its judgment on the Constitution (Fifth Amendment) Act, 1979, wherein Justice. Khairul Huq ruled that the Fifth Amendment, which was enacted to ratify, confirm, and validate the Martial Law Proclamations, Regulations, and Orders, was illegal and void[141].The Court repeatedly re-affirmed that Parliament may amend the Constitution, but it cannot abrogate it, suspend it, or change its basic feature or structure. It was observed that *"The power to destroy is not the power to amend"*. The Court was of the view that amendment provision *"confers enabling power for amendment but cannot swallow the constitutional fabrics"*. It was further held that *"the fabrics of the Constitution cannot be dismantles even by the Parliament which is a creation of the Constitution itself"*, and while the amendment power is wide, it is *"not that wide to abrogate the Constitution or to transform its democratic republican character into one of dictatorship or monarchy"*. Lastly, that *"the Court has got power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution"*[142]. The Appellate Division of the Supreme Court upheld this ruling.

Similarly in a most recent decision of 2011, rendered in *"Abdul Mannan Khan"* Case,[143] the Supreme Court's Appellate Division faced a challenge to the Constitution

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[140] *Alam Ara Huq vs. Government of Bangladesh*: [42 DLR (1990) 98]; *Fazle Rabbi v. Election Commission*: [(1992) 44 DLR 14]; *Dr. Ahmed Hossain v. Bangladesh*: [(1992) 44 DLR (AD) 109, 110]; *Mashihur Rahman v. Bangladesh*: [1997 BLD 55], respectively.

[141] *Bangladesh Italian Marble Works Ltd v Bangladesh*, [(2006) 14 BLT (Special) (HCD) 1]; [(2010) 62 DLR (HCD) 70 (29.08.2005), p. 317, 335]

[142] Ibid., pp. 187-188

[143] *Abdul Mannan Khan vs. Government of Bangladesh: (Civil Appeal No. 139 of 2005 with Civil Petition For Leave to Appeal No. 569 of 2005 (10.05.2011)*, available at www.supremecourt.gov.bd/web/?page=Judgments.php&menu=00&d, at serial 50, lastly visited on 05.06.2018

(Thirteenth Amendment) Act, 1996 (Act 1 of 1996), which mandated elected governments, on completion of their term, to transfer power to an unelected non-partisan caretaker administration to oversee new Parliamentary elections. Due to its violation of democratic values, which are basic features of the Constitution, this amendment was prospectively declared ultra vires to the Constitution and void. Thus, even in the absence of un-amendable provisions in its Constitution, on the contrary in a series of cases it was decided that the amendment power under the Constitution of Bangladesh is implicitly limited. Consequently, substantive judicial review of constitutional amendments, vis-à-vis implicit limits in the form of the 'basic structure' doctrine, has developed into an accepted practice, therein too. It is important to pinpoint here that apart from above, the Constitution (Fifteenth Amendment) Act, 2011 also inserted Article 7B which has now laid foundations for the permanent introduction of the concept of the Basic Structure into its Constitution, thereof.

1.3.2.1.3 **Pakistani Position:**

As far as the position in Pakistan is concern, the debate as to what constitutes Basic Structure of the Constitution (if at all it exists) has always been remained the hot topic among our judicial as well as the legal fraternity, however, no concrete decision has been laid down by our Superior Courts, in this regard. As such the trend set through various judicial pronouncements of our apex Courts shows that it always resisted in adopting this doctrine as a result of which this fundamental question, remained un-answered so far. In this regard, it is pertinent to discuss those important cases, where our apex Courts have vaguely decided the issue of basis structure in respect of our Constitution.

The first ever of such a case in which the terms "nature" and "basic provisions" of the constitution has been coined, was the case of *"Fazlul Quader Chowdhry"*[144] where the Supreme Court while deciding the scope of Article 224 of the Constitution of 1962, which in fact pertains to the President's power of removing any difficulties in giving full effect to the Constitution through his Presidential Order, held that the

> *"…aspect of the franchise and of the form of the Government is fundamental features of a Constitution"* and therefore *"the Constitution was not intended to be varied according to the wishes of any person or persons…"*[145]

The next one is the case of *Zia-ur-Rehman*[146]; challenging the validity of detentions and convictions of detainee by the Military Courts and also validity of interim Constitution of 1972 and competence of the National Assembly to frame such a Constitution, the Supreme Court held that

> *"…the judiciary, in exercise of its judicial power, cannot strike down a provision of the Constitution. All it can do is to interpret the same. Since, the Supreme Court itself is the creature of the Constitution, so it neither can claim, nor has the right to strike down the provision of the Constitution…"*

Again, in the case of *"Abdul Wali Khan"*[147], wherein while answering the query as to whether an existing provision of the Constitution relating to fundamental rights could at all be amended so as to abridge or take away fundamental right, Mr. Justice Hamood ur Rehman

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[144] *Fazlul Quader Chowdhry vs. Muhammad Abdul Haque* : (PLD 1963 SC 486)

[145] Ibid at page 511

[146] *State vs. Zia-ur-Rehman* : (PLD 1973 SC 49)

[147] *Islamic Republic of Pakistan vs. Abdul Wali Khan*: (PLD 1976 SC 57)

(the then Chief Justice), while quoting his own decision in the case of *"Siraj ul Haq Patwari"*[148] said that:

> *"…the Court should lean in favor of upholding the constitutionality of a legislation and it is, therefore, incumbent upon Courts to be extremely reluctant to strike down laws an unconstitutional…"*

Furthermore, while avoiding getting into the discussion of whether the fundamental rights can be abrogated through a constitutional amendment, it is held that

> *"the issue before this Court is to decide that whether the Court can strike down any provision for being violative or repugnant".*

To this question, the answer was in negative.

Again in the case of *Darvesh M. Arbey* [149], Justice Shameem Hussain of the Lahore High Court stated that *"the Parliament is not sovereign to amend the Constitution according to its likes and dislikes much less than changing the basic structure of the Constitution".*

But this view was corrected by the subsequent judgment of the Supreme Court in famous Judgment *"Fauji Foundation's"* Case, discussed herein below.

Similarly, while deciding the case of *"United Sugar Mills"*[150], wherein challenge was cast to the validity of the Constitution (Fourth Amendment), Act, 1975, particularly the insertion of clause (4-A) to Article 199, setting life time of the interim orders of the High Court passed in writ jurisdiction in respect to assessment or collection of public revenue to a fixed period of Sixty days; the Supreme Court vehemently denied to exercise its power to set

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[148] *Province of East Pakistan vs. Siraj ul Haq Patwari* : (PLD 1966 SC 854)

[149] *Darvesh M. Arbey vs. Federation of Pakistan*: (PLD 1977 Lahore 846)

[150] *Federation of Pakistan vs. United Sugar Mills*: (PLD 1977 SC 397)

aside a constitutional amendment, by relying upon the case of *Zia ur Rehman* (Supra) and holding, that

> *"...a constitutional provision cannot be challenged on the ground of being repugnant to what are sometimes stated as "national inspirations" or an "abstract concept" so long as the provision is passed by the competent Legislature in accordance with the procedure laid down by the Constitution..."*

Likewise, in *"Fauji Foundation"*[151] case, Martial Law Regulations No: 103 was challenged on the ground that the dissolution of a company pursuance to MLR referred above and the transfer of its assets, debts, liabilities and obligations to the appellant, amounts to legislative judgment, Mr. Justice Haleem (the then Chief Justice) after analyzing the ratio of case from Indian jurisdiction i.e., Golak Nath, Kesavananda Bharati and Indra Gandhi, upheld the transfer of the Company's assets etc., in favour of the Fauji Foundation. It is important to pinpoint here that in instant case the Supreme Court also explained the position taken by the Judge of Lahore High Court (Justice Shameem Hussain as he then was) in its judgment rendered in *"Darvesh M. Abrey's"* Case, by holding that in the above referred case, that *"the learned judge failed to notice that the amending power, unless it is restricted, can amend, vary, modify or repeal any provision of the Constitution"*.

Again, in *"Al-Jehad Trust"*[152] case, the Court, instead of adopting the basic structure doctrine, has pressed in to service the rule of interpretation that if there is a conflict, the provision which contains lesser rights will yield in favor of the provision which contains higher right.

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[151] *Fauji Foundation vs. Shamimur Rahman*: (PLD 1983 SC 457)

[152] *Al-Jehad Trust vs. Federation of Pakistan*: (PLD 1996 SC 324)

Again in *"Al-Jehad Trust"*[153] case, the Court while determining the Basic Structure of the Constitution held that

> *"...In order to understand fully as to what is the basic structure of the Constitution of Pakistan, 1973, it would be pertinent to read not only the constitution but other relevant documents, such as Preamble, Constitution Bill, Report of the constitution Committee, Debates and Amendments, if any..."*

In *Mahmood Khan Achakzai*[154], wherein Constitution (Eighth Amendment), Act, 1985 was under challenge, particularly the most controversial power which were held by the office of President of Pakistan under Article 58(2)(b) to the Constitution of 1973, empowering him to dissolve the National Assembly at his discretion. It was held by the Court that:

> *"... [i]t is open to the Parliament to make amendment to the Constitution of any provision of the Eighth Amendment as contemplated under Article 239 as long as basic characteristics of federalism, parliamentary democracy and Islamic provisions as envisaged in the Objective Resolution/ Preamble of the Constitution of 1973 which now stands as substantive part of the Constitution in the shape of 2A are not touched..."*

However, while rejecting the basic structure theory, it was held that

> *"... [i]t can, thus, be said that in Pakistan there is a consistent view from the very beginning that a provision of the Constitution cannot be struck down holding that it is violative of any prominent feature,; characteristic or structure of the Constitution. The theory of basic structure had thus completely been rejected. However, as discussed hereunder every Constitution has its own characteristic and features which play important role in formulating the laws and*

[153] *Al-Jehad Trust vs. Federation of Pakistan*: (PLD 1997 SC 84)

[154] *Mahmood Khan Achakzai vs. Federation of Pakistan*: (PLD 1997 SC 426)

> *interpreting the provisions of the Constitution. Such prominent features are found within the realm of the Constitution. It does not mean that I impliedly accept the theory of the basic structure of the Constitution. It has only been referred to illustrate that every Constitution has its own characteristics."*

Similarly, in *Wukula Mahaz Barai Tahafaz Dastoor*[155] challenge was put to the Constitution (Fourteenth Amendment) Act, 1997, whereby Article 63A, relating to the disqualification on the ground of defection, was inserted into the Constitution, the Court while interpreting the afore said article held that

> *"…when an impugned Constitutional amendment is of such a nature, which tends to destroy any of the basic features of the Constitution without which the State could not have been run as was originally mandated by the framers of the Constitution…"*

The same cannot be upheld as it destroys the basic feature of the Constitution. The Court went on to state that

> *"…what are the basic essential features of the Constitution of Pakistan is yet to be answered with clarity…"*

Finally it was held that

> *"…the concept (i.e., of basic structure of Constitution) has remained alien to the Courts of our country, and has not been consistently applied in Pakistan…"*

In Benazir Bhutto[156] case, challenge was cast to the Presidential Proclamation of dated: 5th November, 1996, whereby the National Assembly was ordered to be dissolved by invoking constitutional powers under Article 58(2)(b), in which it was held by the Court that

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[155] *Wukula Mahaz Barai Tahafaz Dastoor vs. Federation of Pakistan*: (PLD 1998 SC 1263)

[156] *Benazir Bhutto vs. President of Pakistan*: (PLD 1998 SC 388)

> *"... what is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now substantive part of the Constitution……It was held that the main features reflected in the Objective Resolution are Federalism and Parliamentary form of Government blended with Islamic provision…."*

In Syed Masroor Ahsan and others vs. Ardeshir Cowasjee and other, the Supreme Court observed that:

> *"Parliament could not transgress its limits by affecting the Constitution's Basic Structure, and if it were to do so, the judiciary enjoys ultimate power of it judicial review"*

In *Syed Zafar Ali Shah*[157] case, challenge was cast to the military coup of the General Parvaiz Musharraf in the year 1999, the Supreme Court while conferring power to amend the constitution unto him held that

> *"...the Constitution of Pakistan is the supreme law of the land and its basic features, i.e., independence of judiciary, federalism and parliamentary form of government blended with Islamic Provisions, cannot be altered even by the Parliament…"*

Later on in the year 2005, the Supreme Court while deciding the constitutionality of 17th Amendment to the Constitution in the case of *Pakistan Lawyer's Forum*[158], the Court while adopting the refrain policy refuse to strike down the afore said amendment by hold that

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[157] *Syed Zafar Ali Shah vs. Federation of Pakistan*: (PLD 2000 SC 869)

[158] *Pakistan Lawyer's Forum vs. Federation of Pakistan*: (PLD 2005 SC 719)

> *"...the theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features..."*

Again in the case of *Nadeem Ahmad Advocate*[159]; in which vires of the Constitution (Eighteenth Amendment) Act, 2010 were under challenged on the ground of its being violative to the basic structure of the Constitution, most particularly the amendment relating to process of the appointments of the Judges of apex Court in to the Article 175A to the Constitution was changed. The Supreme Court, after deliberating on the issue refrained from deciding it and deemed it appropriate to remand it to the extent of Article 175A for reconsideration by the Parliament, whereof the decision of Parliament finally emerged in shape of the passage of the Constitutional (Nineteenth Amendment) Act, 2010. However, it is worth to point out here that the issue of the application of the theory of basic structure raised and argued before the Court were deliberately remain open and undecided.

It was once again in the case of *District Bar Association Rawalpindi*[160], wherein the Constitution's Eighteenth & Twenty-First Amendments, were under challenge, but the Supreme Court after repeating its earlier view, rejected the basic structure theory for the purpose of striking down the Constitutional Amendments, accordingly.

Hence, with few exceptions, the above cited verdicts leaves one in no doubt, that the Supreme Court has right from 1973 of *"Ziaur Rahman"* Case till 2015 of *"District Bar Association Rawalpindi"* Case (supra) consistently held that the doctrine of basic structure theory has been recognized by our apex Courts, but only to the extent of identifying the salient or fundamental features of the Constitution. However, it has never been accepted or

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[159] *Nadeem Ahmad Advocate vs. Federation of Pakistan*: (PLD 2010 SC 1165)

[160] *District Bar Association Rawalpindi and others vs. Federation of Pakistan*: (PLD 2015 SC 401)

applied as a ground for annulling/striking down a constitutional amendment, thereof, as is the position taken by the apex Courts of India or Bangladesh, in their respective jurisdictions.

Even, in the famous NRO case[161] wherein National Reconciliation Ordinance, 2007 was under challenge, the observation of Justice Jawwad S. Khawaja (As he then was) in his separate note is of worth quoting here, when his lordships held that *"courts could not enter into the minefield of doctrines as it would lead to disaster"*. So, the consistent views of our Courts remained smooth in maintaining the policy of restraint in respect of adopting any foreign doctrines thereof, irrespective of the fact that how much they be attractive, in this regard.

1.3.2.2 General Theory of Un-amendability

As has already discussed herein above; that the constitution can be formally changed through the amendment procedure, prescribed into the Constitution in this regard. But according to the General Theory of Un-amendability there are certain provisions in the Constitution which cannot be amended even by following the prescribed produce thereof; as particularly propounded in detail in our neighboring country India's Supreme Court verdict rendered in "*Kesavananda Bharti"* Case[162] or likewise is present expressly in the Constitutions of other countries[163].

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[161] *Dr. Mobashir Hassan and others vs. Federation of Pakistan and others*: (PLD 2010 SC 265)

[162] *Kesavananda Bharti vs. The State of Kerala* : (AIR1973 SC 1461)

[163] Yaniv Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, ETHESES (February, 2014), http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutionalconstitutional-amendments.pdf at page 28. In which author's research demonstrates that between 1789 and 1944, only 17% of world constitutions included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted include such provisions (78 out of 286). Likewise, out of the constitutions which were enacted in between 1989 and 2013 (53%) of the countries included unamendable provisions (76 out of 143). According to him in net total out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions.

However, if that being considered for a while so, then one wonders that in that eventuality the only way left for the future generations *(for meeting its day to day reform needs)* is to finds its solution through the adaptation of the revolution only; which in all fairness is not proper in any democratic setup, therefore placing either express or implied limitation over the amending powers of an existing or future Parliament is not workable at all, particularly when, even on the other hand this situation gives raise to some more important and serious questions of law as well, which this general theory of unamendability fails to reply, such as:

a). What if it is true that in a changing life, a Constitution being considered as living document may also have to be changed from time to time and ages to ages, can any theory halt its ways from futuristic progresses?

b). Whether the Constitution, if it being a living document, should reflect the wishes of the generation in existence or that of the past?

c). Whether the unamendable Constitution could force living peoples to a permanent subjugation of the dead people?

d). Can the Constitution framed by a constituent assembly of the past, should be followed as it is, even by the future generation(s), that too without reservations of there any right of the making of any necessary substantive changes therein, for all the times to come?

e). Can the Constitutional Amendment(s) be subjected to super added command in shape of implied limitation as floated from the verdicts of the apex Courts which are influenced under the so called Doctrine of Basic Structure, which as a matter of fact never

ever been remained the intention of the law makers from the day one at all?

f). Whether the Constitutional Amendment can be limited to any kind of doctrine or essential or non-essential parts thereof?

g). If through an amendment the Constitution cannot be rewrite, or even if it is allowed so subject to certain restrictions, then what purpose of carrying out an amendment therein?

Conclusion:

Therefore, one can conclude from the above referred discussions that if a written Constitution of a country does not put any restrictions, either over its complete revision or any of its constitutional provision thereof, then the power of Parliament to amend can modify its Constitution completely, as similar to the constitutional system which our country do have. Needless to state here that one wonders that when admittedly neither the concept of Basic Structure Doctrine does expressly set out in any particular provision of the Constitution nor any such authority of the application of implied limitation deduced by the apex Courts finds its basis in the text of Constitution, then how the apex Courts under the guise of its interpretation could put implied restrictions over the authority of Parliament which is vested by Constitution inherently in Parliament's domain only. Moreover, even ultimately, in a democratic system of government, it is the people who are the masters of Constitution and for whom the Constitution is meant. Therefore, I am in full agreement with the author of the book titled as *"Need to amend a Constitution and Doctrine of Basic Feature"*, when he concludes his remarks[164] in respect of implied limitations in the following words

[164] Dr. Ashok Dhamija *"Need to Amend a Constitution and Doctrine of Basic Features"*, (New Delhli/Agra/Nagpur, Wadhwa and Company, Law Publisher, First Edition 2007) at pages 458 & 459

> *"...It is submitted with great respect that the doctrine of the basic feature is not valid, when viewed purely from the legal and constitutional point of view,....."*

Likewise is the position of any arguments if advanced on bases of any *"theory of Supra-Constitutionality"* or *"theory of hierarchy between provisions of the Constitution"* [165], as the case may be.

[165] Kemal Gozler "Judicial Review of Constitutional Amendments, A Comparative Study (Turkey, Ekin Press, Bursa-2008) at pages 71& 74

CHAPTER-II

B. COMPARATIVE STUDY OF CONSTITUTION AMENDMENTS IN ASIAN SUB CONTINENT COUNTRIES, i.e., PAKISTAN, INDIA & BANGLADESH

In the instant chapter I will be examining mode, method of the effecting of the Constitution amendments in the Asian sub-continent countries my focus of study would be remain to the constitutional amendment system of the three countries only which includes the Pakistan, India and Bangladesh respectively. It is important to note here that the Asian Sub-Continent countries which are under discussion here, commonly shared the British colonial legacy. For example Pakistan & India emerged from a combine state of British India (Sub-Continent) into two new States, wherein Government of India Act, 1935 had served as the interim constitutional document for each of the independent domains, until they could have pass their own Constitutions, pursuance to the task given to their respectively newly elected constituent assemblies under the Indian Independence Act, 1947.

However, it is unfortunate that the Constitution Making Process in our part of the domain unfortunately went through slow moving process as compared to the high pace constitution making process of our neighboring country (i.e., India), who after three years of the hectic debates & deliberations, finally succeeded in giving a Constitution to its nation on November, 1949 which came into effect on 26th January, 1950. While on the other hands, Pakistan's two constituent assemblies[166], inspite of chalking out the broader structure of the future constitution through the passage of the Objective Resolution on 12th March, 1949, remained failed in discharge of their prime obligations/duties till passage of the 09 years in

[166] The First one was created on 26th July, 1947 under Independence Act, 1947, while the Second one was created on 28th May 1955 under Governor General's Order No: 12 of 1955, *Parliamentary History*, available at www.na.gov.pk, lastly visited on 21-03-2017

this regard, where after it had initially delivered its first short lived Constitution of 1956 setting Parliamentary Form of Government; which was replaced with a new of Constitution of 1962 with Presidential Form of Government; again the same was replaced with an interim Constitution of 1972 setting Presidential Form of Government; which was while finally replaced with the Constitution of 1973 setting Parliamentary Form of Government, once again. So, in nut shell the process of replacement of the Colonial Constitution with that of the unified Code of life *(i.e., The Constitution of Islamic Republic of Pakistan, 1973)* for an independent State of Pakistan went through various surgical operations in the years 1956, 1962 & 1972 respectively.

On the other hand pursuance to the Proclamation of Independence of 26th March, 1971 advance by the popular, political leader of the Awami League *(i.e., Sheikh Mujibur Rahman)*, unfortunately rests in dismemberment of the eastern wing of our country (i.e., East Pakistan) in December 1971, giving birth thereby to the new independent State of Bangladesh[167]. Base on the constitutional break out from the combine State of Pakistan, the emerging new State of Bangladesh also have interesting common features as well, whereby for making of their respective Constitutions for two independent states *(i.e., to the extent of the formation of the constituent assembly)*, both of them derived their respective powers from the Legal Framework Order of 1970 introduced by the then military dictator i.e., General Yahya Khan, based on the members of National and Provincial Assemblies elected in both of wings of the then united states of Pakistan (East & West Pakistan) that too pursuance to the elections of 1970. Where through the territory now comprising of Pakistan with elected members from the then West Pakistan served as Constituent Assembly for making

[167] Justice Mustafa Kamal *"Bangladesh Constitution: Trends and Issues"*, Published by University of Dhaka, Bangladesh, First Edition July 1994, at page 1

Constitution for its part of the country[168], while the territory now comprising on Bangladesh with elected members of the then East Pakistan, given to its new Constituent Assembly the task of the framing of future Constitution for its country[169], respectively.

So, it is cleared from the above cited facts that 03 States which had been emerged from the combine State of the Sub-Continents, almost shares common ancestral Constitutional history, with set up of the Parliamentary Form of Governments, thereof. But, the only difference which lies among them is, with respect to the process of effecting Constitution Amendments in their respective Constitutions, which significantly differs from each other. It is for the above referred reasons that the author would be trying to confine his focus to the relevant provision relating to the Constitution Amendments only.

But before coming to the scheme of amendment in Constitution of 1973, it would be appropriate to have the benefit of the constitutional schemes of the previous constitutions of our country i.e., the Constitution of 1956, 1962 & 1972 (interim) as well, so that the difference of the procedure of constitution amendment as envisaged therein could be examined in toto with respect to its phase wise development in detail. So let us at first instance have a glance over the text of those relevant constitutional provisions which existed in the past while keeping them in jexta-position to each other's, which reads as follows.

[168] S. M. Zafar Senior Advocate, *"Constitutional Development [Fifty Years of Pakistan: Achievements and Failures and the Way out]"* Published in PLD 2002 [Journal] page 249 at 254.

[169] Justice Mustafa Kamal *"Bangladesh Constitution: Trends and Issues"*, Published by University of Dhaka, Bangladesh, First Edition July 1994, at page 3

2.1 DIFFERENCE OF THE PROCEDURE OF CONSTITUTION AMENDMENTS AS PER CONSTITUTIONAL SCHEMES OF THE PREVIOUS CONSTITUTIONS OF PAKISTAN, i.e., 1956, 1962, 1972.

Text as Constitutional Schemes of the Constitution in Pakistan		
1956	**1962**	**1972**
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.[170]	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.[171]	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.[172]
Article 216 **Amendment of the Constitution**	**Article 208** **Amendment by Act of Central Legislature**	**Article 279 (1)(c), Continuation, Repeal and Validation of Laws**
(1). The Constitution or any provision thereof may be amended or repealed by an Act of Parliament if a Bill for	Subject to this part, the Constitution may be amended by Act of the Central Legislature.	(1). The President shall, by Order, make such provisions as appear to him to be necessary or expedient---
that purpose is passed by a majority of the total number of members of the National Assembly, and by the votes of not less than two-thirds of the members of that Assembly present and voting, and is assented to by the President:	(1) A Bill to amend this Constitution shall not be presented to the President for assent unless it has been passed by the votes of not less than two-thirds of the total number of members of the National Assembly	(c). for making omissions from, additions to, modifications of, and amendments in this Constitution

[170] Original Text of Article 216: *The Constitution of 1956*, available in Constitutional Documents of 1964, Volume-III at page 219.

[171] Original Text of Article 209: *The Constitution of 1962*, Published by The Manager of Publication, Government of Pakistan, Press Karachi, 1964, available in Supreme Court of Pakistan Judges Library, at Islamabad

[172] Original Text of Article 279 (1) (c), The Interim Constitution 1972: [PLD 1972 (Central Statutes) 505 at page 583].

1956	1962	1972
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.
Article 216 **Amendment of the Constitution**	**Article 209** **Assent of President**	
Provided that if such a Bill provides for the amendment or repeal of any of the provisions contained in Articles 1, 31, 39, 44, 77, 106, 118, 119, 199, or this Article, it shall not be presented to the President for his assent unless it has been approved by a resolution of each Provincial Assembly, or, if it applies to one Province only, of the Provincial Assembly of that Province:		
Provided further that the Schedules, other than the Fifth Schedule and Part IV of the Fourth Schedule, may be amended or repealed if a Bill for that purpose is passed by a majority of the members present and voting and is assented to by the President:	(2). The following provisions of this Article shall apply in relation to such a Bill in lieu of the provisions of clauses (2) to (6) (inclusive) of Article 27	
	(3). The President shall, within thirty days after a Bill to amend this Constitution is presented to him---	

1956	1962	1972
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.
Article 216 **Amendment of the Constitution**	**Article 209** **Assent of President**	
Provided further that a Provincial Legislature may by law make provision with respect to matters specified in Part IV of the Fourth Schedule.	(a). assent to the Bill;	
	(b). declare that he withholds assent from the Bill; or	
(2). A certificate under the hand of the speaker of the National Assembly that a Bill has been passed in accordance with the provisions of clause (1) shall be conclusive, and shall not be questioned in any court.	(c). return the Bill to the National Assembly with a message requesting that the Bill, or a particular provision of the Bill, be reconsidered and that any amendments specified in the message be considered, but if the President fails to do any of those things within the period of thirty days, he shall be deemed to have assented to the Bill at the expiration of that period.	

1956	1962	1972
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.
	Article 209 **Assent of President**	
	(4). If the President declares that he withholds assent from the Bill, the National Assembly shall be competent to reconsider the Bill and, if the Bill is again passed by the Assembly (with or without amendment) by the votes of not less than three-quarters of the total number of members of the Assembly, the Bill shall again be presented to the President for assent.	
	(5). If the President returns the Bill to the National Assembly, the Assembly shall reconsider the Bill and if----	
	(a). the Bill is again passed by the Assembly, without amendment or with the amendments specified by the President in his message or with amendments which the President has subsequently informed the speaker of the Assembly are acceptable to him, by the votes of not les than two-thirds of the total	

1956	1962	1972
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.
	Article 209 **Assent of President**	
	number of members of the the Assembly; or	
	(b).the Bill shall again passed by the Assembly, with amendments of a kind not referred to in paragraph (a) of this clause, by the votes of not less than three-quarters of the total number of members of the Assembly,	
	the Bill shall again be presented to the President for assent.	
	(6). When the Bill is again presented to the President for assent in pursuance of clause (4) or clause (5) of this Article, the President shall, within ten days after the Bill is presented to him---	
	(a). assent to the Bill; or	
	(b). cause to be referred to a referendum under Article 24 the question whether the Bill should or should not be assented to,	

1956	1962	1972
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.
	Article 209 **Assent of President**	
	but if, within the period of ten days, the President fails to do either of those things and the Assembly is not dissolved, the President shall be deemed to have assented to the Bill at the expiration of that period.	
	(7). If at a referendum conducted in relation to a Bill by virtue of paragraph (b) of clause (6) of this Article, the votes of a majority of the total number of members of the Electoral College are cast in favour of the Bill being assented to, the President shall be deemed to have assented to the Bill on the day on which the result of the referendum is declared.	

1956	1962	1972
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1956.	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1962.	Mode & Method of the Constitution Amendment as per Original Interim Constitutional Scheme in 1972.
	Article 210 **Amendment affecting limits of a Province**	
	A Bill to amend this Constitution which would have the effect of altering the limits of a Province shall not be passed by the National Assembly unless it has been approved by a resolution of the Assembly of the Province passed by the votes of not less than two-thirds of the total number of members of that Assembly.	

Taking the case of the Constitution of 1956 at first, perusal of which reveals that the process of the Constitution's Amendment is provided under Article 216, according to which the Constitution or any provision thereof may be amended or repealed by an Act of unicameral Parliament (i.e., comprises over the President and the National Assembly), if for that purpose a Bill is passed by votes of not less than two thirds majority of the total members of the National Assembly present and voting, which was to be later on assented by the office of President. However through its first proviso, it put rider over the right exercise of the Constitutional powers of the Parliament, by stating that if, a Bill to amend or repeal Articles such as Article (s) 1 (i.e., the Republic and its territories), 31 (i.e., Provisions for equal

participation in national activities by people of Pakistan), 39 (i.e., Extent of executive authority of the Federation), 44 (i.e., Composition of the National Assembly), 77 (i.e., Composition of the Provincial Assembly), 106 (i.e., Subject-matter of Federal and Provincial laws), 118 (i.e., National Finance Commission), 119 (i.e., Inter-Provincial trade), 199 (i.e., National Economic Council) or Article 216 (i.e., Amendment of the Constitution) or likewise similar restrictions imposed through Second proviso, while saving the Fifth Schedule (i.e., Federal List, Current List & the Provincial List) and Part IV of the Fourth Schedule dealing with the remuneration and privileges in the Provinces vis a vis that of the Procedure and privileges of a Provincial Assembly; from being subjecting it to the amendment process. Although at the one hand if Article 216 does provide flexible mode for passage of the Constitutional Amendment Bill, but on the other, it was rigid and impracticable too, because inspite of having back up of the two-thirds majority of the votes of the unicameral Parliament and upon reaching at the final stage of the giving of assent to the Constitutional Amendment Bill, it could have been withheld by the office of President, as the very Article does not described in specific terms the time frame within which the office of President has been bound to give his assent thereto, as such admittedly the whole provision in this respect is seems to be silent to this effect. So it is proved beyond any shadow of doubt that in the Constitution of 1956, center of powers as for the Constitution Amendment is concern, lies with the office of President only.

Similarly the process of the Constitution amendment as envisaged in the Constitution of 1962, per dictates of its Articles 208 & 209 was subjected to conditions & procedure laid down in its Part XI and which falls within the exclusive domain of the Central Legislature which again comprises over the President & a unicameral Parliament (i.e. of the National Assembly). Perusal of which also seems to be rigid and extremely difficult one, because no

amending Bill can be presented to the President unless it has the backing of two-thirds of the total number of the National Assembly. Even, if this condition is fulfilled, the President may withhold his assent to the Bill so passed or may return it for reconsideration. In case if assent is withheld, the Assembly may reconsider the Bill but it cannot again be presented to the President for assent unless it has the support of three-fourths of the total number of members of the National Assembly. Likewise, if the Bill is returned for reconsideration and it is passed by the Assembly, without any amendment or with amendments suggested by the President, by a two-third majority of the total number of members, it may be re-presented to the President who may, if the Bill be still not acceptable to him; float it to a referendum, that too, through the Electoral College constituted under Article 158.

Here again the process of holding such referendum was not beyond any shadow of doubt and as such was not safe, reliable and fair in as much as that surprisingly the very conduct of the such exercise of process (i.e., referendum) through the Electoral College was within full administrative control of the President, as is self-evident from the perusal of the relevant provisions as contained under Article 229(8) to the Constitution of 1962. So even if the Constitution does provide time frame to the office of President, for giving assent to the Constitution Amendment Bill, but it seems to have failed in catering the Presidency's obstructing abuse in passage of the Constitution's Amendment under Article 209.

Again likewise parallel provision of the amendment of the Constitution were also contained in Article 279 (1) (c) to the Interim Constitution of 1972, as well. According to which the President was given sole authority to make omissions from, additions to, modifications of and amendments in the Constitution, as appear to him to be necessary or expedient, without any involvement of the Parliament therein.

Conclusion

Hence, from the above discussions it is clear that in each of the phases of previous Constitutions although the process and procedure of effecting constitution amendments were based on rigid tests, but unfortunately in every of its shape, it was subjected to the abusive powers *(i.e., direct or indirect)* of the office of President only; who while misusing authority of his office, could have obstruct passage of any constitutional amendment, for an indefinite period or even create hurdles in its passage as such. However, interestingly the relevant Articles in each of the Constitutions neither puts any restriction over the type of amendment which has to be made into the Constitution nor likewise it puts any such restrictions over the exercise of the Constituent Powers of the present or future Parliament as the case may be.

2.2 PROCEDURE OF CONSTITUTION AMENDMENT AS PER ORIGINAL CONSTITUTIONAL SCHEMES OF THE SUB-CONTINENT COUNTRIES

After analyzing the past history of the process and procedure of the Constitution Amendments in our previous Constitutions, now an attempt would be made here to analyse the process & procedure of the present day Constitution (1973) which travelled through different phases till present day shape vis a vis of the Constitutional schemes of the Asian Sub-Continent Countries. So let us at first instance have a glance over the text of those relevant original constitutional provisions while keeping them in jexta-position to each other's, which reads as follows.

Text as per Original Constitution Scheme		
PAKISTAN	**INDIA**	**BANGLADESH**
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1973.[173]	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1950.[174]	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1972.[175]
Article 238 Amendment of Constitution		
Subject to this part, the Constitution may be amended by Act of Parliament.		
Article 239 **Constitution Amendment Bill**	**Article 368** **Procedure for amendment of the Constitution**	**Article 142** **Power to amend or repeal any provision of the Constitution**
(1). A Bill to amend the Constitution shall originate in the National Assembly and when the Bill has been passed by the votes of not less than two-thirds of the total membership of the Assembly it shall be transmitted to the Senate.	An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than the two thirds of the members of that house	Notwithstanding anything contained in this Constitution- (a). any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament: Provided that----

[173] Original Text of Articles 238 & 239, *The Constitution of 1973*, original copy, passed by National Assembly of Pakistan on 10th April, 1973, available in Supreme Court of Pakistan Judges Library, at Islamabad

[174] Original Text of Article 368 reproduced under footnote 49 at page 256 under link, http://shodhganga.inflibnet.ac.in/bitstream/10603/39853/10/chapter%206.pdf, lastly visited on 07.04.2018

[175] Original Text of Article 142 as reproduced in *Khondkher Delwar Hossain Secretary B.N.P Party etc vs. Bangladesh Italian Marble Works Ltd, Dhaka and others*:(CPLA# 1044& 1045/2009 decided by Supreme Court of Bangladesh on 01-Febraruy-2010) at Page 110, unreported Judgment of Supreme Court Bangladesh accessed through www.google.com in addition to www.resdal.org/archive/ban-ex.htm, lastly visited on 26.04.2018

Text as per Original Constitution Scheme		
PAKISTAN	**INDIA**	**BANGLADESH**
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1973	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1950	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1972
	present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:	(i). no Bill for such amendment or repeal shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;
(2). If the Bill is passed by the Senate by a majority of the total membership of the Senate it shall be presented to the President for assent.	Provided that if such amendment seeks to make any change in	(ii). No such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;
	a. article 54, article 55, article 73, article 162 or article 241, or	
	b. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or	
	c. any of the Lists in the Seventh Schedule, or	
	d. the representation of States in Parliament, or	
	e. the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than	(b). when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is

Text as per Original Constitution Scheme		
PAKISTAN	**INDIA**	**BANGLADESH**
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1973	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1950	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1972
	one half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.	presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.
(3). If the Bill is passed by the Senate with amendments, it shall be reconsidered by the National Assembly; and if the Bill as amended by the Senate is passed by the Assembly by the votes of not less than two-thirds of the total membership of the Assembly, it shall be presented to the President for assent.		
(4). If the Bill is not passed by the Senate within ninety days from the day of its receipt the Bill shall be deemed to have been rejected by the Senate.		
(5). If the President shall assent to the Bill within seven days of the		

Text as per Original Constitution Scheme		
PAKISTAN	**INDIA**	**BANGLADESH**
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1973	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1950	Mode & Method of the Constitution Amendment as per Original Constitutional Scheme in 1972
presentation of the Bill to him, and if he fails to do so he shall be deemed to have assented thereto at the expiration of that period.		
(6). When the President has assented to or is deemed to have assented to the Bill, the Bill shall become Act of Parliament and the Constitution shall stand amended in accordance with the terms thereof.		
(7). A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be passed by the National Assembly unless it has been approved by a resolution of the Provincial Assembly of that Province passed by the votes of not less than two-thirds of the total membership of that Assembly.		

So, let us examine each of them one by one, such as follows.

2.2.1 **The Case Study of Pakistan as per its Original Constitutional Scheme of the Constitution of 1973**:-

Taking the case of our own country (i.e., Pakistan) at first, the text reproduced as per the Original Constitutional Scheme, depicts in the first column of the table hereinabove, reveals that as per the Original Constitutional Scheme, Part-XI, it has two articles which deals with the procedure of the Constitution Amendments i.e., Articles 238 & 239 respectively. The former of which mandates that the process of Constitution Amendment can only be effected by Act of Parliament and that too subject to the procedure prescribed in Part-XI, which means that it would be in accordance with the procedure as prescribed under Article 239 only. Perusal of which show that initially the process of the effecting of the Constitution Amendment was not only rigid but was also imbalanced as well. This was rigid for the reason that in view of Article 238, the Constitution Amendments were subjected only to the method prescribed in Part XI of the Constitution, more particularly, Article 239 specially entrust the powers of the origination of a Bill to amend the Constitution into the hands of the Lower House i.e., the National Assembly only, while it seems to be imbalanced for the reasons that it was not obligatory for the Senate to pass the Constitution Amendment Bill transmitted to its domain. To clarify the situation little more, take the practical example in which a Constitution Amendment Bill so originated & passed by the two-third of the total membership of the National Assembly, later on transmitted to the Senate, if is as such not passed by the same with its total majority, within the period of ninety days from the day of its receipt, the Bill pending before it would be deemed to have been rejected by the Senate[176].

[176] It is important to note here that although a member of the National Assembly namely M. Muhammad Rafiq had tried his best to bring amendment in Clause (4) to Article 239 proposing thereby to bring amendments with respect to the words *"deemed to have been rejected"* with that of the words *"deemed to be passed"*, which were later on withdrawn on the opinion of the Speaker of National Assembly of its being not proper. For details see the National Assembly of Pakistan (Constitution Making) Debates Official Report (Volume 3) of dated 28th March 1973, at pages 2018 to 2019, Printed at Ferozsons Ltd Lahore Published by the Manager of Publications,

So, by this way *(i.e., implied veto powers invested with the Upper House i.e., the Senate)* even order of the amendment process is made more difficult not only, with respect to the introducing changes in the text of any provision of the Constitution, but also with respect to a Bill seeking alteration of the boundaries of a Province as well, however to this effect, that very Province *(i.e., of which boundaries were going to be altered)* may have also to ratify such Bill, by resolution of two third majority of its own Assembly's there to. Hence, by this way the monopoly of the Upper House (i.e., Senate) was created through which it could create hurdles in passage of a Constitution Amendment Bill. However, interestingly the entire Article(s) neither puts any restriction over the type of amendment which has to be made into the Constitution nor likewise it puts any such restrictions over the exercise of the Constituent Powers of the present or future Parliament as the case may be.

2.2.2 **The Case Study of India as per its Original Constitutional Scheme of the Constitution of 1950**:-

Similarly, while taking the case of India its Original Constitutional Scheme as depicts from bare readings of the text of Article 368 reproduced in column No: 2 hereinabove, the Indian Constitution *(describing two types of the Constitution Amendments)* seems to be blended with mixture of flexibility and rigidity at a time, as such if on the one hand it confers power of the amendment of the Constitution onto either of the House of the Parliament, which can pass an amendment Bill by simple majority of the total membership of two third of the members of that House, present and voting, thereafter it is presented to the President for his assent. On the other hand, it makes the procedure of amendment of the Constitution rigid one, as depicts from the perusal of the proviso attached to Art.368, which lays down that if it seeks amendments with respect to the *"Mode and manner of the election of the President of*

Karachi, available in Supreme Court of Pakistan Judges Library as well as on the official website of the National Assembly as well (i.e., www.na.gov.pk)

India" (Articles 54, 55); *"Extent of executive power of the Union"* (Article 73); *"Extent of executive power of the States"* (Article 162); *"Constitution of High Courts for a Union Territory"* (Article 241); likewise the *"Provisions relating to Union Judiciary*" in Chapter IV of Part V (Articles 124 to 147), *"Provisions relating to High Courts"* in Chapter V of Part VI (Articles 214 to 223); or *"Provisions relating to distribution of legislative powers between Center and States"* in Chapter I of Part XI (Articles 245 to 255) ; *"Subject Matters of laws made by Parliament and by the Legislatures of States"* in any of the Lists in the Seventh Schedule (Article 246); *"the representation of States in Parliament"* (Article 80, Schedule IV) , or *"the provisions of article 368 itself"* (Article 368, Schedule IV), as the case may be, in that eventuality the Constitutional Amendment Bill shall also require to be ratified by the Legislatures of not less than one half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

Here, too, the Original Constitutional Scheme seems to have created sole monopoly of the President, who in the event of the passage of the Constitution Amendment Bill by either of the House of Parliament including that of its ratification by the one-half of the States Legislature, could have create hurdles in the passage of such Bill, by withholding his consent there to, for indefinite period, as it does not prescribe any time frame for the assent of the Bill by the President in this regard. However, here again the entire Article does not put any restriction over the type of amendment which has to be made into the Constitution or likewise puts any restrictions over the exercise of the Constituent Powers of the present or future Parliament as the case may be.

2.2.3 **The Case Study of Bangladesh as per its Original Constitutional Scheme of the Constitution of 1972**:-

Likewise, while taking the case of Bangladesh, its Original Constitutional Scheme as depicts from bare readings of the text of Article 142 reproduced in column No: 3 hereinabove, also seems to be blended with flexibility, for the reason that at the first the Article's opening title as well as the text of Article itself allows its sole legislating component (i.e., Parliament commonly known as House of the Nation) with the power to make amendment in any provision of the Constitution, by way of addition, alteration, substitution or repeal by Act of Parliament, through which it can pass an amendment Bill by simple majority of the total membership of two-third of the members of Parliament, thereafter a Bill so passed is to be presented to the President for his assent, who is bound to give his assent there to within seven days of the presentation of Bill to him, upon his failure to do so, the Bill shall be deemed to have been assented to, on the expiration of aforesaid period. However, the distinguishing feature of it is that it does not create monopoly of any of the State's organ in the passage of such Constitution amendment, as had already been seen in the cases of India & Pakistan hereinabove. Again here too, the entire Article does not put any sort of the restriction over the type of amendment which has to be made into the Constitution or likewise puts any restrictions over the exercise of the Constituent Powers of the present or future Parliament as the case may be.

2.3 **CHANGES BROUGHT IN, IN THE PROCEDURE OF CONSTITUTION AMENDMENT OF THE CONSTITUTIONS OF SUB-CONTINENT COUNTRIES UNDER DISCUSSION.**

There is no cavil to this fact that a written Constitution of a country, being living document, grows as per needs of its coming generations, that too only through the process of amendment prescribed therein, which only makes it possible to compete and cater with ever

fasting developments of a changing society, as it is impracticable to cater with the future needs beforehand. That's why the framers of the Constitution of such countries which do have written Constitutions; there such Social Binding Contract (i.e., Constitution) does provide due mechanism for catering all such problems, thereof. In this respect when while analyzing the Constitutions of the Sub-Continent countries, particularly the countries which are in focus of the instant thesis i.e., the Pakistan, the India & the Bangladesh, it reveals that their respective Social Binding Contracts do provide detail mechanism of the Constitution Amendments in their relevant Articles such as Article(s) 238 to 239 (in Pakistan), 368 (in India) and 142 (in Bangladesh) respectively. But important fact which is to be noted here is that their respective Constitutions, which were as such initially adopted by all the above cited countries, does have receive radical changes by way of the incorporation of the Constitution Amendments which had not only affected the entire fabric of their respective Social Binding Contract but it also affected the very provision dealing with/relating to the mode & procedure prescribing the Constitution's Amendment as well. So, let us examine each of them with their relevant changed constitutional provisions one by one.

2.3.1. The Case Study of Pakistan as per its Changed Constitutional Scheme of the Constitution of 1973.

As is known that our Original Constitution of 1973 do contains two main articles (i.e., 238 & 239), dealing with the mode & procedure of the Constitution Amendment, respectively, which unfortunate being the provisions of the Constitution itself, had also received major procedural changes twice, due to the radical changes brought therein by the then military dictator through his controversial legislative instruments of 1985[177], whereof surprisingly the text of Article 239 of Constitution which prescribes detail procedure of

[177] Initially through (P.O No: 14 of 1985) by Article 2 and Schedule, Item 48 (w.e.f. March 2, 1985), published in [PLD 1985 (Central Statute) page 456] & subsequently through (PO No 20 of 1985) by Article 3 of the Constitutional (Second Amendment) of 1985 published in [PLD 1985 (Central Statute) page 582], respectively

effecting the Constitution Amendment to utter surprise of the readers, unfortunately it still retains its that very position even words by words in the present day's Constitution as well, which was admittedly ditto introduced through the Second legislative instrument of the military dictator (i.e., P.O. 20 of 1985), as duly protected later on through the Constitution (Eight Amendment) Act of 1985. It would be appropriate here to have the benefit of the original and the finally amended text of these two articles beforehand, for our comparative discussion over it.

Text of the Changed Constitution Scheme after Amendments	
PAKISTAN	
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1973.	Mode & Method of the Constitution Amendment as per Changed Constitutional Scheme of the Constitution of 1973.
Article 238 **Amendment of Constitution**	**Article 238** **Amendment of Constitution**
Subject to this part, the Constitution may be amended by Act of Parliament.	Subject to this part, the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).
Article 239 **Constitution Amendment Bill**	**Article 239** **Constitution Amendment Bill**
(1). A Bill to amend the Constitution shall originate in the National Assembly and when the Bill has been passed by the votes of not less than two-thirds of the total membership of the Assembly it shall be transmitted to the Senate.	(1). A Bill to amend the Constitution shall originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.
(2). If the Bill is passed by the Senate by a majority of the total membership of the Senate it shall be presented to the President for assent.	(2). If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is

Text of the Changed Constitution Scheme after Amendments	
PAKISTAN	
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1973.	Mode & Method of the Constitution Amendment as per Changed Constitutional Scheme of the Constitution of 1973.
	transmitted under clause (1), it shall, subject to the provisions of clause (4) be presented to the President for assent.
(3). If the Bill is passed by the Senate with amendments, it shall be reconsidered by the National Assembly; and if the Bill as amended by the Senate is passed by the Assembly by the votes of not less than two-thirds of the total membership of the Assembly, it shall be presented to the President for assent.	(3). If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions
(4). If the Bill is not passed by the Senate within ninety days from the day of its receipt the Bill shall be deemed to have been rejected by the Senate.	(4). A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.
(5). If the President shall assent to the Bill within seven days of the presentation of the Bill to him, and if he fails to do so he shall be deemed to have assented thereto at the expiration of that period.	(5). No amendment of the Constitution shall be called in question in any Court on any ground whatsoever.
(6). When the President has assented to or is deemed to have assented to the Bill, the Bill shall become Act of Parliament and	(6). For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora

Text of the Changed Constitution Scheme after Amendments	
PAKISTAN	
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1973.	Mode & Method of the Constitution Amendment as per Changed Constitutional Scheme of the Constitution of 1973.
the Constitution shall stand amended in accordance with the terms thereof.	(Parliament) to amend any of the provisions of the Constitution.
(7). A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be passed by the National Assembly unless it has been approved by a resolution of the Provincial Assembly of that Province passed by the votes of not less than two-thirds of the total membership of that Assembly.	

Perusal of the Original Constitutional Scheme as depicts from Column 01 hereinabove reveals that the former Original Article (Article 238) subjected the method of effecting a Constitution Amendment to the process only envisaged in Part-XI of the Constitution, while the later Original Article *(i.e., Article 239)* prescribe the details for passage of a Constitution Amendment Bill, thereof. However, this Original Constitutional Scheme does had created two tier monopoly of the two Houses at the same time, such as through sub-clause (1) of the Article ibid, if on the one hand a Bill seeking amendment into the Constitution shall have only to be originate in the Lower House *(i.e., the National Assembly)* alone and none else; while on the other hand through sub-clause (4) of the same Article, it was also not made obligatory for the Upper House *(i.e., the Senate)* to pass the Constitution Bill which is transmitted to its domain from the Lower House. Creating thereby complete monopolies of both the Houses *(i.e., National Assembly or Senate)* at a time, who

could respectively have create hurdles in either ways of the introduction or passage of a Constitution Amendment Bill, even at the cost of National Interest as well.

However in 1985, per the changed position of the above referred provisions as depicts from the perusal of column 02 hereinabove, the then military dictator had introduced changes into the said constitutional provisions, wherein under the new scheme he does cater the earlier scheme of the origination of a Constitution Amendment Bill being the sole privilege of the Lower House *(i.e., National Assembly)*; by neutralizing and allowing it for both of the Houses while creating balance inter se of them *(i.e., National Assembly & Senate)*; which scheme still holds its field even till today, whereof now a Constitution Amendment Bill could originated in either of the two Houses *(i.e., the National Assembly or the Senate)*, wherein unlike India, the article dealing with amendment of the Constitution does not require further ratification from its Federating Units (i.e., Provinces) through a special resolution thereof, except when the question of the alteration of the limits of a Province is involved therein; only in that very situation the resolution of that very Provincial Assembly is additionally required. However, it is important to pinpoint here that inspite of doing these positive moves, the unfortunate steps of the military dictator's efforts of the restructuring of the said constitutional provision, seems to be not only rests in total omission of the original clause (4) to Article 239, which prescribed time limit of 90 days for the Upper House *(i.e., the Senate)* for passaging a Constitution Amendment Bill but also with respect to the similar omission of the original clause (5) as well, which sets time limit of 07 days for giving assent to such Constitution Amendment Bill by the office of President. In addition to above the said provision also seems to be silent in catering the situation like that what would be the solution to an event, when one of the components of Parliament either withhold its debate and voting over a Constitution Amendment Bill or the other one withholds his assent thereto. Hence,

creating thereby, complete monopoly of the respective components of Majlis-e-Shoora (Parliament), i.e., the President, National Assembly and Senate, who could now, individually halt in the way of the passage of the Constitution Amendment for indefinite period, thereof.

It is also important to note here that through insertion of clauses 5 & 6 to the changed scheme of Article 239 to the Constitution of 1973, it had now been more specifically cleared in unequivocal terms that neither the Constitutional Amendment can be called in question in any court on any ground whatsoever [i.e., Article 239 (5)] nor there is any limitation whatsoever on the power of Majlis-e-Shoora [Parliament] to amend any of the provision of the Constitution [i.e., Article 239 (6)]. Hence, now the prevalent constitutional scheme expressly reveals that the powers to amend any of constitutional provision remain in the hands of Parliament absolutely and none of the other organ of the state thereof, which even cannot be called in question before any court on grounds whatsoever.

2.3.2. The Case Study of India as per its Changed Constitutional Scheme of the Constitution of 1950.

Now let us examine the Indian Constitution provisions relating to the amendment of Constitution. If we go by book we find that as per its Original Constitutional Scheme in Part XX of its Constitution; it is its' sole Article 368 which empowers its Parliament to amend its Constitution according to the detailed procedure laid down therein. However, it is important to note here that this Article (i.e., 368) had too received thrice radical changes when it was put to further amendment by the Indian Parliament by way of the Constitution's 07th, 24th and 42nd Amendments effected in the years 1956, 1971 and 1976 respectively. The text of the Original Constitution provision and that of the finally amended one is reproduced herein below.

Text of the Changed Constitution Scheme after Amendments	
INDIA	
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1950.	Mode & Method of the Constitution Amendment as per Changed Constitutional Scheme of the Constitution of 1950.
Article 368 **Procedure for amendment of the Constitution**	**Article 368** **Power of Parliament to amend the Constitution and Procedure therefor**
An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than the two thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:	(1). Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
	(2). An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Text of the Changed Constitution Scheme after Amendments	
INDIA	
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1950.	Mode & Method of the Constitution Amendment as per Changed Constitutional Scheme of the Constitution of 1950.
Provided that if such amendment seeks to make any change in-	Provided that if such amendment seeks to make any change in-
a. article 54, article 55, article 73, article 162 or article 241, or	a. article 54, article 55, article 73, article 162 or article 241, or
b. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or	b. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
c. any of the Lists in the Seventh Schedule, or	c. any of the Lists in the Seventh Schedule, or
d. the representation of States in Parliament, or	d. the representation of States in Parliament, or
e. the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.	e. the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
	(3). Nothing in article 13 shall apply to any amendment made under this article.
	(4). No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-Second Amendment) Act,

Text of the Changed Constitution Scheme after Amendments	
INDIA	
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1950.	Mode & Method of the Constitution Amendment as per Changed Constitutional Scheme of the Constitution of 1950.
	1976 shall be called in question in any court on any ground.
	(5). For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

Close examination of the Original Constitutional Scheme of India as depicts in Column 01 hereinabove, reveals that the Original Article 368, prescribes three tire process of the Constitution's Amendment, such as one by the Simple Majority of the Parliament, second by Special Majority and third by Special Majority of the Parliament and its further ratification by the Half of the State Legislature, respectively. However, the Article as a whole, empowers either of the House *(i.e., Art 79, the Council of States and the House of the People)* of the Indian Parliament to introduce a Constitution Amendment Bill, which if passed by both of them, with their respective two-third simple majority of its total membership(s) present and voting, it shall thereafter be presented to the President for his assent. It is upon the assent given to such Bill by the President that finally the Constitution is amended so, unless the Constitution Amendment Bill falls within the ambit of the one of grounds mentioned in its proviso thereof, in that eventuality in addition to a resolution passed by both the Houses, it

also requires further Special Majority ratification of half of the State's Legislatures as specified in Parts "A" & "B" to the First Schedule, accordingly.

It is important to note here that in the Original Constitutional Scheme surprisingly there is neither any time frame for the ratification of a Constitution Amendment Bill by any House/State Legislature nor does it cater a situation in which if both the Houses were in disagreement over the Constitution Amendment Bill, then how to resolve such dead lock thereof, as such admittedly the Indian Constitution did not prescribe any mechanism of Joint Sitting of the two Houses for resolution of such issue. The matter does not ends here rather the President too, could have withheld his assent to a Constitution Amendment Bill, in a situation in which even a Constitution Amendment Bill is duly passed by the legislature, as the Original Constitutional Scheme vests discretionary powers of giving assent to a Bill with the office of President, that too without fixing any time limit thereof.

However, it was pursuance to the agrarian reforms introduced through the domestic laws i.e., the States Reorganization Act, 1956 & the West Bengal (Transfer of Territories) Act, 1956 respectively, that for the first time changes were brought into Article 368 as well as in the First Schedule to the Constitution by passage of the Constitution (Seventh Amendment) Act, 1956, through which the words *"specified in Part A and B of the First Schedule"* in its proviso were deleted in addition to adding Articles 31-A and 31-B to the Constitution, besides above excluding the powers of Judicial Review of the laws which were placed in the Ninth Schedule, respectively.

Subsequently it was the Constitution (24th Amendment) Act, 1971 which had actually substituted the original Art.368 not only by replacing its original title but also by substituting its whole text as well, as depicts from the perusal of Column No 2 herein above. According to

which it was made clear that in exercise of its constituent power the Indian Parliament can amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure lay down in article 368 only. The important insertion in the said Article was the addition of clause (3) to article ibid, which extended due protection to the legislative powers of the Parliament in effecting Constitution amendments which are even inconsistent with or in derogation of the fundamental rights as guaranteed under Article 13 to its Constitution.

Later on Article 368 to the Indian Constitution had once again received further amendments by way of the Constitution (42nd Amendment) Act, 1976, whereby clauses (4) & (5) were inserted thereto, which had declared in unequivocal terms that the constituent power of Parliament are unlimited and absolute which is also exclude from any sort of the interference by the Courts even on any ground. Suffice it to state here that this amendment (i.e., 42nd) had been later on struck down by the Supreme Court of India in the year 1980 in a famous case of *"Minerva Mills Ltd vs. Union of India"* (AIR 1980 SC 1789). But apart from judicial verdict referred above, it is crystal clear that the provisions of Article 368 even substituted lastly, does not puts any sort of the restrictions, over the exercise of the constituent powers of the Parliament in order to effect a Constitution amendment thereof, except that it must be in conformity with the procedure laid down in Article 368 only. It is also important to note here that even the new Constitutional Scheme retains the past practice of two tier process of effecting the Constitution amendments, surprisingly without addressing the previous issue of the retaining of discretionary powers of giving assent to a Bill by the President for an indefinite period of time, respectively.

2.3.3. The Case Study of Bangladesh as per its Changed Constitutional Scheme of the Constitution of 1972.

Now coming to the Bangladesh Constitution, we see that its provisions relating to the amendment of Constitution, find its place as per its Original Constitutional Scheme in Part X of its Constitution. It is its' sole Article 142 which empowers its Parliament to amend its Constitution according to the detailed procedure laid down therein. However, it is important to note here that this Article (i.e., 142) had too received four times radical changes when it was put to further amendment by the Bangladesh's Parliament & the two Military Dictators by way of the Constitution's 2nd Amendment in the year 1973, the Second Proclamations (Amendment) Order No: IV of 1978 and the Constitution's 05th, 7th, 12th, 15th Amendment effected in the year, 1991 & 2011, respectively. The text of the Original Constitution provision, changes brought on therein later on and that of the finally amended shapes are reproduced herein below.

Text of the Changed Constitution Scheme after Amendments		
BANGLADESH		
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Dictatorial etc., Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Finally Changed Constitutional Scheme of the Constitution of 1972.
Article 142 **Power to amend or repeal any provision of the Constitution**	**Article 142** **Power to amend any provision of the Constitution**	**Article 142** **Power to amend any provision of the Constitution**
Notwithstanding anything contained in this Constitution-	Notwithstanding anything contained in this Constitution-	Notwithstanding anything contained in this

Text of the Changed Constitution Scheme after Amendments		
BANGLADESH		
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Dictatorial etc., Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Finally Changed Constitutional Scheme of the Constitution of 1972.
(a). any provision thereof may be amended or repeal by Act of Parliament: Provided that---- (i). no Bill for such amendment or repeal shall be allowed to proceed unless the long title thereof expressly states that it will amend or repeal a provision of the Constitution;	(a). any provision thereof may be amended or repealed by Act of Parliament: Provided that---- (i). no Bill for such amendment or repeal shall be allowed to proceed unless the long title thereof expressly states that it will amend or repeal a provision of the Constitution;	Constitution- (a). any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament: Provided that---- (i). no Bill for such amendment or repeal shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;
	(b). when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.	
(ii). No such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of	(1A). Notwithstanding anything contained in clause (1), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble or any provisions	(ii). No such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the

Text of the Changed Constitution Scheme after Amendments		
BANGLADESH		
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Dictatorial etc., Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Finally Changed Constitutional Scheme of the Constitution of 1972.
members of Parliament;	of articles 8, 48 or 56, 58, 80, 92A or this article, is presented to the President for assent, the President, shall, within the period of seven days after the Bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to.	total number of members of Parliament;
	(1B). A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the persons enrolled on the electoral roll prepared for the purpose of election to the office of President.	
	(1C). On the day on which the result of the referendum conducted in relation to a Bill under this article is declared, the President shall be deemed to have- (a). assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assented to; or	

Text of the Changed Constitution Scheme after Amendments		
BANGLADESH		
Mode & Method of the Constitution Amendment as per Original Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Dictatorial etc., Constitutional Scheme of the Constitution of 1972.	Mode & Method of the Constitution Amendment as per Finally Changed Constitutional Scheme of the Constitution of 1972.
	(b). withheld assent therefrom, if the majority of the total votes cast are not in favour of the Bill being assented to.	
	(1D). Nothing in clause (1C) shall be deemed to be an expression of confidence or no-confidence in the Cabinet or Parliament.	
	(2). Nothing in article 26 shall apply to any amendment made under this article.	

Perusal of the original text of Article 142 as depicts from column No: 1 herein above, it reveals that Bangladesh Unicameral Parliament has unfettered right to amend the Constitution subject only to the limitations put forth in Article 142 itself, i.e., a Constitutional Amendment Bill's long title should expressly reflect that it wants to amend or repeal a provision of the Constitution, only thereafter its Parliament *(Jatiyo Sangsad)* can amend the Constitution through two-third majority of the total numbers of members of Parliament *(Jatiyo Sangsad)*, which is to be placed before the President for seeking his assent within seven days.

It is important to note here that the above cited Article 142 to the Constitution do have received minor changes *[i.e., omission of the words "or repeal" from its title, renumbering of Article 142 as clause (1) and addition of clause (2), as the case may be]* in the year 1973, where through even a new Sub-Clause (2) was also incorporated in above cited article, which expressly excludes the application of the provision of Article 26 to the process of the amendment of Constitution, so by this way the Parliament, can even make Constitution amendments, which even may be inconsistent with the Fundamental Rights there too.

However, it was pursuance to the first martial law imposed by the then General Ziaur Rahman, that the Constitution of the Bangladesh which was held in abeyance had received major amendments during his military regime *(1975 to 1979)*, which has not only affected several other articles of their Constitution but also affected the Original Constitutional Scheme of Article 142 meant for effecting Constitution's own amendment as well, through its controversial Second Proclamation (Amendment) Order No: IV of 1978, inserting whereby three new clauses to Article 142 i.e., Clauses (1A), (1B) and (1C), empowering its President to refer the issue of Constitution Amendment Bill to general public's poll, with respect to particular articles only (i.e., Articles 8, 48, 56, 58, 80, 92A or 142); for the purpose of holding a referendum in this respect through its Election Commission and the result of such referendum would determine the fate of the acceptance or rejection of the Constitution Amendment Bill under consideration, accordingly.[178] Later on the Constitution (Twelfth Amendment) Act, 1991 has introduced further changes in Article 142 whereby in clause (1A) the word *"or"* was substituted with that of the comma *","* while in same clause the commas

[178] Shiekh Hafizur Rahman Karzon Abdul Abdullah-Al-Faruque's Article on *"Martial Law Regimes: Critically Situating The Validity of The Fifth and Seventh Amendments"*, accessed on www.google.com lastly visited on 26.04.2018

and figures *",58,80,92A"* were omitted while a new clause (1D) was inserted, respectively.[179]As self-evident from the perusal of column No: 2 hereinabove.

However, it was the Constitution (Fifteenth Amendment) Act, 2011, which has once again restored the provisions of Article 142 to its original position thereof, as depicts from perusal of the Column No: 3 hereinabove, but the important change which the Constitution Fifteenth Amendment has brought therein was the introduction of Article 7B, which has expressly laid foundations for introducing the concept of the Basic Structure into the Constitution of Bangladesh, as a result of which now it does not allow its Parliament to make any amendment into the Preamble, articles of Part-I, II, III and article 150 of Part-XI, otherwise if it was a case of simple restoration of the original text of the said Article (i.e., 142) then it would have not place any restrictions over the amendment power of the Parliament thereof. Suffice it to state here that much before the promulgation of Constitution (Fifteenth Amendment) Act, 2011, the Supreme Court of Bangladesh had already laid foundation of the existence of Basic Structure into their Constitution much before in the year 1989, through a famous case of *"Anwar Hossain Chowdary's"*, when for the first time it had strike down the Constitution (Eighth Amendment), thereof.

Net Conclusion

Hence, the above referred discussion reveal that although in the countries of the Asian Sub-Continent the amendments incorporated into their respective Constitutions do have brought substantive changes not only in its whole Original Constitutional Schemes but also into the relevant Articles dealing with the mode and method of effecting the Constitution Amendments as well *[i.e.,Article(s) 238 & 239 of Pakistan, 368 of India and 142 of Bangladesh]*, irrespective of the fact that their respective Constitutions do share commonality

[179] Ibid.

with respect to the Federal and Parliamentary Form of Governments, prescribing Fundamental Rights and Principles of Policy, Legislative Powers of the Parliament including Presidential Powers of making ordinances so on and so forth, but it do differs from each other with respect to mode & method of the introduction and passage of the Constitution Amendments, the concepts of Supremacy of the Parliament and the Supremacy of Constitution as the case may be. For example the Pakistan and India have bicameral legislature system while that of the Bangladesh having unitary legislature system, with common supremacy to the central legislature in case of conflicts as is the positions of Pakistan and India, while sole Supremacy of the Parliament of Bangladesh, respectively. Likewise, general concept of the supremacy of Parliament also finds its place in both of the countries' set up, as an ordinance promulgated by the President has to be laid before the Parliament unless sooner it stands repeal on the expiration of sixth month period in case of Pakistan and India while in case of Bangladesh on expires of the thirty days thereof. Similarly, all the three countries does have similarities with respect to having separate procedures for effecting ordinary (normal law making) and special (Constitution Amendments) legislative powers with their respective legislative bodies, with limited role of its components States in the Constitutional Amendments, as well.

Similarly, there is also a unique resemblance of the historical fact sharing among the Pakistan and Bangladesh as well, whereby both of the countries have experienced the dictatorial interference & the incorporation of the Constitution Amendments in to their respective Constitutions that too at his behest & in deviation to the procedure prescribed into the Constitution itself, which were not only rectified by their respective Parliament(s)[180] but

[180] In Pakistan the 8th & 17th Constitution Amendments, while in Bangladesh the 5th & 7th Constitution Amendments have been introduced by their respective military dictators and given protections by the Parliaments of respective countries

also had to great extent de-shaped their respective Constitution's Original Scheme as well, however, fortunately it is the India alone which remain an exception to such type of tempering till today. It is also worth to point out here that the situation in Pakistan is little bit worst as such the Constitution Amendments incorporated by civilian as well as by the military usurpers (8th & 17th Constitution Amendment) in abuse of the amendatory process, had unfortunately judicial[181] as well as political backing thereto on the contrary the Bangladesh Constitution received only political backing to the amendments introduced by its military usurpers such as the Constitution's 5th and 7th Amendments.

However, fortunately none of the total Twenty-Five Constitution Amendments effected so far in our country has ever been strike down by our Supreme Court, on the contrary the Supreme Court of India had also strike down its Six Constitution Amendments (25th, 32nd, 39th, 42nd & 52nd)[182]out of the total Hundred & One Amendments, likewise, while following the same footsteps the Supreme Court of Bangladesh has also declared its

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[181] *Federation of Pakistan vs. Moulvi Tamizuddin Khan*: (PLD 1955 FC 240);
Usif Patel and others vs. The Crown: (PLD 1955 FC 387);
The State vs. Dosso and another: [PLD 1958 SC (Pak) 533];
Begum Nusrat Bhutto vs. Chief of Army Staff and Federation of Pakistan: (PLD 1977 SC 657);
Federation of Pakistan and another vs. Malik Ghulam Mustafa Khar : (PLD 1989 SC 26);
Khawaja Ahmad Tariq Rahim vs. Federation of Pakistan and others: (PLD 1992 SC 646);
Mehmood Khan Achakzai vs. Federation of Pakistan: (PLD 1997 SC 426);
Wukula Mahaz Barai Tahafaz Dastoor vs. Federation of Pakistan: (PLD 1998 SC 1263);
Zafar Ali Shah vs. General Pervez Musharaf: (PLD 2000 SC 869);
Tika Iqbal Muhammad Khan vs. General Pervaiz Musharraf etc [i.e., (PLD 2008 SC 6), (PLD 2008 SC 178) & (PLD 2008 SC 615)]

[182] (a). Twenty Fifth Amendment &Forty Second Amendment in the year 1980 in the case of *"Minerva Mills vs Union of India"*;
(b). Thirty Second Amendment in 1986 in the case of*"P Samba Murthy vs State of Andhra Pradesh"*;
(c). Thirty Ninth Amendment struck down in the year 1975 in the famous case of *"Indira Gandhi vs Raj Narain"*;
(d). Forty Second Amendment in the year 1997 in the case of *"L Chandra Kumar vs Union of India"*;
(e). Fifty Second Amendment in the year 1992 in the case of *"Kihoto Hollohan vs. Zachillhu"*.

Five Amendments (5th, 7th, 8th, 13th & 16th) [183] out of the total Sixteen as unconstitutional. Hence, from the above cited discussion, it is concluded that even the final changes introduced into the relevant articles, which prescribes the mode and method of the Constitution Amendments, particularly with respect to the Pakistan and India, does not put any express restriction over the right of exercising power of the amendment in its Constitution, except that of the Bangladesh.

It is equally important to pin point here that in the countries under discussion here although most of the Constitutional Amendments have been claimed to be enacted in the name of constitutional needs and service towards people but in reality it has serve little interests of the people and rather served the political purposes of the ruling classes only, be it the civilian or a military lead Government(s) or even the judicial institution, as the case may be; who have individually as well as in collaboration with other State and non-State actors, had brutally ruined the fabric of its Constitution, by using the tools of amendment, for strengthening their illegal hold on Government affairs and weakening/suppressing their bitter opponents including other pillars of the States as well. The glaring example in this respect from our own country is the Constitution's 1st, 3rd, 4th, 5th, 7th, 8th, 14th, 17th & 19th

[183] (a). Fifth Amendment declared unconstitutional in the year 2005 by the High Court Division in *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLT (Special) (HCD) 1. Subsequently, the Appellate Division upheld the decision of the HCD in *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298;
(b). Seventh Amendment in *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84 by the High Court Division;
(c). The Eight Amendment by the Appellate Division in *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (AD) (Special) 1;
(d). Thirteenth Amendment in *Saleem Ullah v Bangladesh* (2005) 57 DLR (HCD) 171, in which the HCD validated the CtG system. Subsequently, the decision was challenged in the Appellate Division which, in *Abdul Mannan Khan v Bangladesh* (2012) 64 DLR (AD) 1.
(e). Likewise the Sixteen Amendment by the High Court Division in *Asaduzzaman Siddiqui and Others v Bangladesh* (Writ Petition No. 9989 of 2014; decision of 5 May 2016). The Appellate Division upheld the HCD's decision in *Government of Bangladesh and others v Advocate Asaduzzaman Siddiqui and others* (Civil Appeal No. 6 of 2017; decision of 3 July 2017).

Amendment(s)[184], in India the Constitution's 1st, 24th,25th,38th,42nd,44th,52nd & 99th Amendment(s)[185], while in Bangladesh the Constitution's 1st,4th,5th & 7th Amendment(s)[186],

[184] In Pakistan's Constitution's:-
(1st Amendment) placed restriction on Freedom of Association and barred the High Courts from issuing writs against persons belonging to Armed Forces.
(3rd Amendment) curtail rights of person held under preventive detention.
(4th Amendment) Laws pertaining to Fundamental Rights were diluted, High Courts were barred from granting bails to the political detenees.
(5th Amendment) barred High Courts from issuing injunctive order against members serving in Armed Forces High Courts were also prohibited from making suspending operation of order issued under preventive detention laws. President was given sole powers to transfer a Judge of a High Court to another High Court with tranfree judge consent.
(7th Amendment) provided mechanism for introducing mode of confidence in Prime Minister through holding of a Referendum, in which his failure to obtain majority votes leads him to disqualification by deeming him to be resigned from his post accordingly.
(8th Amendment) was similar to mini Constitution of India (i.e., 42nd Constitution Amendment), which had totally changed the Original Constitutional Scheme after protecting illegal autocracy of the military regime of the then military dictator i.e., Genearl Zia-ul-Haq, accordingly.
(14th Amendment) was similar to Indian (52nd Constitution Amendment), which disqualifies members of the Parliament on ground of defection i.e., from one party to other besides a member who even votes against the Constitution Amendment Bill contrary to party's policies, as well.
(17th Amendment) was again similar to mini Constitution of India (i.e., 42nd Constitution Amendment), which had brought drastic changes in the already deteriorated Constitutional Scheme while strengthen the illegal autocracy of the military regime of the then military dictator i.e., Genearl Parvez Musharraf, accordingly.
(19th Amendment) was akin to the India's (i.e., 99th Amendment), which cater the changed formula introduced by the Constitution (Eighteenth Amendment) Act, 2010, for the appointment of the apex Courts Judges thereof.

[185] In India's Constitution's:-
(1st Amendment) limited the right to freedom of speech and expression by creating more exceptions, limited the right to property by given protection legislation relating to "Land Reforms" etc.,
(24th Amendment) overcome the barriers imposed by the Supreme Court in "*Golaknath Case"*, with reference to Fundamental Rights by amending Article 368 empowering Parliament to amend any provision of the Constitution.
(25th Amendment) replaced word "compensation" with "amount" & added Article 31-C by virtue of which the application of Fundamental Rights guaranteed under Articles 14, 19, & 31 were made subservient to the goals specified under Article 39(b) and (c), (38th Amendment) Enhanced power of President and Governor to issue Ordinance which were ousted from Judicial Review of apex Courts,
(42nd Amendment) commonly known as Mini Constitution introduced in internal emergency period which curtail fundamental rights, imposed fundamental duties and changed basic structure of the Constitution by making Parliament as Supreme.
(52nd Amendment) Disqualifies members of the Parliament on ground of defection i.e., from one party to other.
(99th Amendment) formed a National Judicial Appointments Commission for the appointment of the apex Courts Judges.

[186] In Bangladesh's Constitution's:-
(1st Amendment) allowed punishment and prosecution of war criminals of its independence struggle under international law, while suspending the application of fundamental rights to suspect criminals thereof.
(4th Amendment) changed Original Constitutional Scheme of Parliamentary Form of Government with that of the Presidential one, Parliaments powers were curtailed, powers of apex Courts were restricted with respect to enforcement and protection of Fundamental Rights.
(5th Amendment) was similar to mini Constitution of India (i.e., 42nd Constitution Amendment), which had totally changed the Original Constitutional Scheme after protecting illegal autocracy of the military regime of the then military dictator i.e., General Ziaur Rahman, accordingly.

respectively. Similarly, the trend of the apex Court's decision in our country remains in upholding illegal tempering in the Constitution by the State & non-State Actors, which even still hold its field in the present day Constitution as well, whereas on the contrary the Indian & Bangladesh Supreme Courts have struck down all such illegal tempering from their respective Constitution(s) while apply the doctrine of Basic Structure of Constitution thereof.

(7th Amendment) was again similar to mini Constitution of India (i.e., 42nd Constitution Amendment), which had brought drastic changes in the already deteriorated Constitutional Scheme while strengthen the illegal autocracy of the military regime of the then military dictator i.e., General Ershad, accordingly.

CHAPTER-III

C. NATURE AND LEGISLATIVE COMPETENCE OF THE INSTITUTIONS/ FORUMS, TO BRING OR EFFECT THE CONSISTITUTIONAL AMENDMENTS.

As publically known that, the Constitution of Islamic Republic of Pakistan, 1973 has introduced Parliamentary Form of Government with Bi-Cameral Legislature System. Perhaps, the overall Constitutional Scheme seems to be the strong supporter of the doctrine of the Separation of Powers *(a universal principle of recognition prevalent throughout of the civilized world)*; that's why we also see power sharing among various pillars of the states. Under this principle of trichotomy there is clear cut constitutional demarcations, which binds the pillars of States i.e., the Legislature, the Executive and the Judiciary, to exercise their respective powers, within such constitutionally prescribed spheres[187]as a compliment of each other, only. These views find its strength further when we appreciate the constitutional restrictions which are placed either on the Majlis-e-Shoora (Parliament) with respect to discussion of the conduct of any Judge of the Supreme or a High Court in the discharge of his duties and likewise the counter restrictions imposed with respect to the powers of the Courts, as to inquire into proceedings of the Majlis-e-Shoora (Parliament), as the case may be[188].

Similarly, when the matter comes to the Legislative Competence of the Majlis-e-Shoora (Parliament), particularly with respect to the Constitutional Amendment *(through the exercise of its Constituent Power)*, one finds that the Constitution specifically recognizes the unbridled power of Parliament to amend any provision of the Constitution with an additional surety that the Courts cannot call into question any of its such amendment[189]. Hence,

[187] See Articles 90 to 99, 141 to 144 & 175 to 212 of the Constitution of Islamic Republic of Pakistan, 1973

[188] See Articles 68 to 69of the Constitution of Islamic Republic of Pakistan, 1973

[189] See Article 239of the Constitution of Islamic Republic of Pakistan, 1973

textually as well as while applying either the Cardinal Rule of the Construction of Statute *(i.e., Literal or Purposive Approach)* or of the Legislative Intent as Judicially interpreted from time to time[190] over the Constitutional Provisions under discussion, it is proved beyond any shadow of doubt that besides its ordinary legislation, the power of amending any provision of the Constitution is the sole prerogative of the "Legislature" (i.e., Majlis-e-Shoora [Parliament]) as it has admittedly created this foremost legal document *(Will of the People)*, in the capacity of being public representative body, that too, after due deliberations, thereto.

3.1 Framework/Structure/Status of the Original Constitution of 1973 (i.e., either it is framed by a Constituent Assembly or by else)

The Constitution of Islamic Republic of Pakistan, 1973, establishes Islamic Principles as aspired through the Objective Resolution of 1949 which is now part & parcel of the Preamble and duly express the will of people, as summarized herein below that the sovereignty of the universe belongs to Al-Mighty Allah; on earth people being delegatee hold it as a trust and in discharge of its obligations they are guided by teaching of Islam through the Holy Quran and Sunnah (SAW)[191]; Islam is declared as state religion[192]; Principles of Policy enables the Muslims to order their life on Islamic way of life; Prohibition is placed over all forbidden & immoral activities[193]; family & minorities rights have been fully

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[190] *Dilawar Hussain vs. Province of Sindh*: (PLD 2016 SC 514);
Rana Aamer Raza Ashfaq vs. Dr. Minhaj Ahmad Khan: (2012 SCMR 6);
Syed Mehmood Akhtar Naqvi vs. Federation of Pakistan through Secretary Law: (PLD 2012 SC 1089);
Mumtaz Hussain vs. Dr. Nasir Khan: (2010 SCMR 1254);
Fazal Dad vs. Col. (Rtd) Ghulam Muhammad Malik: (PLD 2007 SC 571);
Pakistan Industrial Development Corporation vs. Pakistan: (1992 SCMR 891).
Messrs S. A. Haroon and others vs. The Collector of Customs, Karachi and the Federation of Pakistan: (PLD 1959 SC 177);

[191] See Preamble to the Constitution of Islamic Republic of Pakistan, 1973

[192] See Article 2 of the Constitution of Islamic Republic of Pakistan, 1973

[193] See Article 37 of the Constitution of Islamic Republic of Pakistan, 1973

protected[194] ; State is given the task to promote social & economic well-being of the people[195], legal reforms are suggested for bringing the existing laws in accordance with teach of Islam[196], Council of Islamic Ideology is entrusted with the powers to recommend through the Parliament, necessary measures for brining existing laws in conformity with the Injunctions of Islam[197]. The Federal characteristic with representative democracy guaranteed the constitutional safeguards[198], in order to do social, economic & political justice to subjects and to achieve Muslim nationhood besides promoting international peace/harmony[199] is the main philosophy of our Constitution. So, a Constitution without any philosophy[200] would be like the famous saying of an English Constitution writer (1955) W. B. Bagehot when he states in following words as:-

> *"...A Constitution without a philosophy underlying it is a mere skeleton without flesh and blood and even without a soul...."*

Keeping in view the above, if we dig out the history of the framing of our Constitution, we find that pursuance to elections of 07th December, 1970 two main political figures surfaced on ground by way of the Sheikh Mujeebur Rehman in East Pakistan while the Zulfiqar Ali Bhutto in West Pakistan, in which the former was having an overall heavy mandate through out of the Country. It is also important to note here that pursuance to above

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[194] See Articles 35 & 36 of the Constitution of Islamic Republic of Pakistan, 1973

[195] See Articles 37 & 38 of the Constitution of Islamic Republic of Pakistan, 1973

[196] See Article 8 of the Constitution of Islamic Republic of Pakistan, 1973

[197] See Article 228 of the Constitution of Islamic Republic of Pakistan, 1973

[198] See Articles 7 to 28 of the Constitution of Islamic Republic of Pakistan, 1973

[199] See Article 40 of the Constitution of Islamic Republic of Pakistan, 1973

[200] Mehreen Anwar Raja, *The Constitution of Islamic Republic of Pakistan, 1973*", (Lahore: Eastern Law Book House, Volume-I, 2010): page 23

elections a Constituent Assembly was also assigned the task of the framing of future Constitution within 120 days; along with their due assurance to their respective electorates, that the future Constitution of the country would be such which avoids concentration of powers in the hands of few individual and also protects the fundamental basic rights of the public at large[201]. But somehow, due to internal political rifts, stern stand & dis-agreement over various political issues among Political Heads of the Eastern & Western Wings, in addition to mishandling of the situation by the Press & Military establishment sparked confrontation at national level, which unfortunately rests in dismemberment of the eastern part of country, in December 1971[202]. But strange enough that the Constituent Assembly elected pursuance to the elections of December 1970, held on all Pakistan Basis (Eastern & Western Wings [i.e., Pakistan & Bangladesh]), has inspite of the formation of Bangladesh in 1971, continue to serve as the Constituent Assembly for remaining part of the territories now comprising on the present day Pakistan (Western Wing), that too without holding any fresh elections thereof, on similar footings as had already been done by the Bangladesh, in this behalf.

So it is this assembly which through a Presidential Order of 1972[203] issued under the Civilian Martial Law, giving the mandate to the assembly via the Legal Framework Order, 1970 *(i.e., of General Yahya)*, to give the Interim Constitution of 1972, in addition to appoint a committee to draft a permanent Constitution, thereto[204]. It was on 17th April, 1972, that

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[201] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Pages 208,222 & 227

[202] Ibid at Page241

[203] *National Assembly (Short Session) Order, 1972,* [PLD 1972 (Central Statute) 434]

[204] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 254.

Mr. Zulfiqar Ali Bhutto appointed a Constitutional Committee comprising over 25 members *(i.e., including 6 from the Opposition)* from the National Assembly, initially under the chairmanship of Mr. Mahmood Kasuri and then of Mr. Abdul Hafeez Pirzada, the then Law Minister(s), to prepare a draft Constitution, who pursuance to an accord of dated: 20th October, 1972, reached to unanimous consensus over the formation of Federal Parliamentary System of Government with Bicameral Legislature and Provincial Autonomy, blended with Islamic teachings accordingly[205]. So, keeping in view the above, it can be safely concluded that in the legal parlance, the assembly undertaking the making of the Constitution of 1973, was not a Constituent Assembly, in its *Sensu Stricto*, as after the debacle of 1971, no fresh elections were held for the remaining part consisting on the present day Pakistan *(i.e., the West Pakistan)*, so as to give fresh mandate to the new Constituent Assembly in the changing political circumstances.

It is pertinent to make clear that reference of holding no fresh elections to form a new Constituent Assembly hereinabove is never quoted in a context of entering into another sphere of the controversial debate of the legality of the Constitution Making Committee *(admittedly Constituted by the Civilian Government of Mr. Zulfiqar Ali Bhutto)* but it is an un-denied historical fact of our country that the Committee so formed derives its original mandate from the Legal Framework Order of 1970 of a military usurper (i.e., General Yahya Khan). As no one can reverse the history so let us assume that the Constitution so framed (1973) by the then Constituent Assembly represents the will of the people.

[205] Ibid at Pages 265 & 266

3.2 Competence/Powers of the Institutions/Forums who can bring in or effect such Constitutional Amendment in the Constitution of 1973

It is well known fact that Constitution of a country is a kind of social contract which binds people, society and the state. It is the nation's commitment to the goals set out in it which ensure promotion of nationhood and stability in system. That is the reason that scheme of the Constitution of Islamic Republic of Pakistan, 1973 is also based on trichotomy, in which all the pillar of state perform their due role to achieve the above cited goals, i.e., the Legislature exercise its right to legislate, the Judiciary to interpret law and the Executive to implement it. As far as the Constitutional Amendment is concern, this right exclusively falls within the domain of legislature competence by virtue of Article 238 to the Constitution of Islamic Republic of Pakistan, 1973, which reads as follows:-

> **238. Amendment of Constitution**:-
>
> Subject to this Part, the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).

However, the only embargo placed on the exercise of this power is, that it has been subjected to Part XI of the Constitution, which mean that whenever the Constitution requires any amendment etc., it would be passed through the detail procedure as contemplated under Article 239, thereof. The text of which reads as follows:-

> **239. Constitution amendment Bill**:-
>
> (1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.
>
> (2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.

> (3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had or originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions of clause (4), be presented to the President for assent.
>
> (4) A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.
>
> (5) No amendment of the Constitution shall be called in question in any Court on any ground whatsoever.
>
> (6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

Bare reading of the above text reveal that the body competent to exercise the power to amend lies with the Majlis-e-Shoora (Parliament) only, which alone has the full power to amend any provision of the Constitution and in this behalf, there is no limitation or restrictions in its way to do the needful. The philosophy behind this logic seems to keep the Constitution alive and in line with the pace of progress, aspiration, wills, needs and demands of the people. Therefore, while keeping in view the procedure for effecting amendment as prescribed in Articles 238 & 239 to the Constitution, in mind, one can safely conclude that the power to make any Constitutional Amendment vests exclusively with the Majlis-e-Shoora (Parliament) which represents the will of the people and none of the other organ of State; be it the Executive or the Judiciary, as the case may be.

Now the crucial question which crop up from the above cited situation is that, which of the assembly *(i.e., Constituent or Present Day)* has the right to introduce such

Constitutional Amendment and what are the limitations to this effect over the exercise of such right, in accordance with law. Let us examine the issue in detail:-

3.2.1 Constituent Assembly

If for a while let us assume that the introduction of every Constitutional Amendment is the prime job of Constituent Assembly only, then at the first place the role of the present day Assembly completely ousted from the screen of Constitution making process, which does not seems to be practicable at all. It is so, because of the appreciating following facts i.e., the Constituent Assembly which is formed for one time only with a specific given task and after the completion of its task, disperse ipso facto, by leaving the actual business of legislation to another body. Moreover, the separate elections/re-election for electing the members of a Constituent Assembly *(in the nature of Parliament)* for the purpose of effecting any Constitutional Amendment parallel with the election of the ordinary members of Parliament, either on permanent basis or with regular intervals thereof or likewise at a time the entrustment of two legislative functions to two different entities for doing two separate jobs is also constitutionally not only impracticable but also impermissible in view of our own Constitutional scheme as well; which under Articles 238 & 239 to the Constitution does not expressly envisage any such intention of the Constitution makers at all.

Similarly, when the people gave the Constitution to the people, with absolute and unqualified amending power to the Parliament, then how, after the death of those persons, the living peoples of future generations could be subjugated to the wishes of the dead peoples, as

has rightly been observed by Thomas Jefferson when he explain the above situation in the following words i.e.,[206]

> *".....each generation has a right to determine the law under which it lives; the earth belongs in usufruct to the living; the dead have neither powers nor rights over it……"*

Even in this respect judicial precedent from our own jurisdiction uphold similar views, when pursuance to a reference moved by the President of Pakistan on the question of recognition of the State of Bangladesh[207], our Supreme Court categorically held that Legislation of today could not enact a law or pass a resolution which binds successor legislation, particularly in the event when a legislative measure or the Constitutional amendment is brought before a House. There is also another precedent set by our apex Courts as well, according to which admittedly, when our Supreme Court itself had given the permission to the Military dictator(s) to amend the Constitution in the past, So this act of the Court *ipso facto* ousts the concept of a Constituent Assembly from the scene at all.

Moreover, although the scholars do agrees upon the universally known fact, that with the fast growing society the change in Constitutional needs are imperative, but the attachment of the condition of the introduction of any such reform(s) with that to the Constituent Assembly only, seems not to be feasible, in view of appreciating the ground realties as discussed hereinabove. Particularly, when the express and unambiguous language of Article 239 *(as originally framed till its present day shape)*, entrust absolute and unqualified powers

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[206] Dr. Ashok Dhamija *"Need to Amend a Constitution and Doctrine of Basic Features"*, (New Delhli/Agra/Nagpur, Wadhwa and Company, Law Publisher, First Edition 2007) at page 479

[207] *Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan by President Zulfikar Ali Bhutto* : (PLD 1973 SC 563)

to the Parliament for effecting any sort of amendment, without any express limitations thereof.

3.2.2 Present Day Assembly

As already stated herein above that attachment of the pre-condition of amend-ability of the Constitution with that to the sanction of Constituent Assembly only, does not works at all, therefore the only option which is left behind with the current generation is to invoke the powers of the present day Assembly. At the cost of repetition, while considering the Constitution to be a living organism, there is unanimity among all the scholars about the need for an absolute amending power with the existing assembly so that the future generations could have fulfills their own aspirations and meets their own cherished social and economic goals. If that being so, then it seems strange enough that how can a generation of the past binds all the generations to come? So, then in the given circumstances a straitjacket answer to the above query would be that, it is the prerogative of the future generations alone to decide for themselves as to what is good or bad for them.

Moreover, one wonders that if the amendment of Constitution was subjected to the approval of Constituent Assembly only, then why the law-makers had not mention this fact in express terms into the relevant chapter prescribing the mode of effecting Constitution Amendments. Similarly, why Article 239 to our Constitution (as original as it was) from the day one till its present day substituted shape also did not place any express restriction/limitation in its way thereto.

Keeping in view the above, I am in full agreement with the opinion that the present day assembly do have powers to effect Constitutional Amendments of every provision of the Constitution, because textually the Constitution did not place any express bar in its way, so

this situation leaves no room for me to differ with the advice of Dr. Ashok Dhamija author of the book titled *"Need to Amend a Constitution and Doctrine of Basic Features"*, whereby he suggest to allow the present day assembly for making Constitution Amendments albeit with stringent or difficult procedure, so that in return this process will ensure that sacred provisions of the Constitution would not become the plaything at the hands of some vested interests or of some powerful people. Therefore in view of the above any express or implied limitations whatsoever, placed on the amending power in a written Constitution is not desirable.

3.2.3 Limitations

There is unanimity in the opinions of scholars for the need of amending a constitution, but difference which exists if any, is only to the extent & frequency of such amendments. Some scholar's advocates on putting certain limitations on the power of Parliament to effect Constitutional Amendment, while applying the principles of doctrinal interpretation[208] i.e., "Basic Structure Theory", "inner unity", "identity" or "spirit" of the constitution, of the word "Law", on the theory of "Supra-Constitutionality" or likewise on the theory of "hierarchy between provisions of the Constitution"; "prohibitions imposed by natural law" etc., while assuming certain substances which practically does not have existence in the express Constitutional text as is the case of our neighbouring South Asian Sub-Continent countries like India, Bangladesh etc., while the others, did not recognize any of such limitations/restrictions at all, basing the silence of any express provisions to this respect into the Constitution, which either puts any substantive limitations or expressly bars the Parliamentarian, thereof, the glaring example of such country is that of our own, wherein

[208] For further details please read Kemal Gozler "Judicial Review of Constitutional Amendments, A Comparative Study (Turkey, Ekin Press, Bursa-2008) at pages 66 to 77

right from the original text of Article 239, incorporated into the original Constitution of 1973 till its present day shape, no such provision has ever been expressly exists.

Likewise a Constitutional Amendment is always considered to be beyond the ambit of the judicial review as well, however, on contrast we do have Judgments from our own Superior Courts which recognizes the vesting of power to amend the Constitution with that of the Majlis-e-Shoora (Parliament), but puts certain limitations over the exercise of it such powers, while holding:

> *"...Provisions of Article 239 of the Constitution though confer unlimited power to the legislature to amend the constitution, yet it cannot, by sheer force of minority and public opinion, make laws amending the Constitution in complete violation of the provisions of Islam, nor can it convert democratic form in completely undemocratic one. Likewise by amendment Courts cannot be abolished which perish only with the Constitution..."*

and concluding in the following words that:

> *".....Freedom bestowed upon the Parliament in Article 239(6) of the Constitution of Pakistan does not include power to amend those provisions of the Constitution by which would be altered salient features of the Constitution, namely, Federalism, Parliamentary Form of Government blended with Islamic provisions. As long as such salient features reflected in the Objectives Resolution are retained and not altered in substance, amendments can be made as per procedure prescribed in Article 239 of the Constitution...."*[209]

[209] *Mahmood Khan Achakzai vs. Federation of* Pakistan: (PLD 1997 SC 426)

In another case our Supreme Court also held that

> *"....the freedom of Parliament does not include power to repeal, abrogate or to alter the salient features of the Constitution..."*[210]

Similarly, yet in another case the Supreme Court also held as

> *"....Parliament of Pakistan has no power to repeal or alter provisions of Articles 1, s2, 2A, 4, 5, 9, 11, 14, 25 & 257 of the Constitution because of their importance, especially, keeping in view the back ground of Pakistan Movement and thinking on human rights in the modern world and for the reason that these provisions are the very foundation on which constitutional structure has been raised...."*

It went on to state as:-

> *"... Any amendment in the Constitution which purports to alter the existing federal structure or the Islamic character of the Constitution or the existing Parliamentary system or which undermines independence of judiciary or abrogates or abridges any Fundamental Right may be regarded as repugnant to the basic structure of the Constitution..."*.[211]

Even, in a recent judgment of the past the Supreme Court, while dilating upon the issue of parliamentary sovereignty principle, held that:

> *"...Constitution of Pakistan did not state that Parliament enjoyed supremacy over the constitution itself...In fact quite the contrary was established in that supremacy of the Constitution over all State organs had to be recognized...*

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[210] *Benazir Bhutto vs. President of Pakistan*: (PLD 1998 SC 388) & also in
Syed Zafar Ali Shah and others vs. General Pervez Mushrraf, Chief Executive of Pakistan and others: (PLD 2000 SC 869) to the then military dictator as well.

[211] *Wukula Mahaz Barai Tahafaz Dastoor vs. Federation of Pakistan*: (PLD 1998 SC 1263)

Parliament was not sovereign as its power to amend the Constitution was constrained by limitations which were clear from the reading of the Constitution as a whole…" [212]

It is thus clear that although the text of our Constitution does not place any embargo upon the exercise of the legislative power by the Parliament when the matter of amendment of the Constitution is deliberated/debated thereof but the judicial interpretations as referred above do place certain limitations, thereto.

3.3 Legitimacy of the Judicial Review of the Constitutional Amendments as held through various precedents

Before dilating upon the issue in hand, let us have an over view of the legal term "Judicial Review". Judicial review is a legal procedure under which certain executive and legislative actions are reviewed by the judiciary. It is the method whereby the judiciary can invalidate any law found to be incompatible with the expressed provisions of the Constitution. However, there exists conflicting views in respect of the very scope and parameters, of the exercise of such powers by the Superior Courts. One view restricts it to the ordinary legislation while the other excludes it to the extent of Constitutional Amendment; therefore without touching the merits of those opinions, I would confine myself to the extent of Original Constitutional Scheme of the Constitution of Islamic Republic of Pakistan, 1973, which has been introduced in respect of the Constitutional Amendments and the judicial trends set through various precedence of our own apex Courts, in this regard.

So, let us have the benefit of reading of original text of the relevant Articles, incorporated at the time of Original Constitution of 1973 making process, which reads as follows:-

[212] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401)

238. <u>Amendment of Constitution</u>:-

Subject to this Part, the Constitution may be amended by Act of Parliament.

239. <u>Constitution amendment Bill</u>:-

(1) A Bill to amend the Constitution shall originate in the National Assembly and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the Assembly, it shall be transmitted to the Senate.

(2) If the Bill is passed by the Senate by a majority of the total membership of the Senate it shall be presented to the President for assent.

(3) If the Bill is passed with amendment by the Senate with Amendments, it shall be reconsidered by the National Assembly; and if the Bill as amended by the Senate is passed by the Assembly by the votes of not less than two-thirds of the total membership of the Assembly, it shall be presented to the President for assent.

(4). If the Bill is not passed by the Senate within ninety days from the day of its receipt the Bill shall be deemed to have been rejected by the Senate.

(5). The President shall assent to the Bill within seven days of the presentation of the Bill to him, and if he fails to do so he shall be deemed to have assented thereto at the expiration of that period.

(6). When the President has assented to or is deemed to have assented to the Bill, the Bill shall become Act of Parliament and the Constitution shall stand amended in accordance with the terms thereof.

(7) A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be passed by the National Assembly unless it has been approved by a resolution of the Provincial Assembly passed by the votes of not less than two-thirds of its total membership of that Assembly.

Bare reading of the above cited provision reveals that the Original Constitution through its Articles 238 and 239 vest the Constitution Amendment Power exclusively in the Parliament. It gives the absolute power of the introduction of a Constitutional Amendment Bill to the National Assembly wherein if the bill is passed by two-third majority of the total membership

then it is transmitted to the Senate, wherein if again the bill is passed by the majority of its' total membership then finally it is to be presented before the President for his final assent thereto. However, a Constitutional Amendment Bill which seeks to alter the limits of a Province the article ibid requires that it must have also backing of the resolution of the Provincial Assembly concerned, in addition as well.

It is also important to note here that the above cited Original Articles (i.e., Articles 238 & 239) which were later on twice subjected to major procedural changes *(as is in present day shape)* by the then Military laid Government of 1985[213], had also more specifically cleared in unequivocal terms that neither the Constitution Amendment can be called in question in any Court on any ground whatsoever [i.e., Article 239 (5)] nor there is any limitation whatever on the power of Majlis-e-Shoora (Parliament) to amend any of the Provision of the Constitution [i.e., Article 239 (6)] in this regard. Hence, the core center of the constitutional text in either of the shapes *(i.e., the original or finally substituted one)*; expressly reveals that the power to amend any of constitutional provision remain in the hands of Majlis-e-Shoora (Parliament) absolutely and none of the other organ of the state thereof.

Interestingly when in either of the shapes *(i.e., either the Original or the present day as contained in Articles 238 & 239)* the Constitution of our country, if on the one hand, places no restriction over the absolute power of the Majlis-e-Shoora (Parliament) to amend the Constitution on the other it also does not expressly confer the power of judicial review to the judiciary, particularly with respect to the Constitutional Amendment. On the contrary, what the Constitution confers on the superior judiciary *(i.e., the Constitutional Courts,*

[213] Initially through (P.O No: 14 of 1985) by Article 2 and Schedule, Item 48 (w.e.f. March 2, 1985) & subsequently through (PO No 20 of 1985) by Article 3 of the Constitutional (Second Amendment) of 1985, respectively

Supreme & High Courts) is the power to interpret the Constitution[214]. This situation becomes more interesting when, we go through the text of Article 175(2), which specifically limits the jurisdictions of the Courts *(including that of the apex Court)* to the areas as is conferred on it by the Constitution or under any law, the text of which reads as follows :-

> *"No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law"*.

This constitutional anomaly gives rise to misunderstanding among two pillars of the state, whereby both of them claims their respective supremacy over each other, i.e., the Majlis-e-Shoora (Parliament) alleges its supremacy on the basis of being the primary law making body (i.e., as legislators) while the Judiciary claims its own supremacy on the basis of being the final arbitrator of any legal issues. But in reality the claim of the judiciary seems to be on weak footings, when it is adjudged in view of the overall Constitutional Scheme in front; which specifically empowers the Majlis-e-Shoora (Parliament) to exercise both of its power with respect to Ordinary Legislation *(such as Articles 141 to 144)* & with respect to the Constitutional Legislations *(i.e., Article 238 & 239)* as the case may be, however, on the contrary the Constitutional silence over the role of the Judiciary with respect to calling in question the validity of the Constitutional Amendments is itself inferred by this organ, while building its case of such supremacy on its own judicial interpretations such as follows:-

In *Mahmood Khan Achakzai's*[215] Case, wherein while examining the vires of the Constitutional Eighth Amendment, and explaining the scope of Judicial Review of the Superior Courts, the Supreme Court repel the contention of the learned counsel, that Judges

[214] See Articles 189 & 201 to the Constitution of Islamic Republic of Pakistan, 1973

[215] *Mahmood Khan Achakzai vs. Federation of* Pakistan: (PLD 1997 SC 426)

of the Superior Courts have taken oath under the impugned Amendment and has been drawing salary with increasing effect from time to time, could not strike it out; in response, while holding that the Judges of the Superior Courts had taken oath to defend, preserve and protect the Constitution, therefore any illegal amendment made or had been made into the Constitution could be validly examined by the Courts thereof.

In *Munir Hussain Bhatti's*[216] Case, although no direct challenge was ever cast to the validity of or the legislative competence of the Parliament to effect the Constitutional 18th Amendment, but rather the challenge was to the decisions of the Parliamentary Committee constituted under Article 175A, which refused to confirm the nomination of the recommendees of the Judicial Commission, the Supreme Court while laying down the principles of justice- ability of the issue, explained the constitutional status of the two organs *(i.e., Parliamentary Committee & the Judicial Commission)* by holding that they are not part of the legislature & just two limbs of the one constitutional mechanism created under Article 175A, therefore, they do not claim any immunity by virtue Article 69 to the Constitution, that's why the judicial scrutiny is permissible accordingly.

In a recent judgment, pronounce in the *District Bar Association, Rawalpindi*[217] Case, the Supreme Court while examining the vires of the 18th & 21st Constitutional Amendments and while explaining the scope of the ouster of its jurisdiction by virtue of Article 239(5), held *(as per Minority view)* that it can examine the vires of a Constitution Amendment, if it does not fulfill the pre-conditions of Article 238, whereas through the same Judgment, Justice Qazi Faez Isa while speaking for himself held, that the term "any Court" used in the said Article did not include the name of Supreme Court therein, because as per the scheme of the

[216] *Munir Hussain Bhatti, Advocate and others vs. Federation of Pakistan and another*: (PLD 2011 SC 407)

[217] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401)

original Constitution if it wants to exclude the Jurisdiction of Supreme Court, it must have mentioned the name of Supreme Court thereof.

Moreover, it was further held that in the year 1985, the very act of the insertion of the sub-clauses (5) & (6) into Article 239 to the Constitution were made by the military dictator with intent to serve the dictatorial purpose only, that too with an object to prolong usurpation of his office. Similarly, through the same judgment another view which also came to surface, wherein the Supreme Court while rejecting the doctrine of Parliament Sovereignty held that Constitution of Pakistan did not state that Parliament enjoyed supremacy over the Constitution, therefore, it is the Constitution alone, which has supremacy over all organs of the state, so the Parliament being instrumentality of the people, created by them to sub-serve and implement their will, hence its political limitations are subject to Judicial Review thereof. The opinion of the Supreme Court does not end here rather it also justify the exercise of the power of Judicial Review in respect of the Constitution Amendment on the basis of Preamble, denial of Fundamental Rights to the People or the form of Government which they had chosen or the independence of Judiciary etc., in order to examine and/or strike down any amendment made to the Constitution by Parliament, as the case may be.

Conclusion

From the above discussion it is crystal clear that although Constitution does not place any express restriction over the exercise of the legislative powers of the present day Parliament specifically with respect to effecting Constitution Amendments under its Constituent Powers, except that it is subject to the procedural compliance as provided under Article 238 & 239, while on the contrary the Constitution do put limitations over the exercise of the Jurisdiction of the apex Courts, as envisaged under Articles 175(2), 184 to 188, 199, 203D to 203G, respectively.

CHAPTER-IV

D. CONSISTITUTIONAL AMENDMENTS AND THEIR EFFTECTS ON THE WILL OF PEOPLE

In the preceding chapter I have examined the nature and legislative competence of the institutions/forums to bring or effect the Constitutional Amendments vis a vis the legitimacy of the Judicial Review of those Constitutional Amendments by our apex Courts, whereas the instant chapter will be examining various constitutional amendments which have been effected either by the Military Dictators, Politicians or at the best at the instance of Judiciary, vis a vis their effect on the will of the people.

(A). CONSTITUTIONAL AMENDMENTS & MR. ZULFIQAR ALI BHUTTO (1973 to 1977)

In this respect, it is important to note here that, when we look back at our Constitutional history, it reveals that Mr. Zulfiqar Ali Bhutto the then Prime Minister, who had the credit to put in practice the Constitution of Islamic Republic of Pakistan, 1973; during the course of his first five years terms of office, had also a unique credit on his person of making Seven Amendments into the Constitution of Pakistan, 1973, among whom most of them were not made out of necessity but were motivated by some ulterior motives, which are discussed in chronological orders are as follows:-

4.1 First Constitutional Amendment

A review of the history of the Constitutional Amendments reveals that the Constitution (First Amendment) Act, 1974[218] which was introduced on May 8, 1974; had actually amended total Fourteen Articles including Articles 1, 8, 17, 61, 101, 127, 193, 199, 200, 209, 212, 259, 260 and 270 and the First Schedule to the Constitution of 1973. However,

[218] Constitution (First Amendment) Act, 1974: Published (PLD 1974 Central Statute 252)

the changes introduced in Articles 1, 8, 17, 200 & 250 do have rested with negative impact on Social Binding Contract (i.e., The Constitution). Let us see how:-

Number-01: Article 1 to the original Constitution 1973 which describes the Republic and Geographic Territories of Islamic Republic of Pakistan vis a vis the application of the new Constitution to the whole territory, particularly its Sub-Clause (2) gives rise to an interesting situation which normally got slipped of, from the eyes of scholars, in order to better understanding let us have benefit of the original text of said Article which reads as follows:-

Article 1 The Republic and its territories

(1)……..……
……

(2). The Constitution shall apply to the following territories of Pakistan

(a). ***the Provinces of Baluchistan, the North West Frontier, the Punjab and Sind****;*

(b). the Islamabad Capital Territory, hereinafter referred to as the Federal Capital;

(c). the Federally Administered Tribal Areas; and

(d). Such States and territories as are or may be included in Pakistan, whether by accession or otherwise.

(3). The Constitution shall be appropriately amended so as to enable the people of the Province of East Pakistan, as and when foreign aggression in that Province and its effects are eliminated, to be represented in the affairs of the Federation.

(4). ……..

……

Bare reading of Article 1 (2) & (3) to the original Constitution of 1973, depicts the worst political affairs of the State of Pakistan particularly with respect to the Eastern Wing of Pakistan and also shows the intention of law-makers that in Constitution Making Process, they had only kept the interest of the Western Wing of Pakistan in mind, as is apparent from

the very language used in the said Article [i.e., Article 1(2) & (3)], which reveals that through its former sub-clause (2) the Province of West Pakistan has been shown to be splitted into four Provinces, with Islamabad Capital Territory as a Federal Capital along with the territories forming part of Federally Administered Tribal Area (FATA), *[which if examined, in the true prospective of the West Pakistan Establishment Act, 1955, establishing thereby One Unit of the West Pakistan consisting on 15 Provinces, states and areas, the effect of such repeal would have been re-emerged in shape of 15 constituent units and not in 06 constituent units any how]*, while through its later sub-clause (3), in respect of the Province of Eastern Wing a window had deliberately been left open with a hope of effecting appropriate amendments in future, once the foreign aggression in that part of the Province is to be eliminated, however, the expectations of keeping two wings of the then Pakistan together, do not ended in fruitful results, pursuance to the fall of Dhaka and upon giving official recognition to the Bangladesh in February 1974[219], thereto.

It is equally important to pinpoint here that with respect to the recognition of the Eastern Part of the Pakistan as an independent State of Bangladesh, Mr. Zulfiqar Ali Bhutto also seems reluctant in offering his shoulder to share the responsibility of the dismemberment of the Eastern Wing and its recognition process thereof, as is evident from appreciating the following historical fact that he also moved a Presidential Reference[220] in the capacity of being the President of Pakistan in this respect to the Supreme Court for having its opinion on the legal question of recognition of the State of Bangladesh *(already moved in the National*

[219] Hamid Khan, *Constitutional and Political History of Pakistan*, (Karachi: Oxford University Press, Second Edition, 2009) Page 289

[220] *Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan by President Zulfikar Ali Bhutto* : (PLD 1973 SC 563)

Assembly), while invoking his powers under Article 187 to the Interim Constitution of Pakistan, 1972.

It was consequent upon afore referred recognition which was given by the State of remaining portion of Pakistan to the new emerged state of Bangladesh that finally the Constitution of 1973 was amended for the first time by introduction of the Constitution (First Amendment), Act, 1974, which came into effect on 08th May, 1974, whereby Article 1 to the Original Constitution was got substituted[221] by deletion of the Sub Clause (3) therefrom completely. Needless to state here that this move on the part of Zulfiqar Ali Bhutto's government also seems an attempt of face saving, which admittedly used the forum of Supreme Court to counter public pressure, thereof.

Number 02: Article 8, which talks about the inconsistency of laws made in derogation of Fundamental Rights as being void, through the instant amendment Act, Article 8, Clause (3)(b) to the original Constitution was also got substituted[222] *(after the word "day" at the end with that of the words "or as amended by any of the laws specified in that schedule")* in such a way that it given protection to those legislative instruments which either have been passed or amended through an Act of Parliament during the regimes of Military or Civilian Martial Laws, which remained imposed in between the Period of 1958 to 1972, respectively. As itself depicts from the perusal of Article 270 (*i.e., protecting the Military Martial Law Administrator's act etc.,*) & Article 269 (*i.e., protecting the civilian martial Law Administrator's act etc.,*) incorporated by framers of Constitutions, into the new Constitution of 1973, which amazingly (i.e., Articles 269 & 270) still hold its field, even till to date, which ultimately shows how the Civilian Martial Law Administrator while playing with the will of

[221] Section 2 to Constitution (First Amendment) Act, 1974: Published (PLD 1974 Central Statute 252)

[222] Section 3 ibid.

people, given permanent protection to his misdeeds while temporary protection to the misdeeds of Military Martial Law Administrator of the past, that too for their personal gains, accordingly.

Number 03: Article 17 which guarantees to a citizen of his right of the Freedom of Association, was substituted by insertion of Clause (2) [223] in such a way that the Federal Government was empowered to declare any political party either newly formed or already in existence, on the accusation of it being operating in a manner prejudicial to the sovereignty or integrity of Pakistan. Practically this amendment has imposed curb on the political parties on the pretext of their being involvement in activities against the national interests, besides above it also made it mandatory on them to declare their source of funding too. It was under the garb of these provisions of the amended Constitution that National Awami Party (NAP) was banned on February 10, 1975, and matter was referred to the Supreme Court[224], whereby the order of ban imposed by the Government was finally upheld accordingly.

Number 04: Article 200 to the Original Constitution which talks about the Transfer of High Court Judges was also amended with addition of a new sub clause (3) and a proviso[225] therein, whereby under the new scheme a Chief Justice of a High Court could require a judge of another High Court to attend the sitting of his Court subject to consent of the transferee Judge concern and approval of the President of Pakistan, but with consultations of the Chief Justice of Pakistan and of the Parent Chief Justice of the High Court of transferee Judge, accordingly. This move also seem to be in derogation of the Principle of independence of Judiciary & Provincial Autonomy as well, as admittedly the High Courts of the Provinces

[223] Section 4 ibid

[224] Islamic Republic of Pakistan vs. Abdul Wali Khan: (PLD 1976 SC 57)

[225] Section 10 to Constitution (First Amendment) Act, 1974: Published (PLD 1974 Central Statute 252).

function (administratively) as an independent entity within its territorial jurisdiction *(i.e., in a Province)* without interference of any other sovereign entity or of its institutional head, as the case may be.

Number 05: Article 250 which initially talks about the entitlement of the salaries, allowances and privileges of the President, the Speaker & Deputy Speaker of the National and/ or a Provincial Assembly, Chairman and Deputy Chairman of Senate, the Prime Minister, a Federal or a Provincial Minister, a Minister of State, a Governor and a Chief Election Commissioner; as prevalent two years before the time of making Constitution of the 1973, and as such would be received by them accordingly; was amended[226] by deletion of the words *"a governor"* from clauses (1) & (2) respectively. By doing so the governor of a Province was deprived of the equal treatment in respect of the receipt of salaries, allowances and privileges vis a vis of the office bearers of other government portfolios, named above.

Conclusion:

The sum up of above discussion reveals that the Constitution First Amendment redefined the International as well as the Provincial boundaries of Pakistan besides acknowledging the dismemberment of the Eastern Wing of Pakistan (now Bangladesh), by removing its reference from the Constitution at all. However, it is still mystery that upon repeal of the West Pakistan Establishment Act, 1955 (One Unit Formula) the present day Pakistan, which was originally consisting on 15 Provinces, States and areas, why the effect of such repeal would not have been re-emerged in shape of it's that very 15 constituent units instead of its present day 06 constituent units scheme, thereof. Similarly, the amendment also discloses as to how the Civilian Martial Law Administrator vis-à-vis of the Military Martial

[226] Section 13 ibid

Law Administrators of the Past, given protection to the legislative instruments promulgated during the period of 1958 to 1972, besides above, it also shows the curb of the ruling class which was used for tackling its political opponents. Similarly, by introducing the Transfer of the Judges of High Court Policy at the request of a Chief Justice of High Court from one Province to another, it also put at stake the Principle of Independence of Judiciary & Provincial Autonomy as well. The amendment also seems to be discriminatory with respect to the grant of salary & other allowance to the office of the Governor of Province, as he was also deprived of the perks & privileges vis a vis the office bearers of other government portfolios.

The only remedying feature of the Constitution First Amendment was that besides removing drafting errors, it has bound down every political party to disclose its sources of funding, besides setting at rest the anomaly for being as a member of the Supreme Judicial Council among the persons having portfolio as a Permanent Chief Justices vis a vis having Acting Chief Justices, by excluding the period of service as Acting Chief Justice, while making eligible the permanent Chief Justices only. Another appreciating work which instant amendment has taken care of is that of the establishment of the Administrative Courts and Tribunals for catering the issues relating to terms & condition of the serving class within the country. Likewise, the amendment also recognized the meritorious services of the defenders of the frontiers as well, giving due respect to their sacrifices for the grant of meritorious awards, accordingly.

4.2 Second Constitutional Amendment

The spark of Anti-Ahmediya Movment of 1950 from Punjab, ignited in mid of 1974, when unfortunately the sad event of the dismemberment of Pakistan had already taken

place.[227] However, it was pursuance to the recommendations of the National Assembly of Pakistan's Official Report on *"Proceedings of the Special Committee of the Whole House held in Camera to consider the Qadiani Issue"* dates in between 5th of August, 1974 till 7th of September, 1974[228], whereby the Cross-Examination of the Qadiani Group Delegation were conducted; and as a result of which, The Constitution (Second Amendment), Act of 1974[229], came into effect on 21st September, 1974, whereby it had actually introduced amendments in two articles i.e., Articles 106 ***[i.e., Constitution of Provincial Assemblies]***[230] & 260 ***[i.e., Definitions]***[231] to the Original Constitution of Pakistan, 1973, whereby the Qadianis who called themselves as Ahmadies were declared as non-Muslim in addition to reserving separate seats for them in the Provincial Assembly as well. It is worth to mention here that Article 260 to the Constitution was also got amended by adding Sub Clause (3) to it, whereby it was declared in unequivocal terms that the person who does not believe in the absolute and unqualified finality of the Prophethood "MUHAMMAD" (PBUH) as the last Prophet or claims to be a Prophet, in any sense of the word or of any description whatsoever or recognize such a claimant as a Prophet or a religious reformer, to be a non-Muslim for the purpose of Constitution or law.

Even after carrying out the necessary Constitution Amendment referred above, the continuous propagation of the destructive faith and the Anti-Islamic Activities of the

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[227] Hamid Khan, *Constitutional and Political History of Pakistan*, (Karachi: Oxford University Press, Second Edition, 2009) Page 290

[228] Full Text of *"The National Assembly of Pakistan, Proceedings of the Special Committee of the Whole House held in Camera to consider the Qadiani Issue"*, Official Report dated 05th August, 1974 to 07th of September, 1974, available at www.khatm-e-nubuwwat.org/NA-1974/NA-Proceeding-1974.pdf, lastly visited on 05.06.2018

[229] Constitution (Second Amendment) Act, 1974: Published (PLD 1974 Central Statute 425)

[230] Section 2 ibid

[231] Section 3 ibid

Qadiani's seriously affected the true image of Islam, which compelled a true Muslim to agitate the all those serious issues through civil litigation whereby the learned Civil Court of Dera Ghazi Khan, issued an injunctive orders restraining the defendants (Qadiani's) from naming the disputed place of their worship as mosque and proclaiming azan, respectively. Feeling aggrieved the matter went in appeal before the District Judge who also confirmed the injunctive orders, whereby finally the learned Lahore High Court's single bench comprising on Justice Aftab Hussain,[232] reverse the findings by setting aside the orders of the Courts below by holding as under:

> *"…….Ahmadis still remain completely free to profess and practice their religion and enjoy complete autonomy in regard to their religious tenets and institutions and that the constitutional amendment had not established any ground on which the court can issue an injunction to restrain Ahmadis from calling their places of worship a mosque (Masjid) or from using the call to prayer (Azan) in it or from offering their prayer in the manner laid down in Islam…."*

It is important to note here that the findings of the Lahore High Court ibid, clarified that no legal obstacles were actually exists in the ways of Ahmadies in continuing to profess their faith as the Constitutional Amendments had little impact on Qadianism in curbing their provocative activities thereof. It was this fact that which compelled the leading Muslims Scholars from Jamat-e-Islami, Majlis-e-Ahrar, Jamiat-e-Ulma-Islam, Islamian action committee in the name of Khatm-e-Nabuwwat Movement along with the political leaders of various parties such as Opposition members in Punjab Assembly, Jamat-e-Islami, Pakistan

[232] *Abdul Rehman Mubashir vs. Amir Ali Shah*: (PLD 1978 [Lahore] 113)

Democratic Party (PDP); that a nationwide campaign was started for the enforcement of the Constitutional Amendment in its letter and spirit[233].

Finally it was the Government of General Zia-ul-Haq who promulgated the Anti-Islamic Activities of Qadiani Group, Lahore Group and Ahmedis (Prohibition and Punishment) Ordinance of 1984[234], whereby new Sections 298-A to 298-C[235] were added/inserted into the Pakistan Penal Code of 1860, prescribing punishments for persons who either uses derogatory remarks etc., in respect of holy personages, misuse epithets, descriptions and titles etc., reserved for certain holy personages or places and likewise particularly the persons of Qadiani group etc., who call himself a Muslim or preaching of propagating his faith respectively. It is worth to mention here that this Ordinance has actually nullified the effect of the Judgment of the Lahore High Court, passed in *"Abdul Rehman Mubashir Case" [PLD 1978 (Lahore) 113]*, whereby complete ban was imposed on the anti-Islamic activities of the Qadiani's etc., forever by settling ninety years old problem beside preserving the true Islamic Ideology through a unanimous decision of the Parliament, accordingly. This amendment was too passed by the Parliament through having little debate over it.

Conclusion:

The upshot of above discussion reveals that the Constitution Second Amendment has actually set at rest the most sensitive and glaring religious issue dear to all Muslim

[233] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 291

[234] Anti-Islamic Activities of Qadiani Group, Lahore Group and Ahmedis (Prohibition and Punishment) Ordinance of 1984, Published in [PLD 1984 Central Statute 102].

[235] Sections 298-A to 298-C Published in [PLD 1981 Central Statute, Page 84] & [Ordinance XX of 1984] i.e., [PLD 1984 Central Statute 102]

Community of the absolute and unqualified finality of the Prophethood attached to our beloved Holy Prophet (PBUH) Hazrat Muhammad (SAW) by declaring the Ahmadies *(on the basis of their belief as well as of the Anti-Islamic Activities)* as being non-Muslims. The positive result of such move towards religious harmony also depicts that in our domestic legislations as well now by insertions of Sections 298-A to 298-C[236] into the Pakistan Penal Code of 1860 as well, we do have prescribe punishments for person(s) who either uses derogatory remarks etc., in respect of Holy Prophet (PBUH), the Companions of the Holy Prophet or misuse epithets, descriptions and titles etc., reserved for such Holy personages or places, which were declared to be cognizable offences, as such.

4.3 Third Constitutional Amendment

The Constitution (Third Amendment) Act, 1975[237] which was passed on February 18th 1975, had actually introduced amendments into two articles i.e., Articles 10 ***[i.e., Safeguard as to arrest and detention]*** while in Article 232 relating to ***[i.e., Proclamation of emergency on account of war, internal disturbance, etc.,],*** respectively, which affected the fabric of Constitution such as follows:-

Number 01: The former curtailed the rights of a person detained under a law meant for preventive detention, while giving widest powers to the detaining authority after amending the original text of Article 10 to the Constitution of 1973, in such a way that clause (4) to the said article in which the period for preventive detention of a detainee was originally fixed as *"one month"* was got substituted[238] by extending this very initial period of the detention with that to the new substituted period of *"three months"*; hence by this new scheme a detainee

[236] Sections 298-A to 298-C Published in [PLD 1981 Central Statute, Page 84] & [Ordinance XX of 1984] i.e., [PLD 1984 Central Statute 102]

[237] Constitution (Third Amendment) Act, 1975: Published (PLD 1975 Central Statute 109)

[238] Section 2 ibid

could have now been kept in confinement stretching to a period of three month, unless an appropriate Review Board formed in this regard after affording the detainee an opportunity of personal hearing, reviewed his case otherwise, that too with its supporting opinion thereof.

Another change which introduced by the said amendment Act was the introduction of an amendment into clause (5) to the said article, where by the Original Constitutional Scheme, which provides that the detainee (held under the preventive detention) should have the right of the communication of the grounds of his detention, within *"a week"* of his such detention, so as to enable him to make appropriate representations against such adverse orders in field thereof; this fundamental right of the detainee (citizen) prescribing the initial period for communication of such information was also got extended from *"a week"* to that of the *"fifteen days"*, accordingly.

Similarly, Clause (7) to the said article which originally talks about the limits of the total period of preventive detention to the maximum period of eight months that too within a period of twenty-four months commencing of the day of his first detention while its proviso, which supplying an exception to the said principle for a person who was employed by, or worked for, or acted on instructions received from the enemy, could have been detained indefinitely.

This scheme was originally meant for an enemy, but through the instant amendment it was further extended to the citizens as well by adding the following words thereof, such as any person who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a federal law or is a member of any association which has for its objects, or which indulges him in any such anti-national activity.

Hence, armed with these powers Zulfiqar Ali Bhutto undertook such steps that hampered civil liberties, particularly of his political opponents.[239]

Number 02: Likewise the later one has substituted the original paragraph (b) to clause (7) of Article 232, which talks about the imposition of emergency on Presidential orders and also restricts the continuation of said emergency, subject to a resolution of the joint sitting of the house, to a maxim period of six months at a time; this paragraph (b) was duly substituted[240] with that of a new paragraph (b) whereby the period of the imposition of Presidential emergency was got extended from its fix period of six months to that of indefinite period; while similarly the lifting of such emergency was also subjected to the resolution of the house, and that too with further condition of the majority of votes of the total membership of the two houses sat in a joint sitting. This amendment has actually laid foundation of the imposition of political martial laws within the country for an indefinite period as well.

Conclusion:

The net result of the above discussion reach to sole conclusion that the Constitution Third Amendment curtailed the fundamental rights of the Political detenus, besides extending the period of the imposition of the Emergency *(originally fixed for maximum period of six months)* promulgated pursuance to a Presidential Order, while detaining them in the former case and subjecting the lifting of such Emergency in the later case to the approval of Joint Sitting of the House, that too for an indefinite period. Conversely, it has also enhanced illegally the powers of the ruling government, as well.

[239] For more details see Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) at Page 293

[240] Section 3 to Constitution (Third Amendment) Act, 1975: Published (PLD 1975 Central Statute 109)

4.4 Fourth Constitutional Amendment

The Constitution (Fourth Amendment) Act, 1975[241] which came into force on 25th November, 1975 had introduced changes in Articles, 8, 17, 19, 51, 54, 106, 199, 271, 272, 273 and the First & Fourth Schedule, respectively. Under these amendments the prominent changes which were brought into the Social Binding Contract (i.e., The Constitution) were pertains to giving protection to the legislative instruments promulgated in Civilian and Military Regimes besides diluting the laws pertaining to fundamental rights, as evident from the perusal of Articles 8, 17, 19 & 199 which caste negative effects upon the whole Constitutional scheme, such as:

Number 01: Article 8 was amended[242] by substitution of clause (3) paragraph (b), in such a way that it was further splitted into two further sub paragraphs i.e., (i) & (ii), wherein the former has given protection to the amending laws, which amended the laws specified in the First Schedule, while the latter protected the other laws which were already specified in Part-I of the First Schedule, respectively. It has also given protection to those legislative instruments too which either have been passed or amended through an Act of Parliament during the regimes of Military or Civilian Martial Laws, which remained imposed in between the Period of 1958 to 1972, respectively, as already highlighted in detail to Constitution (First Amendment) Act of 1974 ibid.

Number 02: Article 17 which talks about the right of a citizen to have Freedom of Association wherein, for the words *"morality or public order"* the words *"sovereignty or integrity of Pakistan, public order or morality"* were substituted[243]. , whereby, the right of a

[241] Constitution (Fourth Amendment) Act, 1975: Published (PLD 1975 Central Statute 337)

[242] Section 2 ibid

[243] Section 3 ibid

citizen to form association in respect of his anti-state activities was not recognized. Although this move was apparently seems to be made in the better interest of state, but practically it was utilized against the political opponents of the Government in power i.e., of the Zulfiqar Ali Bhutto, as already discussed in detail to Constitution (First Amendment) Act of 1974 ibid.

Number 03: Article 19 was changed to the effect of the deletion & substitution[244] of the word *"defamation"* with that of the words *"commission of"*, only. Again the apparent legislative intention behind it seems to be to enlarge the scope of the restrictions in respect of a citizen's right as to *"Freedom of Speech"* but as was in the past, it was not the earlier fact of *"defamation"* alone which comes within the ambit of an offences, rather now any kind of the commission or incitement to an offence do fall in its restricted limits. Which of course used as teasing tool again political opponents, as already pointed out in para's ibid.

Number 04: Article 199 was amended with insertion of a new clauses (3-A) & (4-A) [245], after the clauses 3 & 4 respectively, the prime object behind these insertions were to enlarge the scope of preventive laws besides barring the High Courts from granting bail to the political detainees. In respect of the former clause this decision of the Government had not only curtailed the powers and jurisdiction of the Constitutional Courts but also prevented the Courts from extending reliefs to their political opponents. While in respect of the latter one, it also curtailed the jurisdiction of High Courts in the matter of stay of recovery, assessment or collection of public revenue, as by virtue of it the stay granted by Courts would stand ceased upon the expiry of the Sixtieth Day, unless the matter was finally decided once for all by such

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[244] Section 4 ibid

[245] Sections 8 & 14 ibid

Court. Even this provision has been given retrospective effect to the status quo orders announced prior to enforcement of the Constitution (Fourth Amendment), Act, 1974, thereto.

Conclusion:

The Fourth Constitution Amendment in addition to giving protection to Civilian and Military legislative measures promulgated in between the period of 1958 till 1971; also put restrictions on the fundamental rights of citizen particularly with respect to their right to Freedom of Association, whereby with substitution of the words *"sovereignty or integrity of Pakistan, public order or morality"* the list of exception for curtailing afore referred right was enhanced. Besides above, the Constitutional Powers of the apex Courts vis a vis the exercise of its Constitutional Jurisdiction, with respect to the person detained in Preventive Laws, the matters relating to recovery, assessment or collection of Public Revenue, while barring the High Courts in the former case from granting bail to the political detainees while in the latter, declaring the stay orders granted before and after of the afore said amendment to be ceased upon the expiry of Sixtieth Day thereof. The only positive feature of the instant amendment was the allocation of six special seats to the minorities in the National Assembly and an increase in the number of seats for the minorities in the Provincial Assembly of the Punjab from three to five.

However, the unfortunate part of this amendment was that it was never allowed to be debated by the members of opposition benches at the relevant time rather they were thrown out of the assembly by the Sergeants at arms[246]. Therefore, this amendment if on the one hand had protected the due rights of the minorities on the other it had curtailed the

[246] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) at Page 294

constitutional powers of the apex Courts and civil liberties of the political opponents of the Government in power, undemocratically.

4.5 Fifth Constitutional Amendment

The Constitution (Fifth Amendment) Act, 1976[247] of September 5th, 1976, introduced amendments in total 16 Articles which includes Article(s) 101, 160, 175, 179, 180, 187, 192, 195, 196, 199, 200, 204, 206, 212, 260 and 280. It was the first ever amendment which was debated in little by the Parliament. However, the prominent articles of this very amendment which had affected the will of the People (i.e., The Constitution) were Article(s) 101, 175(3), 179, 180, 187, 195, 196, 199, which are as follows:

Number 01: The first article which was subjected to amendment process[248] was Article 101 which talks about the appointment of Governor, wherein after clause (2) a new proviso and a new clause (2-A) were added, whereby the former clause put ban on a person having permanent residence from becoming Governor of that very Province. While through the latter clause (2-A), protection has been given to such appointee, during the course of Civilian Martial Laws imposed either under Article 232 or 234, as the case may be.

Number 02: By making amendments to Article 175 clause (3) [249], the period for separation of the judiciary from the executive was enhanced from the original period set as "three" years to that of "five" years.

Number 03: Through amendments[250] in Articles 179, 195 & 196, the clauses of said articles were re-numbering with addition of clause (2), paragraphs (a) & (b), clauses (3), (4)

[247] Constitution (Fifth Amendment) Act, 1976: Published (PLD 1976 Central Statute 538)

[248] Section 2 ibid

[249] Section 4 ibid

& (5) respectively , whereby the Chief Justice of Supreme Court and of the High Court(s), were not only given fixed term extensions of five and four years respectively, in their normal term of office inspite of their fixed term of office of sixty five years & sixty years of the age of retirement, as the case may be; but also upon completion of the terms as such Chief Justice(s), they were also given two ended open options too, i.e., either to retire from the office and receive the pension or in the alternate to assume the office of most senior of the judges of the Courts, with same perks and privileges, which were attached to the respective offices, before their retirement, concern. However, assumption of the charge of this kind by a judge, may give to such a judge an edge over a judge who hold such position of being senior most position among his college's in normal course, that he was considered to be the most senior judge, over the normal Senior Judge as well.

Number 04: Similarly by virtue of the amendment[251] made in Article 180 & 196, a retired judge exercising the option of Senior Most Judge deprive him to become an acting Chief Justice even in the case of arising any vacancy to this effect. Interestingly all the afore referred clauses with paragraphs ibid, were given over riding effects in contrast to whatever the position taken with respect to incumbent in office through Article 275 of the Constitution extending protection in respect of the continuance in office of the persons already in service of Pakistan etc.,. Similarly, a Chief Justice who continued to be in office after completion of his term as Senior Most Judge, could also even not be appointed as acting Chief Justice, during the course of absence period or in case of arising any vacancy, in the office of Chief Justice, as well. Even these term attached to the office of the Chief Justice, as prescribed through instant amendment were also made applicable to such posts, retrospectively.

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[250] Sections 5, 9 & 10 ibid

[251] Sections 6 & 10 ibid

Number 05: Likewise, through an amendment[252] in Article 187, which relates to the Issue and execution of the processes of Supreme Court for doing complete justice; the starting word *"The"* was substituted with the words, brackets, figures and comma *"Subject to clause (2) of Article 175, the"*, whereby the powers of the Supreme Court in respect of issuance of such directions, orders or decrees which were necessary for doing complete justice, were totally curtailed by subjecting it to the constitutional limitations & restrictions, thereof.

Number 06: Again Article 199, which was initially substituted with clause (3) by the Constitution (First Amendment), Act, 1974, whereby the High Courts were barred from issuance of injunctive orders in respect of the members serving under armed forces; through the instant amendment[253] was again put to substitution by way of the addition of new clauses such (3-A), (3-B) & (3-C) thereto.

By virtue of the first substituted clause (i.e., 3-A), prohibiting the High Courts from either of making, suspending the operation of an order issued under the preventive detention or similarly from granting bails before arrest or ordering the release of a person on bail; releasing on bail or suspending the operation of an order for the custody; of any person against whom a case had been registered at any police station, in respect of any offence or who had been convicted by any Court or tribunal; or an order prohibiting the registration of a case at a police station or the making of a report or complaint before any Court or tribunal in respect of any offence; or granting interim reliefs to any such person as the case may be.

Similarly by virtue of the second & third substituted clauses (i.e., 3-B and 3-C), all the above referred orders which were issued after the passage of the Constitution (Fourth Amendment) Act, 1975 or of the Constitution (Fifth Amendment) , Act, 1976, either by the

[252] Section 7 ibid

[253] Section 11 ibid

High Courts or by the Supreme Court, as the case may be, they were also declared to be ceased to have effect, besides above all such applications, leave to appeal or other miscellaneous applications similarly pending either before the High Courts or that of the Supreme Court were also declared to be stand abated, accordingly.

Number 07: Article 200 which talks about the transfer of High Court Judges, was changed by substitution of a proviso at the end of clause (1) [254] therein, which authorized the President of Pakistan to transfer a Judge of a High Court to another High Court, without his (transferee Judge) consent & consultation of the Chief Justices of the apex Courts, if the period of his intended transfer does not exceed the maximum period of one year. An Explanation was also added after the said proviso, in order to clarify the term "Judge" used in the instant article, does not include a "Chief Justice" of a High Court. This move has created sense of job in security among normal judges of the High Courts.

Number 08: Article 204 which authorized the Supreme Court & a High Court, to punish any person found guilty of the Contempt of Court, on the grounds mentioned as per the original Constitution scheme envisaged under clauses (2) & (3) of article ibid, was amended by substitution of a new clause (2) [255] whereby the power of the Supreme and a High Court to punish a person for contempt of Court was made subservient to ordinary law.

Number 09: Article 206 which give a Judge of the Supreme Court or of a High Court an option to resign from his office while tendering his resignation to the office of President of Pakistan, the said article was substituted after re-numbering and addition clause (2) [256] to it in

[254] Section 12 ibid

[255] Section 13 ibid

[256] Section 14 ibid

such a way that now a judge of a High who refused to accept appointment as a judge of the Supreme Court was deemed to have been retired from his office. This move has also created sense of job in security among judges of the High Courts, as well.

Number 10: Article 280 which gives protection to the Proclamation of Emergency issued on the 23rd November, 1971 on similar footings as have already been granted to such emergencies of the past by virtue of Article 232 with similar terms & conditions as envisaged under clause (7) & (8) to it, however through instant amendment[257] the Courts were barred from calling in question the legality of the said martial law even on the grounds of its inconsistency with any of the rights conferred by Chapter I of Part II. Indirectly the Constitution recognized the emergency proclaimed during military martial law imposed by the usurper.

Conclusion:

The Fifth Constitution Amendment put ban on a person to become the Governor of a Province from whom he permanently belongs however an exception was created to this effect for the appointees who were inducted on such portfolios during the course of Civilian Martial Law Regimes. Again in depth study of the afore referred amendments also reveals that the amendment also enhanced the period of separation of the judiciary from the executive, while extending the original period from three years to five years as initially set for the such independence, while practically making the judicial institution subservient to the dictates of executives as well. As is apparent itself from appreciating the following facts that, through instant amendment even the scope of the restriction imposed on the apex Courts i.e., High Court were also got widened, as by doing so even it has strip powers of the High Courts to

[257] Section 17 ibid

enforce the grants of natural Fundamental Rights as explained in Chapter I, Part II to the Constitution. Besides barring it from exercising their respective jurisdictions while invoking their power (including similar powers) under Article 199 from issuing an order prohibiting the making; taking in custody or suspension of such an order or likewise granting bail to a person held under preventive laws, against whom a complaint or a report has been duly registered, which has been under consideration before any Court or Tribunal, thereof. Even an interim relief to this effect was also refused to such persons as well.

Similarly, the judicial institution was also made to be corrupt, by setting up the maximum age limit for the Chief Justice(s) of the High Court(s) and that of the Supreme Court, to hold their respective offices for a period of four and five, unless sooner they attain their respective normal ages of retirement at 65 & 62 years respectively. Again for the afore mentioned Judges of the apex Court even an additional two folded option was also left open, through which they could either have an option of getting retirement and to receive pensionery benefits attached to his office or else to assume the office as the Most Senior Judge of the Court concern. But the later choice of serving as Most Senior Judge, could have made him ineligible for his future appointments as acting Chief Justice on behalf of or in place of the absent or vacant posts of the Chief Justice of that very Court(s) as well. Amazingly the benefit of this very amendment was extended retrospectively to the Chief Justices who were appointed prior to the date of enforcement of Constitution Fifth Amendment, too.

Likewise the powers of the Supreme Court to issue directions, order or decree were also made subject to Article 175(2) of the Constitution, while restricting the right of the exercise of its constitutional powers to what was expressly granted under the Constitution or Law, only. On the same footing the parallel Constitutional Powers which vests combinedly

within the domain of the High Court(s) vis-à-vis of the Supreme Court (under Article 204), of punishing a person for the Contempt of Court, were also snubbed by restricting and subjecting the High Courts to ordinary Contempt Law only.

It is also surprising to note here that the instant amendment had also nullified the judgments of the apex Courts as well, which were announced before the passage of the Constitution Fifth Amendment, as admittedly by operation of law all such orders of the apex Courts which attain finality, were also declared to be abated as well. The matter does not end here rather the Judges of the High Courts were particularly expose to threat of losing their respective jobs, by inserting such amendments, whereby a judge of a High Court could be transferred to another High Court for a period upto one year not only without his consent but also without the consultation of the Chief Justice concern. Even a judge of High Court who refused to accept his appointment as a Judge of the Supreme Court would also have been deemed to have retired from his office.

Apart from above the only appreciating move of this amendment seems to be the separation of the common High Court of Sindh and Balochistan, whereby two separate High Courts were established for these two Provinces. Otherwise, this targeted amendment seems to be focused & ill-designed while making the Supreme institution of Judiciary to be subservient and curbs of the Executive only.

3.6 Sixth Constitutional Amendment

The Constitution (Sixth Amendment) Act, 1976[258] gazetted on 04th January, 1977, amended 04 Articles including 179, 195, 246 & 260, respectively. Among these, the Article(s) which have brought negative impact to the Social Binding Contract (i.e., The

[258] Constitution (Sixth Amendment) Act, 1976: Published (PLD 1977 Central Statute 46)

Constitution) are Articles 179 & 195. Needless to state here that, this amendment too was passed by the Parliament without having any debate over it.

Articles 179 & 195, which were earlier amended through the Constitution (Fifth Amendment) Act, 1976, and as such were once again put to further amendment, where by *(in both of them)* after the clause (5) a new clause (6) [259] was added by which the extension of five years were made in the specified retiring ages of Sixty-Five and Sixty-Two, of the Chief Justices of the Supreme and High Courts, respectively, who were now pursuance to the instant Amendment were allowed to hold their respective office as Chief Justices till the completion of fixed extended period beyond the period of their specified retirement ages.

Conclusion:

The Sixth Constitution Amendment which was passed quickly overnight when the National Assembly was having its last session before its dissolution prior to fresh elections, seems to be the political gratification offered to the serving Judges of the apex Courts who served the interest of Executive during the course of hard times; as is apparent from appreciating the following fact that it had actually extended the term of office of the Chief Justices of the apex Courts (i.e., High Courts and the Supreme Court) beyond the age of retirement while providing in the former case to a Judge who has attained the age of 62 while in the latter case to a Judge who has attained the age of 65, as the case may be, to complete their respective maximum extended terms of five years of their offices as the Chief Justice of that very Courts, respectively. In nutshell, this amendment on the one hand if forced the judges to retire before reaching the age of retirement on the other, it extended favour to the judges in good book of Mr. Zulfiqar Ali Bhutto, particularly to Justice Yaqub Ali the then

[259] Sections 2 & 3 ibid

Chief Justice of Supreme Court, who was dear to him and as such was due to retire in the middle of 1977, accordingly.[260]

3.7 Seventh Constitutional Amendment

The Constitution (Seventh Amendment) Act, 1977[261] gazette on 16th May, 1977, introduced a new article (i.e., 96-A) into the Constitution of 1973, besides amending the 02 already existing Articles i.e., 101 & 245. However, the fabric of Constitution got affected by introducing amendments int two Articles only i.e., Article(s) 96-A & 245, which are as follows:-

Number 01: Article 96-A[262] comprising on 5 sub clauses; being new article introduced into the Constitution of 1973, providing thereby mechanism for the conduct of a Referendum on the advice of Head of Government placed through the office of President, in order to have obtain confidence of people in the office of the Prime Minister, in accordance to Act of Parliament. For that matter a separate Referendum Commission was setup thereof, with an express rider to the effect that the results of such referendum were also barred from the Judicial or Quasi-Judicial Scrutiny, as well. However, in the event if the final results of such referendum failed to secure majority threshold of the total votes cast, then such Prime Minister shall be deemed to have tendered his resignation in view of Article 94 to the Constitution.

Number 02: Likewise, Article 245, which prescribed the functioning of Armed Forces to render their services pursuance to the directions of Federal Government, to defend the

[260] Hamid Khan, *Constitutional and Political History of Pakistan*, (Karachi: Oxford University Press, Second Edition, 2009) at Pages 301- 302.

[261] Constitution (Seventh Amendment) Act, 1977: Published (PLD 1977 Central Statute 304)

[262] Section 2 ibid

territory of Pakistan against internal or external aggressions, threat of war or to act in aid of the civil powers when called upon in this behalf, was through the instant amendment[263] renumbered in such a way that clause (2) specifically states that the military action as per directions of the Federal Government were saved from questioning before the Courts of law. Even newly added clause (3) barred the High Courts to exercise it constitutional jurisdiction under Article 199, from calling in question the government actions carried out under Article 245, too. However, by virtue of clause (4) the proceedings pending immediately before the date of the enforcement of instant amendment were duly saved.

Conclusion:

The Seventh Constitution Amendment introduced a new concept of the holding of a referendum in order to demonstrate confidence in the Head of Government i.e., the Prime Minister, pursuance to demands of the nine opposition parties' coalition *[Pakistan National Alliance (P.N.A)]* , such as the resignation of Mr. Bhutto, lifting of emergency, Martial Law, release of political prisoners, dissolution of Special Courts and Tribunals, removal of Press curbs, dissolution of the National & Provincial Assemblies, holding of fresh general elections, appointment of new Election Commissioner and appointment on High Key Posts with mutual consent etc., which ultimately boiled down to the dialogue and settlement of three tier basic demands of *(i.e., Dissolution of Assemblies, Holding of new elections and removal of the Chief Election Commissioner)* inter se the PPP Government lead by the Zulfiqar Ali Bhutto's and that of the then opposition alliance represented by Pakistan National Alliance (PNA), to float it in the joint sitting of Parliament, meant for instant amendment.

[263] Section 3 ibid

This amendment has actually provided mechanism for holding a referendum to demonstrate confidence in the Prime Minister, which is to be held in accordance with Act of Parliament and the fate of the Prime Minister was to be determined subjected its outcome thereof. However, the amendment so incorporated at the pressure of opposition group is termed by the scholars as against Parliamentary System as according to them in a Parliamentary System such votes of confidence could have to be taken from the Parliament instead of a strange mechanism of the Public Referendum which tantamount to be a Presidential System. It is strange enough that this amendment in its practical applications did not seen light of the day, as no such referendum was ever held nor any Referendum Commission was constituted thereof[264].

Another change which has been introduced by the present amendment is barring of the High Courts from exercising jurisdiction under Article 199 to the Constitution in relation to area in which the armed forces were acting in aid of the civil power in view of the Article 245, as well.

Net Conclusion of Mr. Zulfiqar Ali Bhutto's Amendments:

The sum up of the above cited Constitution Amendment's *(i.e., First to Seventh)* particularly introduced by Mr. Zulfiqar Ali Bhutto, reveals that he most of the time interfered with the fundamental rights of the citizen, including curtailing the powers of the superior Courts as is evident from perusal of the Constitution First, Fourth, Fifth, Sixth and Seventh Amendments, whereof *(while doing so)*, if he on the one hand pressed hard his opponents, on the other he also acted more like an autocrat and wanted concentration of all powers in his own hands, particularly while making the Judicial institution as subservient to his dictatorial

[264] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) at Pages 314

commands. This fact also gets strength, when one analyses the pages of original Constitution of 1973, which reveals that in respect of the running the affairs of his government, Zulfiqar Ali Bhutto *(during the process of making Constitution of 1973)* had also given **permanent protections** to all his political acts & deeds by giving cover of Parliament by virtue of Article 269, which were carried out by him in between the period of 20th December, 1971 till 20th April 1972 (both days inclusive) as a ***"Civilian Martial Law Administrator"***, likewise discriminated treatment extended to the previous acts & deeds of his predecessor in office *(i.e., the then General Yahya Khan)*, which he did in the capacity of a ***"Chief Martial Law Administrator"***, in between the period of 25th March, 1969 till 19th December, 1971 (both days inclusive) while giving temporary protection to them, while leaving the fate of the validation of all laws introduced by him, at the decision of Parliament, by virtue of Article 270, thereof.

Although, Bhutto's desire of establishing a Presidential system could not be fulfilled because of the strong opposition, but the way he got the Constitution amended shows his lack of respect for the democratic credentials, as most of the time amendments passed by votes, just without debates, while throwing the opposition members outside of the House after suspending the rules of procedure for the passages of the Constitution's Amendments such as the case in the Constitution's Second, Fourth, Fifth, Sixth and Seventh Amendments, respectively.

(B). CONSTITUTIONAL AMENDMENTS & GENEARL ZIA-UL-HAQ (1977 TO 1988)

General Zia's entry into political arena was the results of general elections of the year 1977 and the allegations of riggings leveled by the nine opposition parties' coalition called as *"Pakistan National Alliance"* (PNA) who participated thereof; which actually laid foundations for the political unrest throughout of the country, leading finally to down fall of the Bhutto's government. As a consequence of which the reign of government came into hands of the then Army Chief i.e., General Zia-ul-Haq, who imposed Martial Law through out of the country on 05th of July 1977[265] by holding the Constitution of 1973 in abeyance; there upon the affairs of the country were run on similar footings as were being run in same style as were in 1958 & 1969 martial laws[266]. The imposition of martial law along with the detention of deposed Prime Minister Zulfiqar Ali Bhutto were later on challenged by his wife before the Supreme Court while invoking its jurisdiction under Article 184(3), whereby the Supreme Court had not only validated the military coup but also illegally conferred unto the military dictator *(i.e., General Zia-ul-Haq)* the power to amend the Constitution as well[267].

It was the unauthorized license given by the Supreme Court with respect to making amendments into the Constitution of 1973 that thereby the military dictator brutally misused his authority while making various amendments into the Constitution initially through his various Presidential Orders[268], which finally culminated into his Presidential Order

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[265] Proclamation of Martial Law, (PLD 1977 Central Statute 326)

[266] Laws (Continuance in Force) Order, 1977 [CMLA Order I of 1977]: (PLD 1977 Central Statute 327)

[267] *Begum Nusrat Bhutto vs. Chief of Army Staff and Federation of Pakistan:* (PLD 1977 SC 657)

[268] (a). Constitution (Amendment Order), 1979 [P.O. 3 of 1979]: (PLD 1979 Central Statute 31), *[Created Shariat Benches in the Superior Courts i.e., High Courts & Supreme Courts]*
(b). Constitution (Second Amendment Order), 1979 [P.O. 21 of 1979]: (PLD 1979 Central Statute 567), *[Established Military Courts or Tribunals]*
(c). Constitution (Amendment Order), 1980 [P.O. 1 of 1980]: (PLD 1980 Central Statute 89),

commonly known as Revival of the Constitution of 1973 Order, 1985[269]. It is interesting to note here that until the enforcement of RCO of 1985, the Provisional Constitution Order's[270]

[under Article 199, the High Courts were barred from taking Judicial Review of the validity or effect of any Martial Law Regulations besides above proper Federal Shariat Court was created, by substitution of Chapter 3-A in Part VII of the Constitution]
(d). Constitution (Second Amendment Order), 1980 [P.O. 4 of 1980]: (PLD 1980 Central Statute 124),
[It further amended the articles relating to newly inserted chapter relating to Federal Shariat Court]
(e). Constitution (Third Amendment Order), 1980 [P.O. 14 of 1980]: (PLD 1981 Central Statute 83),
[Added explanation in order to explain the expression "Quran and Sunnah", as per personal law of any Muslim Sect]
(f). Constitution (Fourth Amendment Order), 1980 [P.O. 16 of 1980]: (PLD 1980 Central Statute 232),
[enhanced the members of Islamic Ideology Council from 15 to 20]
(g). Constitution (Amendment Order), 1981 [P.O. 5 of 1981]: (PLD 1981 Central Statute 251),
[It further inserted and amended the articles relating to newly inserted chapter relating to Federal Shariat Court]
(h). Constitution (Second Amendment Order), 1981 [P.O. 7 of 1981]: (PLD 1981 Central Statute 275),
[It further amended and omitted certain articles relating to newly inserted chapter relating to Federal Shariat Court]
(i). Constitution (Third Amendment Order), 1981 [P.O. 12 of 1981]: (PLD 1982 Central Statute 3),
[It further made enhanced the scope of awards to distinction in field of sports and nursing]
(j). Constitution (Fourth Amendment Order), 1981 [P.O. 13 of 1981]: (PLD 1982 Central Statute 8),
[Increased the salaries of the Judges of Supreme Court & High Courts]
(k). Constitution (Fifth Amendment Order), 1981 [P.O. 14 of 1981]: (PLD 1982 Central Statute 3),
[Amended further the Constitution(Fourth Amendment Order), 1981, [P.O. 13 of 1981]
(m). Constitution (Amendment Order), 1982 [P.O. 2 of 1982]: (PLD 1982 Central Statute 153),
[Added explanation to Article 181, with respect to judge of a High Court]
(n). Constitution (Second Amendment Order), 1982 [P.O. 5 of 1982]: (PLD 1982 Central Statute 155),
[It further amended the articles relating to newly inserted chapter relating to Federal Shariat Court]
(o). Constitution (Third Amendment Order), 1982 [P.O. 12 of 1982]: (PLD 1982 Central Statute 344),
[It further amended the articles relating to newly inserted chapter relating to Federal Shariat Court]
(p). Constitution (Fourth Amendment Order), 1982 [P.O. 13 of 1982]: (PLD 1982 Central Statute 352),
[Empowered the President to appoint one of the member of Islamic Council as Chairman]
(q). Constitution (Amendment Order), 1983 [P.O. 4 of 1983]: (PLD 1983 Central Statute 71),
[Further increased the salaries of the Judges of Supreme Court & High Courts]
(r). Constitution (Second Amendment Order), 1983 [P.O. 7 of 1983]: (PLD 1983 Central Statute 86),
[It further amended the article relating to newly inserted chapter relating to Federal Shariat Court]
(s). Constitution (Third Amendment Order), 1983 [P.O. 9 of 1983]: (PLD 1983 Central Statute 123),
[It further amended the article relating to newly inserted chapter relating to Federal Shariat Court]
(t). Constitution (Amendment Order), 1984 [P.O. 1 of 1984]: (PLD 1984 Central Statute 86),
[It again further amended the article relating to newly inserted chapter relating to Federal Shariat Court]
(u). Constitution (Second Amendment Order), 1984 [P.O. 2 of 1984]: (PLD 1985 Central Statute 1),
[It again further amended the article relating to newly inserted chapter relating to Federal Shariat Court]
(v). Constitution (Amendment Order), 1985 [P.O. 6 of 1985]: (PLD 1985 Central Statute 550),
[It further increased the salaries parks & privileges of the Judges of Supreme Court & High Courts]
(w). Constitution (Amendment Order), 1985 [P.O. 11 of 1985]: (PLD 1985 Central Statute 569),
[It added new article which empowers the Parliament to impose tax on the income of certain Corporations etc.,]
(x). Constitution (Second Amendment Order), 1985 [P.O. 20 of 1985]: (PLD 1985 Central Statute 582),
[It amended Article 89 pertaining to Federal & Concurrent Legislative List as the case may be]
(y). Constitution (Third Amendment Order), 1985 [P.O. 24 of 1985]: (PLD 1985 Central Statute 645),
[Amended Articles 200, 203-C, 226 & 260(3) to the Constitution of 1973, respectively]

[269] Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985]: (PLD 1985 Central Statute 456)

issued under the capacity of Chief Martial Law Administrator, allowed General Zia-ul-Haq to bypass the Constitution of 1973 and to run the affairs of Government, thereto. However, it was the settlement inter se the then Government and that of the Military Dictator, that finally the Parliament of 1985, endorsed the RCO of 1985 by incorporating it in the Constitution (Eighth Amendment), Act, 1985, which is discussed in detail herein below.

3.8 Eighth Constitutional Amendment

The Constitution (Eighth Amendment) Act, 1985[271], gazetted on 11th November, 1985, which lives even today, had been based on 65 Articles & two Schedules (i.e., Second and Third Schedule) which were either amended/ substituted/ added/ modified/ delete or omitted, through the Revival of the Constitution of 1973, Order of 1985 herein after called as (RCO 1985). That's why RCO can be regarded with due justification as an integral part of the Eighth Amendment, without appreciation of which at first, the significance and importance of the Eighth Amendment cannot be analyzed in toto. Suffice it to state here that the Constitution Eighth Amendment *(protecting the RCO of 1985 too)* was passed after lengthy Parliamentary debate of spreading over a period of six to eight weeks, which had brought following major changes into the Constitution, 1973, such as follows:

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[270] (a). Provisional Constitution Order, 1981 [CMLA Order 1 of 1981] Published in (PLD 1981 Central Statute 183)
(b). Provisional Constitution (Amendment) Order, 1981 [CMLA's Order 2 of 1981] Published in (PLD 1981 Central Statute 183)
(c). Provisional Constitution (Amendment) Order, 1981 [CMLA's Order 3 of 1981] Published in (PLD 1981 Central Statute 250)
(d). Provisional Constitution (Amendment) Order, 1981 [CMLA's Order 4 of 1981] Published in (PLD 1981 Central Statute 275)
(e). Provisional Constitution (Amendment) Order, 1982 [CMLA's Order 1 of 1982] Published in (PLD 1982 Central Statute 153)
(f). Provisional Constitution (Second Amendment) Order, 1982 [CMLA's Order 3 of 1982] Published in (PLD 1982 Central Statute 349)

[271] Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

Number 01: The first ever change brought by the schedule attached to RCO[272], is that it substituted the word *"Parliament"* occurring in Article 1 including throughout of the Constitution, wherever it occured with that of the words *"Majlis-e-Shoora (Parliament)"*. So this amendment only changes the nomenclature of the House, while giving it an Islamic touch.

Number 02: In Part-I, after article 2 it had inserted a new Article 2A therein[273], where through the principles and provisions set out in the Objectives Resolution already in existence in the original Constitution as being part of the Preamble; were re-added again as substantive part of the Constitution in shape of an "Annex" after the Article 280, however at this time, *(during the course of its reproduction as an Annexure to the Constitution)*, one of the paragraph which contain the words "freely" *(with respect to the rights of minorities to profess and practice their religion)* as appeared in the original text as such, was seems to be omitted therefrom. While creating an impression for the citizen in minorities, that they were not allowed for professing and practicing their religion *"freely"* in contravention to Constitutional Mandates. This unfortunate state of affairs were remained as it is, until in the year 2010, when finally the word *"freely"* were once again re-incorporated at its original place through Section 99 to the Constitution (Eighteenth Amendment) Act, 2010, accordingly.

It is also worth to pinpoint here that the amendments introduced during the era of military dictator had not only affected the religious rights of the minority community in our country, but on the contrary it had also affected the religious rights of the Muslim

[272] Article 2, Item 1 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

[273] Item 2 ibid

Community at large as well, when pursuance to silence of law over the kind of leaves meant for Muslim Pilgrimages *(who were intending to take Religious Journeys like, Hajj, Umrah or Ziyarat)*, for the first time the lacuna in domestic legislation (i.e Revised Leave Rules of 1980) [274], was filled with introduction of a specifically discriminating amendment, meant only for the *"Khuddam-ul-Hujjaj" only, as a result of this discrimination, conversely the guaranteed fundamental rights of the Freedom to Profess Religion (Article 20) of the Muslim Community, particularly of the Serving Class *(Government/Civil Servants etc., who choose to travel as a sole "Mahram" [275] of their family in their private capacity)*& of their families were blatantly violated.

There is no denying to this fact that Hajj is the most divine and sacred journey to Makkah, Ka'aba. Being fifth pillar of Islam it's performance is made obligatory for all adult Muslims (male and female) who can afford to undertake the journey and are in good health, at least once in a lifetime, while similar is the value of the rituals of Umrah as well. Apart from Hajj and Umrah, Muslims may also choose to take other religiously inspired trips known as Ziyarat, in order to have visit local or regional shrines or to travel to the tombs of the Imams and their immediate descendants and close associates (known as Imamzadeh, a name also given to their shrines) in Iran, Iraq or India as the case may be. In fact, these holy journeys are meant to purify the soul and heart of a person who performed it and then such a person (Muslim) boards on a new stage of life which leads him to spiritual and temporal gains. So, it is clear that religious rituals of Muslim Community are all about leaving the

[274] Sl. No 14 to *the Revised Leave Rules, 1980,* (Islamabad, Vol-I, 2007), published in the ESTA Code, Civil Establishment Code as Finance Division O.M. No. F.1(15) R.4/82, dated: 11-8-1982, at page 498. *(*Those who guide and serve Pilgrims)*

[275] A "Mahram" is an unmarriageable kin with whom marriage or sexual intercourse would be considered haram, illegal in Islam, or people from whom purdah is not obligatory or legal escorts of a woman during journey longer than a day and night, 24 hours.

concerns and trappings of this world behind to get closer to Allah in a unique environment where one exercises the high principles, values and objectives of Islam, as it influences social, moral, national and economical life of a Muslim. Thus, pilgrimage in either of the shapes as discussed hereinabove unites the Muslims of the world into one international fraternity, emphasizing thereby the basic concept that there is only one God i.e. "ALLAH".

However, it is astonishing to note here that being an Islamic country our domestic legislation does not contain any express provision regarding leaves of the kinds with respect to the holy journeys titled above except that of the only Special Leave to "Khuddam-ul-Hajjaj" that too without specifying any number of days in the Revised Leave Rules, 1980. Interestingly, the said Rules also does not provide any criteria or limit of the period of Hajj Umrah or Ziyarat Leaves, to which a person (Government Servant etc.,) while being travelling in the capacity of a private pilgrimage, would have been entitled there too, and as such it left open the matter of the grant of LFP (i.e., Leave with Full Pay) into the sole discretion of departmental Administration Authority, leaving thereby a servant in a vacuum having no alternate choice but to accept whatsoever the number of leaves sanctioned by his parent administration authority, as is self-evident from the bare reading of relevant provision of the Revised Leave Rules, 1980; in Chapter V to the ESTA Code, which reads as follows.

Sl. No. 14 Grant of Special Leave to "Khuddam-ul-Hajjaj"

> *"It has been decided that "Khuddam-ul-Hajjaj, who remain away from their respective duties to work as Khuddam, may be granted special leave on full pay for that period outside their leave account"*[276]

[276] ESTA Code, Civil Establishment Code, the Revised Leave Rules, 1980, (Islamabad, Vol-I, 2007) page 498

Another interesting aspect of the case is that although the Revised Leave Rules, 1980 promulgated during the military regime of General Zia-ul-Haq do have the provisions relating to Recreation Leave[277], Special Leave[278], Maternity Leave[279], Disability Leave[280], Hospital Leave[281], Study Leave[282], Ex-Pakistan Leave[283], Leave Preparatory to Retirement[284] etc., besides having the provision for grant of Leave on full pay[285]comprising on a maximum period of 120 days at one time without any medical certificate, similarly the Leave on half pay[286] as well as Extraordinary leave (leave without pay)[287], but admittedly there is no such provision in the Rules which specifically prescribe the number of Leaves in the shape of the total number of Days to which as a matter of right an intended pilgrimage who is proceeding on Holy Journey in his/her private capacity, is entitled thereto, hence leaving the decision as to grant of such leave into the unfettered powers of the administration authority concern, which in practice always seems to be applied (with utmost respect) discriminately, while keeping aside the glaring Commandments of the Al-Mighty Allah[288], the precepts of the Holy

[277] Ibid at Page 473

[278] Ibid at Page 476

[279] Ibid at Page 476

[280] Ibid at Page 476

[281] Ibid at Page 485

[282] Ibid at Page 501-503

[283] Ibid at Page 477

[284] Ibid at Page 477

[285] Ibid at Page 474

[286] Ibid at Page 474

[287] Ibid at Page 475

[288] The Holy Quran, English Translation of the Meaning of Al-Quran,(Islamabad, Pakistan Islamic Medical Association, 2004) Pages [149]; [140 to 141]; [171] & [452]

Prophet (PBUH)[289] vis a vis of the Muslim Community practices of going on *Ziyarats* (i.e., pious visitation, pilgrimage) to a holy place, tomb, shrine, mosques, maqams, battlefields, mountains, and caves associated with Holy Prophet Muhammad (PBUH), his family members and descendants (as per Fiqh-e-Jafria), the Companions of Holy Prophet (PBUH), the prophets and other venerated figures in Islam such as the prophets, sufi auliyas and prominent Islamic scholars around the world[290], respectively.

As being Muslims we do have certain belief that those whom Allah favored to perform Hajj, Umrah are chosen people among of His servants who can under took the task of accomplishment of these acts of worship, as per His Commands only. However, when the matter of a pilgrimage of an individual particularly among the class of a Government Servant, is tested upon the touch stone of guaranteed Fundamental Right of Professing Religion *(Article 20)* under the Constitution of Islamic Republic of Pakistan, 1973, unfortunately we do find an ugly example of the discrimination of Religious Rights of a citizen which belied theory and practice altogether. When due to silence of the relevant provisions in the EstaCode (with respect to grant of the Ex-Pakistan Leave to a Government Servant etc.,) a victim to such discrimination while being proceeding as a pilgrimage in his private capacity, faced mental agony at the hands of its administration authorities, that too at the cost of discrimination, humiliation, hurdles in schedule departure, non-issuance of the requisite NOC for flight clearance in addition to earning huge financial loss (i.e., for re-scheduling of the

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[289] Dr. Muhammad Muhsin Khan, The Translation of the Meanings of Sahih Al-Bukhari, Arabic-English" (Lahore, Vol–I, 1976) Page17
Ibid (Vol-III) at Page 1
Allama Badiuzzaman Bin Molana Masihuzzaman, Jayizatus Shaauzi, Translation of Jam-e-Tirmidi, (Karachi,Vol-I), Page 311
Dr. Muhammad Muhsin Khan, The Translation of the Meanings of Sahih Al-Bukhari, Arabic-Engilish, (Lahore, Vol-III),Page3

[290] E. J. Brills, First Encyclopedia of Islam 1913-1936, (Netherlands, Vol-VIII, 1987) Page 1234

conformed flight tickets including that of the expenses of the reservations of hoteling both at Makkah and Madina) and dual penalties (censure[291] plus leave without pay[292]) in violation of the legal provisions as contained the Rule 24 to the Revised Leave Rules of 1980[293] as well of the guaranteed constitutional mandates including that of the Principles of Double Jeopardy[294], respectively.

That too contrary to the admitted established fact of brutality of his office administration as itself proved on the record, whereby the office administration in power, while turning down the minimum requested period of 30 days leaves by illegally reducing it to 21 days; despite of having knowledge of the fact that timely request of the enhancement of the said reduced period (i.e., 21 days), with that of the minimum period of VISA (i.e., 30 days) was duly made by moving a separate application in this regard, which was unfortunately turn down while ignoring the fact in view of having sufficient balance in his leave (of the kind due i.e., Leave with Full Pay) accounts, thereto[295]. Consequently violating guaranteed fundamental rights of Professing Religion as well as of the of Protection of Family etc., available to the victim's family, that too without being found at fault at any stage of the proceedings, thereof[296]. Unfortunately reminding all of us the pre-Islamic historical

[291] Office Order bearing No: F.24/685/2006-SCA, dated: Islamabad, July, 02, 2010 (unpublished available in personal file of employee bearing No: F.24/685/2006-SCA, available in Admin Branch of Supreme Court of Pakistan, Islamabad)

[292] Notification of dated: Islamabad, July, 02, 2010 (unpublished available in personal file of employee bearing No: F.24/685/2006-SCA, available in Admin Branch of Supreme Court of Pakistan, Islamabad)

[293] ESTA Code, Civil Establishment Code the Revised Leave Rules, 1980, (Islamabad, Vol-I, 2007), 480.

[294] Muhammad Abdul Basit Advocate, The Constitution of the Islamic Republic of Pakistan, 1973, [Articles 13, 14, 20, 25, 35& 37], (Lahore, Federal Law House, 2016) 199, 211, 272, 323, 348, 355.

[295] Memorandum bearing No: F.24/685/2006-SCA, dated: Islamabad, May, 04, 2010 (unpublished available in Admin Branch of Supreme Court of Pakistan, Islamabad).

[296] DSA 05 of 2010, Muhammad Waseem Tariq vs. The Honorable Registrar, Supreme Court of Pakistan: (unreported available in personal file bearing No: F.24/685/2006-SCA, in Admin Branch of Supreme Court of Pakistan, Islamabad)

events of the tyranny invoked by the Quraish against the Muslims pilgrimages in 6 th Hijri, by not allowing them to perform religious ritual like Umrah.

The above scenario raises a serious question as to can a State interfere into the religious rights of an individual, particularly with respect to the discharge of the Prime responsibility of a human being in performance of Right of God (Huquq Allah)? The answer to this query definitely rests in a big "No". As we all know that Religion is a private matter between a person and his Creator, as ordained in Chapter 51 verse 56 of Holy Quran, which speaks about the very purpose of the creation of Jin and human being is meant to worship his Creator. Therefore, performance of religious rituals like proceeding to Hajj or Umrah, being part of the absolute religious belief of every Muslim and also an integral part of one of the pillars of Islam; that in such like situations (in cases where as a matter of right the question of the freedom of belief in a religion is involved, therein) the state does not have any right to interfere in the relationship of a man and his Creator. Particularly, when his Creator (Allah) has Himself chosen them from among His servants to perform these acts of worship through which they should implore Almighty Allah to accept their good deeds. Hence, if that being so, then the state cannot restrict the right of a private pilgrimage (Government Servant) proceeding either individually or as a "Mahram"of his family or similarly they can also not create hurdles in such holy journey being act of devotions, (that too carried out upon the specific Commands of his Creator only) while making excuses on the pretext of preserving public order and moral values or likewise even not on the ground of the protection of the rights and freedom of others, at all.

As such proceeding on Hajj, Umrah or Ziyarat are the religious rituals which are common to all sects of Muslim Ummah according to their respective beliefs. Moreover, these

holy rituals also do not clash with the religious beliefs of other Muslim sects or non-Muslim Communities at all, the public performance of which would justify a valid reason for interference of the State agencies. Therefore, by creating any systematic prohibition or curtailment of the possibility for pilgrims to undertake journeys to sacred places, (God Forbid) would amounts to be preferring "will of man" over the "Will of God (Allah)", as is the unfortunate living example of its kind sets hereinabove, contrary to the precedents set by our apex Courts. For instance, in a case over dispute on mosque and in order to avoid danger of breach of peace, the orders of a Magistrate sealing the mosque (Masjid) were set aside by the honorable High Court, while in an another case the imposition of curfew for an indefinite period without relaxation of time for prayers in mosques were got challenged in apex Courts of Law whereby the honorable High Court has declared it to be violates to fundamental rights while placing reliance on Article 20 of the Constitution and Command of Allah in Verse 114 Surah Al-Baqrah[297], while holding that the prayer being devotional act common to Muslim Community according to their respective practices, accordingly. Similarly, we do have precedent of apex Court to this effect too, whereby the prayer of petitioner for promulgation of new law against forced conversion from one religion to another was declined by the Supreme Court on the ground that in view of Article 20 to the Constitution there was no necessity of a specific legislation as had been prayed for, because every citizen had a fundamental right to profess, practice and propagate his religion per Constitutionally Guarantees[298].

Hence, in view of these glaring examples it can be safely concluded that dictatorial legislations and amendments of General Zia-ul-Haq has not only affected the minority alone

[297] *Anjum Iqbal and others vs. The State and others*: [2016 YLR (Lahore, Rawalpindi Bench) 1725], *Darwesh M. Arbey, Advocate vs. Federation of Pakistan through the Law Secretary and 2 others*: [PLD 1980 (Lahore) 206]

[298] *Pakistan Hindu Council vs. Pakistan through Ministry of Law*: [PLD 2012 SC 679]

but as a matter of fact the Muslim community is also subjected to religious discrimination, as well.

Number 03: Article 5, which talks about the Loyalty to the State & Obedience to Constitution and law, was amended with substitution[299] of the words *"basic"* as occurring in sub-clause (2) only, with that of the words *"inviolable"*. Which shows the unfortunate state of the affairs of the military regime that instead of substituting the words *"basic"* occurred in sub-clause (1) too, the military dictator had only make it an inviolable obligation for every citizen and of every other person for the time being in Pakistan; to show obedience to the Constitution and the law promulgated during the course of his military regime.

Number 04: Article 27 which safeguards the rights of citizen against discrimination in service, was amended[300] in its first proviso while extending the period of reservations of posts belonging to backward class or area, in order to secure their adequate representation in the service of Pakistan, from the original period of *"ten"* years to that to *"twenty"* years, from the commencing day of the Constitution. So through the instant move, the back words citizens were given little relief, in state appointments.

Number 05: Article 31 which enables the Muslims of Pakistan individually and collectively to order themselves, in accordance with the Injunctions of Islam as prescribed by the Holy Quran and Sunnah (SAW), was as such subjected to amendment[301] whereby under clause (2) (c) a new word *"Ushr"* was got inserted after the words *"Zakat"*, by enlarging the scope of state's responsibility, to secure proper organization of *"Ushr"* as well.

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[299] Article 3, Item 1 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

[300] Item 4 ibid

[301] Item 5 ibid

Number 06: Article 41 which talks about the President of Pakistan, was amended with substitution of clause (3) [302] whereby for the elections of the President of Pakistan, the original method of the conduct of election for President by the members of Parliament in Joint sitting was changed and substituted with introduction of the new concept of the electoral college consisting on (a). the members of both Houses; and (b). the members of the Provincial Assemblies, respectively. However, the applicability of this new method of the election was subjected to the expiration of the term of office of the incumbent President as envisaged under newly inserted clause (7), whereby the military dictator (i.e., General Muhammad Zia-ul-Haq), had given full protection to his own Presidential elections, conducted in violation of the Constitutional Mandate, that too through the process of Referendum held on 19th December, 1984.

Number 07: Article 46 which by Original Constitutional Scheme require the Prime Minister to keep the President informed on matters of internal and foreign policy and on all legislative proposals which the Federal Government intends to bring before Parliament, was totally substituted[303] with a new article in addition to changing its marginal headings as *"Duties of Prime Minister in relation to President"* too, whereby the office of Prime Minster was bound down to communicate to the President, about all the decisions of his Cabinet relating to the administration of the affairs of the Federation and proposals for legislation in addition to such information which the President may requires from him, which includes even reservation to himself *(i.e., to the President)* the right to re-submit any decision taken by the Prime Minister's Cabinet, for its reconsiderations as well. So, in nut shall the military dictator had open a door with respect to affairs of the government policy, while making the office of

[302] Item 6 ibid

[303] Item 7 ibid

Prime Minister and his Cabinet as subservient to the office of President, practically tilting the Original Constitutional Scheme of the Parliamentary Form of Government with that of the Presidential Form of Government thereof.

Number 08: Article 47 which prescribe the charges over which and the procedure through which, the question with respect to the misconduct & physical or mental incapacity of a President in the discharge of his official duties is to be determined was subjected to further amendments[304]; while substituting firstly its marginal headings with the words *"or impeachment"* after the words *"Removal"*, secondly with further substitution of the Original clauses (1) & (2) in the manner as follows i.e., with respect to former [i.e., clause (1)], the original language as contained therein was changed while differentiating the grounds for removal and impeachment separately, besides making addition of the words *"impeachment"* in the later [i.e., clause (2)], respectively. By this way a new mode of the removal of the President through impeachment was also got introduced.

Number 09: Articles 48 & 105 as originally framed, binds the office of President/a Governor to act on advice of Prime Minister/Chief Minister, but the instant amendment[305], substituted it with the new scheme (i.e., Articles 48 & 105) whereby now the President/a Governor has to act either on the advice of Cabinet, the Prime Minister/Chief Minister or an appropriate Minister, as the case may be. It is also worth to note here that through its proviso the President/a Governor also retained to himself the powers; as to either to require such Cabinet under their respective supervisions *(i.e., the Prime Minister/Chief Minister or appropriate Minister)* to reconsider or consider such advice, as the case may be.

[304] Item 8 ibid

[305] Items 9 & 23 ibid

However, surprisingly through clause (2) of the Article 48 a clog was put over the provisions of clause (1), whereby the President was empowered even to act in his discretion too in respect of any matter with respect of which he was empowered by the Constitution *(as amended by himself from time to time)* to act so, while, on the other hand, by virtue of Second Proviso to clause(1) of Article 105, the Governor of a Province had to act in his discretion but his such discretion was subject to prior approval of the office of President; that too limitedly with respect to matter of the appointment of the Chief Minister, dismissal of Cabinet, in the event of lost confidence of the Provincial Assembly or the dissolution of the Provincial Assembly and when an appeal to the electorate in this effect was necessary, as such.

Moreover, Article 48, Clauses (3), even had given further protections to the discretionary orders of the President, from being called into question before any Court of Law. Likewise protection was also extended to the President's discretionary decisions taken under Article 48, clause (4) at par that with the similar one taken by the Governor of a Province by virtue of Article 105 (2) (in both cases) pursuance to the advice tendered to him by the President, by the Cabinet, the Prime Minister/Chief Minister, a Minister or Minister of State, as the case may be, which were also barred from being inquired into or by any Court or tribunal or other authority, thereof. Article 48, clause (5) which prescribed the procedure, where the President dissolves the National Assembly in his discretion, he would announce a date for fresh general elections within 100 days, besides above he could also appoint a caretaker Cabinet too.

On the contrary under Article 105(3) the Governor could have dissolved the Provincial Assembly and appoints in his discretion a caretaker Cabinet but it was again subjected to the prior approval of the office of President only. Similarly, Article 48 Clause (6)

authorize the President *(either in his discretion or on the advice of Prime Minister)* to refer any matter of Public Importance for referendum in the form of a question that is capable of being answered either by "Yes" or "No", however, the detail procedure, compilation and consolidation of the results of such referendum were left open while subjecting it to an Act of Parliament, thereof. But in contrast surprisingly, no such powers have ever been given to the office of Governor at Provincial Level. It is also worth to mention here that the amendments made in Article 48(6) & (7) shows that the initial march of a military dictator from the Presidential Form of Government to a total autocracy of an individual was indeed, pursuance to above referred amendment too, where through the election of the military dictator as the President of Pakistan was engineered by way of a Referendum[306], which was as such totally in deviation to the Original Constitutional Scheme, mandates thereof.

It is also important to note here that while analyzing the amendments effected through RCO in Articles 48 & 105, we find that in the final draft of the Constitution (Eighteenth Amendment), Act, 1985, the Parliament succeeded in substituting the words *"the Prime Minister/Chief Minister or appropriate Minister*" with that of the words *"or the Prime Minister"*. By doing so the words *"appropriate Minister"* were got totally omitted from the original text at entry 9 in Article 48(1) & at entry 23 in Article 105(1) along with similar omission of its first provisos inserted through RCO of 1985 in the former one [i.e., Article 48(1)] & in the later one [i.e., Article 105 clause (1)]; while substituting both of them with the new provisos, respectively.

Likewise under the same Article (i.e., Article 48), clause (2) was also got amended after the words *"do so"* by making new addition of the words *"and the validity of anything*

[306] Referendum Order, 1984 [President's Order. 11 of 1984]: (PLD 1985 Central Statutes 449)

done by the President in his discretion shall not be called in question on any ground whatsoever" thereto. Needless to state here that by insertion of the afore referred words in clause (2), practically the object stated through clause (3) as to the finality attached to decisions of the military dictator issued in the capacity of his being as a President while making them subservient to his discretionary powers, were given as such due protection from the judicial scrutiny, in the final draft of the Constitution (Eight Amendment) Act, 1985. It is also worth to mention here that subsequently, after securing of the above cited guarantees through the medium of clause (2) ibid, there left no plausible reasons for further retention of the clause (3) which was added through RCO of 1985, hence in the final draft of Constitution Eighth Amendment, the same was as such omitted, thereof.

Similarly, under clause (5) paragraph (a) of article 48, if on the one hand the RCO of 1985 has empowered the President to dissolve the National Assembly in his discretion and to appoint a date not less than "one hundred days" for holding of new general elections from the date of such dissolution, but the final draft of the Constitution (Eighth Amendment), Act, 1985 reduced the said period of holding new general elections from "one hundred days" to "ninety days" accordingly. On the other hand similar powers which were also vested through Article 105, clause (1) of RCO 1985 in the office of a Governor of the Province by insertion of the Second Proviso attached to the said clause, were also omitted in the final draft of the Constitution (Eighth Amendment) Act, 1985. Hence by this way the office of Governor was stripped of the exercise of dissolution of Provincial Assembly under his discretion as well.

Likewise in Article 105, Clause (2) protection earlier given to the advice of Cabinet or a Minister which were inserted through the RCO 1985 was again substituted with the words "or the Cabinet" while in clause (5) to the said article (i.e., Article 105 as substituted through

RCO of 1985) the brackets and figure "(3)" with that of the brackets and figure "(2)", lifting protection with respect to judicial scrutiny with the advice tendered by a Minister and making reference in clause (2) of Article 48 to the "President" to that of the "Governor" as well.

Number 10: Similarly, in Article 51 clause (1) the Muslim elected members of National Assembly were increased[307] from the original figure of *"Two Hundred"* to *"Two Hundred and Seven"*. While Clause (2) of the same article has increased the age limit of a voter from *"eighteen"* years to *"twenty-one"* years; similarly in the same clause under paragraph (d) for the colon (:) at the end a full-stop(.) was substituted, however the proviso attached to the same clause, which prescribed the minimum age limit for a voter electing the members of the first general election or any vacancy which arose there under, has been omitted.

Again Clause (2A) of the same article which was earlier substituted through the Constitution (Fourth Amendment) Act, 1975 was again re-substituted by a new clause (2A), prescribing in detail the numbers of reserve seats for each of the minorities existing in Pakistan, which includes the Christians, Hindus and persons belonging to schedule casts, Sikh, Buddhist and Parsi communities and other non-Muslims including persons belonging to the Quadiani group or the Lahori group (who call themselves Ahmadis), respectively.

Likewise, Clause (4) of the same article which initially reserves *"ten seats"* in the National Assembly for the women the new development increased it to *"twenty seats"* thereof. This of course was a positive move, with respect to acknowledging the due rights of women, in the Parliament. However, in the final draft of Constitution (Eight Amendment) Act, 1985, by the substitution of words *"second"* used in above referred clause, the

[307] Article 2, Item 11 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

application of afore referred interest was made applicable from the holding of *"third"* general elections to the National Assembly.

Similarly, Clauses (4A) & (5) to the article ibid were also substituted with new clauses whereby the former prescribed the mode of filling the seats referred in clause (2A) (i.e., minorities) on the basis of separate electorates by direct and free votes, while the latter prescribe the mode of filling reserve seats allocated for women as per (clause (4)) in a Province by system of proportional representation by means of a single transferable vote by the electoral college consisting of the persons elected to the Assembly from that very Province.

Number 11: Article 54 regarding summoning and prorogation of Parliament, which under clause (2) originally prescribed holding of the "two" sessions of the National Assembly in a year with a fixed term of interval period in between the last sitting in one session and the date of next session as "one hundred and twenty" days, was substituted[308] with the words "thirty" and "sixty", respectively, making it to "three" sessions in a year and increasing the intervening period to "one hundred and sixty" days respectively. This move increases the number of the days of sitting & working of the Parliament in a calendar year, as the case may be.

Number 12: Article 56 which originally talks about the address of the President to either a House or both of the Houses assembled together, was renumbered with addition of new clauses[309] therein, assigning thereby special role to office of President, the clause (2) of which empowered the office of President to send messages to either of the House, with

[308] Item 12 ibid

[309] Item 13 ibid

respect to a Bill then pending in the Majlis-e-Shoora (Parliament) or otherwise, and require such House(s) to reconsider the same. Likewise Clause (3) empowered the President to address both Houses in joint sitting at the commencement of each session of the Parliament. However, in addition to above, a different move of the Presidential address was also introduced, whereby through the final draft of Constitution (Eight Amendment) Act, 1985, the President hold to himself the prerogative of address to the first session of Parliament which is elected as such pursuance to each general elections, thereof. So by such way now the President had two occasion of addressing the Parliament, one in the first session after the each general election and second on the commencement of the first sessions of each year. Similarly Clause (4) prescribed allocation of mode, conduct and allocation of time, as per conduct of the rules of its business for such address.

It is worth to pinpoint here that this article was synonymous to the convention prevailed in the British Parliament whereby at the beginning of each session of the House of Commons, they were summoned to the House of Lords in order to hear the speech of the King[310].

Number 13: Articles 58 & 112 which originally authorize the President of the Country and the Governor of a Province; to dissolve the National/ a Provincial Assembly on the advice of Prime Minister/Chief Minister as the case may be, whereof upon receiving of such advice, the same stands dissolve *ipso facto* on the expiration of forty-eight hours. Among of these articles initially only Article 58 was renumbered vide Article 2 to the Schedule Item 14 to the Revival of the Constitution of 1973, Order 1985[311], wherein, while renumbering the original

[310] *K. Anandan Nambiar and Anr. Vs. Chief Secretary Government of Madras and Ord*: (AIR 1966 SC 657)

[311] Article 2, Item 14 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

Article, in the Explanation already attached to it, following words and figures *"or a Federal Minister performing the functions of Prime Minister under clause (1) or clause (3) of Article 95"* were omitted therefrom. Besides adding new Clause (2) thereto, which empowered the President to dissolve the National Assembly in his discretion where, in his opinion, an appeal to the electorate was necessary.

But surprisingly when the matter came before the Parliament by way of the final draft of the Constitution (Eight Amendment) Act, 1985, an unusual change was seems to be introduced therein[312] (i.e., Article 58) whereby once again in the Explanation attached to clause (1) the words *"resolution for a votes of no-confidence has been moved"* were substituted with that of the words *"notice of a resolution for a votes of no-confidence has been given"*, perhaps with a view to fill the drafting lacuna, as originally the word *"notice"*, was missing therefrom.

It is also interesting to note here that the researcher do see lacuna with respect to Article 112 of the Constitution as well which had been skipped un-attended by the framers of RCO 1985, which provides similar powers to the Governor of a Province, with respect to dissolution of a Provincial Assembly, on the similar grounds as detailed mentioned under Article 58, regarding a Chief Minister against whom a notice of a resolution for no confidence has been given, but such dissolution of the Provincial Assembly is subjected to prior approval of the President thereof.

However, again when the matter put to final draft in shape of the Constitution (Eighth Amendment), Act 1985, again the scheme pertaining to Article 58 as introduced by the RCO of 1985, was changed to the effect of clause (2), which was further splitted into two sub-

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[312] Section 5 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

clauses (a) &(b), enhancing further the discretionary powers of the office of President thereof.

This amendment had actually shifted the balance of powers from the Parliament and vests the same into the discretionary hands of the President, while relegating the offices of the Prime Minister/Chief Minister subservient and subordinate in position. It seems that for all practical purposes the country was griped under political uncertainty, that's why the researches witnesses tussle in history of the politics of Pakistan inter se the offices of Prime Minister and the President for gaining more powers.

Moreover, although proponents of this Article [i.e., 58(2)(b)] adjudged it to be necessity, in order to create adequate balance between the two rival offices of Presidential and Prime Minister and to address Political & Constitutional crises of the country by catering the issue of the dissolution of Assemblies and avoiding the Martial Laws. But its practical implications were altogether different, as such most of the time it has been used to derail the Political System in the country such as; The dissolution of the Assembly by President *"Zia-ul-Haq"* in 1988, President *"Ghulam Ishaq Khan"* in 1990 and in 1993, and President *"Farooq Leghari"* in 1996, respectively.

Number 14: Article 59 defining the composition of the Senate was amended in clause (1) while increasing[313] its member from the original figure of *"sixty three"* to *"eighty seven"*, in clause (1) paragraph (b) the members elected from the Federally Administered Tribal Areas for National Assembly is also increased from its original strength of *"five"* to *"eight"*, with omission of the words *"and"* at the end of the same. Likewise in paragraph (c), representatives chosen through Presidential Orders, from the Federal Capital were increased

[313] Article 2, Item 15 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

from *"two"* to *"three"*. It is worth to mention here that under this paragraph [i.e., (c)] the Constitution (Eighth Amendment) Act, 1985, had again substituted the words *"chosen"* with that of the words *"elected"* thereof, the reasons seems to bring it at par with the preceding paragraphs i.e., (a) & (b) wherein the words *"elected"* had been used, with respect to members elected from Provincial Assembly and Federally Administered Tribal Area, as well, while similarly, the same words of *"or chosen"* were also omitted from proviso to clause (3) of Article ibid, too.

The RCO of 1985 also added a new paragraph (d) into the said article whereby five additional seats were created to represent Ulema, technocrats and other professionals, who were to be elected by the members of each Provincial Assembly. Again Clause (3) of the same article which specifies originally the expiration of the terms of the members of Senate as *"four years"* was substituted by increasing it to *"six years"*, it also describe in detail the expiration of the term of office of each senator(s) as categorized in paragraph (a) to (d) of Clause (1), as well. However, this scheme was once again further amended by substitution of the paragraphs (a) to (c) only[314], while no changes were made with respect to paragraph (d), which relates to the seats of Ulemas, technocrats and other professionals. Besides above it also added new clause (4) in the said article too which describe the mode of filling any casual vacancy which may arise in respect of the members mentioned under paragraph (d) of clause (1), authorizing thereby the Provincial Assembly concern to elect another person thereof, who will be appointed for the unexpired term of the vacancy to which he is elected as such. But the Constitution (Eighth Amendment) Act, 1985, clause (4) was omitted altogether therefrom.

[314] Section 6 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

Number 15: Article 60 which prescribe the mode, method and term of office of the Chairman and Deputy Chairman Senate was subjected to further amendment[315], whereby clause (2) of the said article substituted the words *"two"* with that of the words *"three"*, in return increasing the term of office of the Chairman or Deputy Chairman to maximum three years, from the day on which he enters upon his office.

Number 16: Article 62 which talks about the qualification for membership of Majlis-e-Shoora (Parliament) and equally prescribes standard applicable for the members of Provincial Assembly (Article 113) too; which per Original Constitutional Scheme sets only 04 prescribe qualification i.e., the citizenship, the age for a candidate of National Assembly as minimum 25 years while for the Senate as 30 years and the enrolment of such candidate in any area in a Province, Federal Capital or the Federally Administered Tribal Area, from which he seeks such membership, were as such initially the basic trend set as a prerequisite qualification and were prima facie objective in nature with further enabling the legislature through an act of the Parliament to add more criteria's to these basic requirements if desired so.

However, the Non-State Actor (i.e., military dictator) had infused additional grounds of the present day subjective and moral scrutiny conditions therein while expending it further with 05 more qualifications[316] such as he being a Muslim having a good character and not commonly known as one who violates Islamic Injunctions; having adequate knowledge of Islamic teachings and practice obligatory duties prescribed by Islam and abstains from major sins; be sagacious, righteous, and non-profligate and honest and amen; has not been

[315] Section 7 ibid

[316] Article 2, Items 16 & 113 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

convicted for crime involving moral turpitude or for giving false evidence; has not worked against the integrity of the country and opposed the ideology of Pakistan, respectively.

Although it seems to be a positive steps in bringing the laws of land in accordance with the tenants of Islam, but there are some missing elements therein too, which still requires certain clarification particularly when there is no explanation to Article 62(1)(d) which admittedly remains unsettled in the legal jurisprudence as well, as to how it is to be determined that whether someone is *"commonly known"* to have *"violate Islamic Injunctions"* and what does this phrase means? Who will determine the body of tenets that constitute *"Islamic Injunctions"*, and what these tenets are? Are they restricted to not praying five times a day or do they also extend to not keeping a beard? Further, what evidence of testimony required to be produced for meeting this standard? Whether all aspirants of political office has to advertise their religious inclinations by offering prayers at public place, where from they can be seen to ensure that they are not *"commonly known"* to be otherwise?

Similarly, questions in terms of Article 62(1)(e), what is *"adequate knowledge"*? What is the corpus of injunctions that constitute *"Islamic teachings"* or *"obligatory duties"* or *"major sins"*? Even if a body of *Ulema* is to enumerate such a list, will the same list be applicable to all sects within Islam? Or will different Muslims have to pass the test laid down by their respective schools of thought? Can these really be objectively determined? Going a step further, how does being a *"better"* Muslim translate into the same person being a better legislator and representative of the people?

It is also interesting to note here, it is because of the military dictator's amendment of extension in list of qualification for a member of the assembly, which has recently de-seated

the elected Prime Minister of the country[317], from his office. Needless to state here that by doing so, the Supreme Court has opened Pandora's box, where in future we might have seen the Supreme Court struggling to cope with influx of references that would be filed by political leaders etc., against their opponents, taking shelter under extending list, whom they thought that he was not *"Sadiq and Ameen"* in terms of Article 62(1)(f) of the constitution, which in view of the latest Judgment of Supreme Court in *"Abdul Ghafoor Lehri's"* Case[318], carries even life time disqualification, as well.

Number 17: Article 63 which talks about the grounds of disqualification for not being membership of Majlis-e-Shoora (Parliament) and equally applicable to the members of Provincial Assembly (Article 113), per Original Constitutional Scheme sets 04 tier criteria for the disqualification of a person from being elected or chosen to be member of the Parliament, such of being unsound mind and has been declared so by a competent Court; or an un-discharged insolvent or ceases to be a citizen of Pakistan or acquires the citizenship of a foreign State or holds any office of profit in the service of Pakistan or other than an office declared by law not to disqualify its holder or so disqualified by the Act of Parliament as the case may be.

However, the new move had once again added[319] 12 further grounds based on subjective & moral scrutiny for the disqualifications of a member from being elected as representative in Assembly, which includes but not limited to, a person who is in service of any statutory body or anybody which is owned and controlled by the Government or in which the Government

[317] *Imran Ahmad Khan Niazi vs. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan and 9 others*: (PLD 2017 SC 265)

[318] *Abdul Ghafoor Lehri vs. Returning Officer*: (2013 SCMR 1271)

[319] Article 2, Items 16 & 113 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

has a controlling share or interest; being citizen of Pakistan by virtue of Section 14B of the Pakistan Citizenship Act, 1951, he is for the time being disqualified, under any law in forced in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir.

If he propagate any opinion or act in any manner against the ideology of Pakistan or sovereignty, integrity or security of Pakistan or morality or the maintenance of Public Order or the integrity or independence of the Judiciary of Pakistan, or who defames or brings into ridicule the judiciary or the Armed forces of Pakistan; or being convicted for any offence which in the opinion of Chief Election Commissioner involves moral turpitude; or sentenced to imprisonment for a term of not less than two years, unless five years has elapsed since his release; or likewise dismissed from the service of Pakistan on ground of misconduct, removed or compulsory retired from service unless a period of five years in former case and in later three years has elapsed since his dismissal or removal/compulsory retirement as the case may be.

Or has been in the service of Pakistan or any statutory body or anybody which is owned or controlled by the Government or in which the Government has controlling share or interest, unless a period of two years has elapsed since he ceased to be is in such service; or is found guilty of a corrupt or illegal practice under any law for the time being in force or has been convicted under section 7 of the Political Parties Act, 1962, unless a period of five years has elapsed from the date on which that order takes effect or of such conviction, as the case may be; or he by himself or by any person or body of person was in trust for him or for his benefit or on his account or as a member of a Hindu undivided family, has any share or interest in a contract between a cooperative society and Government, for the supply of goods

to, or for the execution of any contract or for the performance of any service under taken by Government, with exceptions to the effect of the application of afore said provisions thereof.

Similarly if he holds an office of profit in the service of Pakistan with certain exceptions thereof or where he is disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force. However, the question as to whether a member of the Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or the Chairman shall refer the question to the Chief Election Commissioner, who if is of the opinion that the member has become disqualified, only then such a member shall cease to be a member of Parliament and his seat shall become vacant, accordingly.

It is important to note here that the addition of the most controversial, and least quantifiable clauses, introduced by the military dictator into Articles 62 & 63, had created ambiguity & uncertainty with respect to its future application & interpretation, that's why the researchers do see abrupt interference of the Judicial Institution into the domain which purely vest with the Legislature, as a result of which unfortunately now a days we do have Judicially Determined Standards in this regard, too.[320]

[320] *Famous cases on Dual Nationality of the Parliamentarians are as follows, i.e.,*
(a). *Dr. Ahmed Ali Shah and others vs. Syed Mehmood Akhtar Naqvi and others*: (PLD 2018 SC 1276);
(b). *Syed Mehmood Akhtar Naqvi vs. Federation of Pakistan through Secretary Law*: (PLD 2012 SC 1089);
(c). *Syed Mehmood Akhtar Naqvi vs. Federation of Pakistan through Secretary Law*: (PLD 2012 SC 1054);
Wherein the Supreme Court of Pakistan dispensed with Article 63(2) which, in the first instance, requires a determination by the Speaker/Chairman of the House as to whether a 'question' has arisen regarding the disqualification of a member. If so, the matter is to be referred to the Election Commission of Pakistan (the 'ECP'). The Supreme Court, however, directed the ECP to 'de-notify'the dual national Parliamentarians, directed that these individuals 'refund all monetary benefits drawn by them for the period during which they occupied the public office', and also observed that since these Parliamentarians 'had made false declarations before the Election Commission while filing their nomination papers and as such appear to be guilty of corrupt practice... the Election Commission is directed to institute legal proceedings against them.

And in cases of Ridiculing the Judiciary
(d). *Muhammad Azhar Siddiqui and others vs. Federation of Pakistan and others*: (PLD 2012 SC 774)

Number 18: Article 75 which originally define the Assent by the President to a bill to be made within seven days of its such presentation to him under Articles 70 to 73, which was deemed to have been assented to, upon the expiry of the said period, this original scheme was substituted with a new Article while making changes in its marginal heading as *"President's assent to Bills"* and body of the text thereto; whereby a bill presented to the President for assent has now to be assented within forty five days, with an option with the President to return the bill other than a Money Bill to the Majlis-e-Shoora (Parliament) with a message requesting that the Bill so returned or any specified provision thereof, be reconsidered in view of the specified in the message. It further provide that such bill if sent for reconsiderations, be reconsidered as such by the Majlis-e-Shoora (Parliament) in its joint sitting, and again if it is passed, with or without amendment by vote of majority members of joint Houses, it shall be again presented to the President for his assent thereto.

Again, through instant amendment[321] the President's power to assent to the bill were also got increased from its original *"seven days"* to *"forty five days"*, with giving to him additional option to return such bill to the Majlis-e-Shoora (Parliament) for its reconsiderations as well. Needless to state here that, by virtue of Article 116, similar powers was also entrusted to the Governor of Provinces too. However, the Constitution (Eighth Amendment) Act, 1985, reduced the period of assent to a bill as prescribed under clause (1)

(e). *Suo Motu Contempt against Syed Yousaf Raza Gillani the Prime Minister of Pakistan regarding noncompliance of the Court's order dated: 28.05.2016 passed in a case titled and reported as "Dr Mobashir Hassan v Federation of Pakistan [PLD 2010 SC 265]*": (PLD 2012 SC 553),
Wherein upon declaring the National Reconciliation Ordinance of 2009 as unconstitutional, the Supreme Court, *inter alia*, ordered the Federal Government to once again initiate the cases pending against President Asif Ali Zardari in the Swiss Courts, specifically directing the Prime Minister to write a letter to the Swiss authorities, and upon his refusal to do so, convicted him in 2012 of 'willful flouting, disregard and disobedience' of the Court's judgment and of ridiculing the judiciary. Again while bypassing the process of Article 63(2) to the Constitution of Pakistan 1973, in this regard.

[321] Item 19 ibid

of the Article ibid which as such was fixed by RCO 1985 as *"forty-five"* days to that to the *"thirty"* days only.

Besides above another change which has brought into the Constitution was the substitution of clause (2) inserted through RCO 1985, whereby now a bill if returned by the President to the Majlis-e-Shoora (Parliament), it will be reconsidered again in the joint sitting and if as such passed with or without amendment by the votes of majority of the member of both Houses present and voting, it shall be deemed to have been passed by both Houses and shall be presented to the President who shall not withhold his assent therefrom. It is without going to mention here that by virtue of Article 116, similar changes were also introduced with respect to the powers exercise by the offices of the Governor of Provinces, too.[322]

Number 19: Articles 90 to 96 & 129 to 131 were totally substituted[323], whereby per Original Constitutional Scheme of the Article 90 meant for Federal Government while Article 129 meant for Provincial Government; both of which originally comprises over 3 sub clauses in toto and speaks about the exercise of the executive authority of the Federal Government *(consisting on the Prime Minister and the Federal Ministers)* in the name of President while that of similar authority of the Provincial Government *(consisting on the Chief Minister and Provincial Ministers)* in the name of Governor of the Province; who shall act through the offices of Prime Minister or that of the Chief Minister and shall be the Chief executive of the Federation or as the case may be of the Province, respectively.

These original constitutional schemes were changed by vesting the executive authority of the Federation exclusively into the hands of President, while that of the

[322] Section 8 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

[323] Article 2, Item 20 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

Provinces in to the hands of the Provincial Governors, as the case may be, who could thereof either directly or through officer subordinate to them, exercise such executive authority accordingly. However, the re-numbering, re-substitution and addition of Article 90 by the Constitution (Eighth Amendment) Act, 1985, by new clause (2) had clarified the situation more by stating that the vesting of the executive authority of the Federation shall not be deemed to transfer to the President any functions conferred by any existing law on the Government of any Province or of any other authority, with likewise further clarification thereto that nothing can debar the Majlis-e-Shoora (Parliament), from conferring by law functions on authorities other than the President. Hence, by doing so the Parliament actually put clog over the use of unbridles exercise of executive authority in respect to the affairs of Federation by the office of President. However, it is strange enough that on the similar footing no change with respect to the exercise of executive authority by a Governor of Province had ever been made parallelly in Article 129, which even till todate is a mystery.

Number 20: Similarly Articles 91 & 130, which originally prescribe the process of the election of a Muslim *"Prime Minister"* or member (even a non-Muslim) to be the *"Chief Minister"*, as to be elected by votes of the majority of total membership of the National or as the case may be the Provincial Assembly, while going through the process of first, second, third etc., (so on an so forth) re-polls process until the one among whom finally gets the majority votes, who was thereof to be finally called upon by the President or by the Governor of Province, to assume the office of Prime Minister or the Chief Minister, as the case may be. This original process of lengthy election(s) were totally changed[324] not only in the marginal title of the above said Article as *"The Cabinet"* but also by introduction of a new concept of the Cabinet, in the federation comprising over the Prime Minister (being the head) and the

[324] Items 20 & 27 ibid

other Ministers, while similar set up in the Province comprising over the Chief Minister and other Ministers, in order to aid and advice the President or as the case may be the Governor, in the exercise of their respective functions.

However, the embarrassing part of the afore said amendment was the giving powers under Article 91, clause (2) to the office of President, while under Article 130, clause (2) to the office of a Governor, respectively, where through they could even nominate and appoint the Prime Minister or as the case may be the Chief Minister at their discretion, from amongst the members of National or the Provincial Assembly who in view of them commands the confidence of the majority of such Assembly. Again the interesting thing with respect to the insertion of clause (5) to Article 91 & clause (5) to Article 130 made, was the introduction of sword of displeasure of the office of President or that of a Governor, hanged over the heads of Prime Minister /Chief Minister, whereby both could lose their respective offices under the pretext of losing the command of confidence of majority of the members of their respective Assemblies.

However, the positive move of instant reforms which has been taken was with respect to addressing the serious issue of non-attendance of the Ministers in their respective Assembly proceedings, the solution to which was chalked out by the insertion of penal provision in Article 91(7) and parallelly in Article 130(7), while declaring that a Minister concern, who fails to be a member of either assembly for six consecutive months, he had to be ceased to be the Minister of that very assembly, besides debarring him of being re-election to that very assembly once again, unless the assembly completes its running term/tenure, thereof.

Interestingly hereto the researchers will notice a surprising changes which had taken subsequently when the above referred Articles (i.e., 91 & 130) as substituted by RCO 1985, were once again put to further amendments in the final draft of the Constitution (Eighth Amendment) Act, 1985, while inserting therein a new clause(s) (2-A) with a non-absentee clause, giving over riding effect to it, over the other clauses of the Articles ibid; stating with clarity that after 20th March, 1990, the President/Governor shall invite the member of the National/or a Provincial Assembly to be the Prime Minister/Chief Minister who commands the confidence of the majority of the members of the National/or a Provincial Assembly, as is ascertained in a session of the Assembly summoned for that very purpose in accordance with provisions of the Constitution.

So, by this way the power of the President to appoint a Prime Minister in his sole discretion was limited to five years that is till 20th March 1990, while that of the similar power of appointment vesting in the office of Governor of a Province to 20th March, 1988 *(Note the year may be misprinted as 1988 in original draft, which was never ratified so far, that's why it is written as it is accordingly)*, upon the expiration of which the President or as the case may be the Governor of a Province had to invite that member of the National Assembly or of the Provincial Assembly, who commands the confidence of the majority of its members in a poll, were to be invited to take over the Prime Minister or as the Chief Minister, as the case may be.

Likewise reforms were also introduced by the Constitution (Eighth Amendment) Act, 1985 with respect to the clause (5) to Articles 91 & 130 as whereby earlier in cases of the displeasure of the President or the Governor over the heads of Prime Minister /Chief Minister, sword of disqualification hanging over their respective heads under the pretext of

losing the command of confidence of majority of the members of their respective Assemblies, were diluted to some extent by lessening the anxiety of the Prime Minister/Chief Minister, whereby pursuance to new changes now the President/Governor of a Province should in above events, had to summon the National/a Provincial Assembly and require such Prime Minister/Chief Minister to obtain a vote of confidence from that very Assembly.[325]

Number 21: Articles 92 & 132, which per the Original Constitutional Scheme empowers the Prime Minister & the Chief Minister as the case may be, to appoint Federal and Provincial Ministers from amongst the members of the Parliament or that of the Provincial Assembly; were put to further modification[326] whereof the RCO of 1985 had snatched such powers of the Parliament by entrusting the same to the offices of President and Governor(s), respectively, ultimately making their respective offices more powerful.

Number 22: Likewise Articles 93 & 133, by virtue of the Original Constitutional Scheme, it was the express prerogative of the offices of outgoing Prime Minister or of the Chief Minister as the case may be, to continue in his office until the time of the arrival of their respective successors therein. The RCO of 1985 modified[327] the aforesaid constitutional mandate by replacing only, the article number i.e., Article 93 to the Original Constitutional Scheme, with that with a new article number as Article 94, consisting on a single sub clause; empowering thereby the outgoing Prime Minister to remain in his office till his new successor occupies the same, while similar changes were also introduced in original Article

[325] Section 10 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

[326] Article 2, Items 20 & 28 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

[327] Items 20 & 28 ibid

133 as well, which also empowered the outgoing Chief Minister's with the prerogative to remain in his office until new incumbent of his office took over the charge, thereto.

Suffice it to state here that the prerogatives so attached with the offices of Prime Minister/Chief Minister per the Original Constitutional Scheme, were also made subservient to the sole discretion of the offices of President and the Governor of a Province as the case may be, who could now *(per the new scheme)* may ask the outgoing Prime Minister or as the case may be the Chief Minister to continue in his office till the arrivals of their successor(s), ultimately putting the general constitutional prerogative of previous incumbent in offices till the arrival of new appointee by vesting it into the sole discretion of the President or the Governor concern, who could easily manipulate/manage to delay the process of such appointment(s) while asking the outgoing Prime Minister or the Chief Minister as the case may be, on the pretext to hold or not hold their respective offices till the time of the arrival of their new successor.

Number 23: Article 93 newly added[328] through RCO of1985, had introduced a new concept of the Advisers into the Constitution, a scheme which has never ever exists in the past, by virtue of which now it had empowered the office of President to appoint not more than five advisors, upon the advice of the Prime Minister, who by virtue of clause (2) to the Article ibid, were also having the "Right to Speak" but no as such the "Right to Vote" in the Parliament's proceedings, as envisaged under Article 57 to the original Constitution thereof.

Number 24: Articles 95 & 136 which talks about the *"Votes of no-confidence against the Prime Minister & Chief Minister",* and having its actual place under Articles 96 and 136 per

[328] Item 20 ibid

the original Constitution of 1973; the RCO of 1985[329] had totally substituted the earlier mode & method of the moving and passage of the motion with respect to the no-confidence in relation to the Prime Minister/Chief Minister, respectively. The change which has been introduced in this respect is to the effect that if earlier there was no requirement of the minimum percentage of the membership intended to move the resolution for vote of no confidence against the Prime Minister/Chief Minister as the case may be, and in either of the case the National/Provincial Assembly was competent to pass such resolution; whereas now the new scheme sets up that a resolution for a vote of no confidence can only be moved by not less than twenty per centum of the total membership of the National/Provincial Assembly.

Similarly, earlier there was an express bar with respect to movement of such motion in the National/Provincial Assembly unless through the same resolution, the name of another member of the Assembly was put forwarded as the successor in office in place of the outgoing person. This requirement does not find its place in the new amended scheme, however, upon the passage of the resolution referred above by a majority of the total membership of the National/Provincial Assembly, if in earlier set up the President can call upon the nominated successor to assume the office of Prime Minister, but now the new scheme totally block this half opened window for return, by stating that the Prime Minister has to cease to hold his office forthwith.

Number 25: Article 99 which per Original Constitutional Scheme talks about the conduct of business of Federal Government and prescribes the mode for authentication of Orders and other instruments made/executed in the name of the President. Whereby practically the executive authority with respect to running the affairs of the Federation vests in the domain

[329] Items 20 & 30 ibid

of Federal Government which regulate its such business by making Rules or Orders in this regard or for its convenient transaction of such business could also further allocate it to the officers or authorities subordinate to it, with protection to it from the judicial scrutiny as well. These standards were substituted by RCO of 1985[330], whereby now the office of President assumed unto itself, all powers in relation to the conduct of business of the Federation as being the sole running/controlling authority, by virtue of which now the President could only regulate, allocate and transact the business of Federal Government, with similar protection available to his such work & conduct from the judicial scrutiny as was in vague in the past.

Number 26: Article 101, per Original Constitutional Scheme describe mode & method of the appointment of Governor for each Province, was subjected to further changes[331], whereby RCO of 1985 added the words *"in his discretion"* at the end of clause (1), making the appointment of the Governor subservient to the absolutely discretion of the President; who even through addition of a new clause (5) to the article ibid, illegally got total control over the discharging functions of pertaining to the office of the Governor as well.

However, the researchers will notice once again abrupt changes introduced in the Article 101, via the Constitution (Eighth Amendment) Act, 1985, whereby the words with respect to appointment of Governor(s) of a Province in the discretion of President were re-substituted by the words "after consultation with the Prime Minister". It is also important to note here that the Constitution (Eighth Amendment) Act, 1985, also omitted the proviso attached to clause (2) and the clause (2-A) completely which were earlier added through the Constitution (Fifth Amendment) Act, 1976, hence removing thereby; with respect to former

[330] Item 21 ibid

[331] Item 22 ibid

clause (i.e., 2) the clog put over a person having permanent residence of a Province who initially cannot become a Governor of that very Province, while with respect to the later clause (i.e. 2-A), the exception created with respect to the appointments referred in clause (2) ibid, during the period of Orders issued under paragraph (c) of clause (2) of Article 232 or the Proclamation of emergency under Article 234 in forced.[332]

The matter does not end here rather the Original Constitutional Scheme of Article 105 whereby earlier if the Governor was bound down to act on the advice of the Chief Minister; but now under the RCO of 1985 scheme he though ostensibly shown to have act on the advice etc., of the Cabinet, Chief Minister or appropriate Minister, but the language of second proviso newly added to clause (1), restricts his such discretionary powers, whereby his discretion was restricted with respect to matters such as appointment of the Chief Minister, dismissal of Cabinet who has lost confidence of the Provincial Assembly and dissolution of the Provincial Assembly, when an appeal to the electorate was necessary, with protection to such act from judicial scrutiny via newly added Clause (2), as well.

Similarly, per clause (3) of the same article, for appointment of a caretaker Cabinet etc., the Governor had to obtain prior approval of the President. This fact further strengthen by reading the provisions of clause (4) of the same article, which in unequivocal terms explains that the powers conferred by Article 105 on the President shall be exercised by him in his discretion.[333]

[332] Sections 11 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

[333] Article 2, Item 23 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

But again the Constitution (Eighth Amendment), Act, 1985, introduced abrupt changes[334] in Article 105, whereby under its clause (1), for the comma and words "Chief Minister or appropriate Minister" the words "or the Chief Minister" were re-substituted once again, with similar substitution of the first proviso to the clause (1), including therein the word "the Chief Minister", by virtue of which the Governor now could have require the Chief Minster too, to reconsider any advice tendered to him from his office, parallelly to the Cabinet, as well. Likewise, second proviso attached to clause (1) ibid was omitted, the ultimate effect of which was to take back the conditional discretionary powers from of the Governor of a Province, with respect to appointment of Chief Minister, Dismissal of Cabinet or Dissolution of Provincial Assembly, as the case may be. Besides, making substitutions in clause (2) for the words "the Cabinet or a Minister" with that of the words "or the Cabinet", excluding the Minster therefrom.

Thus the fore going provision reveals that practically the office of President in the Federation or those of the Governor(s) in the Provinces were given dominance over the office(s) of Prime Minister or the Chief Ministers, as the case may be.

Number 27: Article 106, which earlier amended through the Constitution (Second Amendment) Act, 1974 & the Constitution (Fourth Amendment) Act, 1975, respectively, was once again put to further amendment[335], whereby the RCO of 1985 in clause (2) paragraph (b) to it substituted the words *"eighteen"* for the words *"twenty one"*, while increasing the age limit for a voter citizen from originally prescribed minimum age of eighteen years to that of the twenty one years; besides above, it also omitted the proviso attached to the same clause

[334] Sections 12 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]
[335] Article 2, Item 24 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

[i.e., clause (2)] as well, which per Original Constitutional Scheme prescribe the minimum age limit for a voter citizen with respect to the first general election to the Provincial Assembly or for filling the vacancy to that respect, was initially fixed as "twenty one" years.

Likewise, clause (3) was also substituted whereby again the reserved seats meant for the minorities in the Provincial Assemblies of Balochistan, North-West Frontier Province & Punjab were further increased, who by virtue of clause (5) were to be elected through separate electorates by direct and free vote in accordance with law. Similarly the seats reserved for women in the general elections to a Provincial Assembly were to be elected on the basis of proportionate representation, by means of a single transferable vote of the Electoral College consisting of the persons elected to that Assembly. However the Constitution (Eight Amendment) Act, 1985, brought changes[336] by substitution to clause (4) where through the schedule of the application of reserved seats for the women from *"second"* general elections to that to the *"third"* general elections.

Number 28: Article 144 per the original Constitution, which empowers the Parliament to legislate for two or more Provinces by consent, was subjected to further amendment[337] via the Constitution (Eight Amendment) Act, 1985, whereby clause (2) attached to it omitted therefrom, by doing so the provisions of the original Article 71 to a bill which was earlier made applicable by reference, were now stand omitted, accordingly.

[336] Section 13 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

[337] Section 17 ibid

Number 29: Article 152A i.e., National Security Council (NSC) being a new concept added[338] through RCO of 1985, brain child of it originator i.e., General Zia-ul-Haq, who while experiencing the past events of the state survival during the course of Political unrest and Military misadventures, proposed for the creation of constitutional arrangements of the top brass of the military, being the Policy Making Body in collaboration with the civilian political leadership. The NSC so constituted consisting on 11 members, with following office bearers: i.e., the President, the Prime Minister, Chairman of the Senate, Chairman, Joint Chiefs of Staff Committee, the Chiefs of Staff of the Army, the Navy and the Air Force, and the four provincial Chief Ministers, who were collectively empowered to make recommendations relating to the issue of imposition of Proclamation of Emergency under Article 232, pertaining to security of Pakistan or likewise any other matter of national importance that may be referred to it by the President in consultation with the Prime Minister. However, due to strong opposition the concept of NSC was subsequently dropped pursuance to the deal effected with the Parliament, in order to get the parliamentary approval for the revised version of RCO by way of omitting it through the Constitution (Eighth Amendment) Act, 1985, accordingly[339].

Number 30: Article 175, earlier amended through the Constitution (Fifth Amendment), Act, 1976; establish and determine thereby the jurisdiction of Constitutional Courts [i.e., Supreme & High Court(s)] was once again subject to further amendment[340] whereby in clause (3) to the said article the original period for separation of the Judiciary from the executive, as

[338] Article 2, Item 32 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

[339] Section 18 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]

[340] Article 2, Item 33 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

was initially fixed as "three" years and so increased to "five" years, pursuance to the Constitution (Fifth Amendment) Act, 1976, was again re-substituted via the RCO of 1985, while further enhancing the lastly increased period separation to a period of "fourteen" years.

Number 31: Articles 179 & 195 which talks about the age of retirement of the apex Courts Judges, and such were earlier twice amended through Constitution (Fifth Amendment), 1976, while re-numbering it clauses with addition of clause (2), paragraphs (a) & (b), clauses (3), (4) & (5) respectively, and later on vide Constitution (Sixth Amendment), Act, 1976, with addition of clause (6) thereof; was again amended[341] through RCO of 1985, whereby all the afore said re-numbering & addition of clauses therein were stand omitted, while restoring the scheme of Articles 179 & 195 relating to the Retiring age of a judge of the Supreme Court and that of the High Court to its original position, as was duly introduced at the time of the framing of the Original Constitution, thereof.

Number 32: Articles 180 & 196 which talked about the appointment of Acting Chief Justice in the Supreme Court and that of the High Court(s) and was as such earlier amended through the Constitution (Fifth Amendment), Act, 1976, putting clog over a retired judge exercising the option of Senior Most Judge deprive him to become an acting Chief Justice even in the case of arising any vacancy to this effect, has now once again re-amended[342] by the RCO of 1985, whereby once again it had restored the original position of the Articles 180 & 196 of the appointment of Senior Most Judge as being Acting Chief Justice as were at the time of framing of the original constitution, thereof.

[341] Items 33 & 37 ibid

[342] Items 35 & 38 ibid

Number 33: Article 186A which empowers the Supreme Court to transfer cases, appeals or other proceedings pending before any High Court to another High Court, was newly inserted[343] into the Constitution.

Number 34: Article 198 which originally define the Principal seat(s) of the High Court(s) only, the RCO of 1985 renumbered it as clause (1), by adding new clauses (2) to (6) herein[344], through which it introduced the concept of the constitution of Benches[345] and Circuit Benches for the respective High Courts of Lahore Sindh, Peshawar and Balochistan High Court as well, within the territorial jurisdiction of which they could respectively perform their function, accordingly. It is also worth to mention here that in addition to above the respective High Courts were allowed constitute as many benches at other places & frame appropriate rules for discharge of its functions as had been determination by Governor of a Province, on the advice of Cabinet and/or with the consultation of the Chief Justice of High Court concern.

Number 35: Article 199 which was earlier amended through Constitution (Fourth Amendment), Act, 1975 & Constitution (Fifth Amendment) Act, 1976, by insertion of clauses(3-A) to (3-C) therein while again re-insertion of the similar clauses (3-A) to (3-C), through the Constitution (Amendment) Order, 1980 [P.O. I of 1980], as the case may be, whereby through the Act first in order, the High Courts were restrained from making an order, prohibiting the making an order for detention of a person or granting bail to such person detained; while through the Act second in order apart from doing the above mentioned acts, it also restrained the High Courts from issuing an order for suspension of the operation

[343] Item 36 ibid

[344] Item 39 ibid

[345] [Lahore High Court at Bahawalpur, Multan, Rawalpindi], [High Court of Sind at Sukkar], [Peshawar High Court at at Abbottabad and Dera Ismail Khan] and the [Baluchistan at Sibi]

of the custody of a person against whom a report or complaint has been made or is going to be made before any Court or tribunal or a Police Station in respect of an offence or who has been stand convicted by any Court or tribunal or likewise making any other interim orders in this respect, either after the Constitution (Fourth Amendment) Act, 1975 or which have cease to effect or abates or even in case which such applications were stand disposed of but matters are still subjudice before the passage of Constitutional (Fifth Amendment) Act, 1976 by way of Civil Petition for Leave to Appeal or an appeal before the Supreme Court. Similarly, the Presidential Order third in order the exercise of powers of judicial review while calling in question the legality of martial law, regulations etc., validity or effect of any judgment or sentence of the military courts etc.,, as the case may be; were all stand omitted[346].

Besides above, in clause (4) paragraph (b) of the original Article as well as with respect to clause (4A) as inserted through the Constitution (Fourth Amendment), Act, 1975 the scope of refusing interim orders by the High Courts were enlarge by insertion of the word "State Property or" therein, on the same footings enhancing the life time of interim order from its earlier period of "sixty days" to "six months", respectively. In addition to above a new clause (4B) was also inserted whereby the High Courts were bound down to dispose of the applications seeking interim orders within a period of six months, unless it is prevented from doing so for sufficient cause, which is to be recorded, as such.

Number 36: Article 200, prescribing the mode of transfer of the High Court's Judge by the President and earlier amended by the Constitution (Fifth Amendment) Act, 1976 with addition of a proviso to clause (1), whereby the President was empower to transfer a judge from one High Court to another High Court, without the consultation of the Chief Justice of

[346] Article 2, Item 40 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

High Court concern, if his such services were required for a period of "one year" only, the RCO of 1985[347] had increased this initial period of "one year" as set earlier by increasing it to a period of "two years". Likewise the original text of clause (2) to the above article whereby if earlier a judge so transferred from one High Court to another High Court was entitled to the perks and privileges as determined by the President by order; now through present amendment, these benefits were not extended to intended transferee judge, who is so transferred to the Principal Seat of such High Court, rather this benefit was restricted to the Judges so transferred/appointed for the said period (i.e., two years) who is as such to serve at the benches & circuit benches only. As evident from its further reading that the same amendment also inserts an explanation with respect to the term "High Court" at the end of clause (3) while defining that the term "High Court" includes bench of a High Court.

Number 37: Article 203Bprescribing definition of various terms which are to be used for the purpose of interpretation as is used under new chapter 3-A in Part-VII of the Constitution, which as such was earlier substituted vide the Constitution (Amendment) Order, 1980 [P.O.I of 1980], while defining the term "Law" used for putting challenge before the Federal Shariat Court, with respect to the fiscal law or any other law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure, does not effective until the expiration of "three" years from commencement of the above referred chapter. This initial period of the three years was later on increased to "four" years by Constitution (Second Amendment) Order, 1983 [P.O. 7 of 1983], then to "five" years vide Constitution (Second

[347] Item 41 ibid

Amendment) Order, 1984 [P.O. 2 of 1984] and finally through the RCO of 1985[348] from "five" to "ten" years respectively.

Number 38: Article 203C substituted initially by the Constitution (Amendment) Order, 1980 [P.O.I of 1980] & later on by the Constitution (Second Amendment) Order, 1980 [P.O. 4 of 1980] inserting new clause (4A) therein, was again through the RCO of 1985 put to further amendment[349], while inserting new clauses (4B) & (4C) therein; empowering thereby the President by order to modify the term of appointment of a judge, assign him any other office or require him to perform such other functions as President may deem fits. With addition of explanation of the term "Judge" it is further clarified that it includes the Chief Justice, as well. However, by virtue of clause (4C) it has been made clear that during the discharge of such functions, such judges would be entitled to the perks & privileges to which the Chief Justice or a Judge of a High Court to which they were already entitled to.

Number 39: Article 204 which empowers the Constitutional Courts (i.e., Supreme & High Court) to punish any person who was found guilty of the Contempt of Court, was substituted by RCO of 1985[350], whereby the original text as framed initially was reproduced once again except without reproduction of the explanation attached to clause (2) only, whereby fair comments made in good faith and in the public interest on the working of the Court or any of its final decisions after the expiry of the period of limitation for appeal, if any, were not held to constitute contempt of the Court, however, the omission of explanation attached to clause ibid had now made the even fair comments of a person in good faith or in public interest on

[348] Item 42 ibid

[349] Item 43 ibid

[350] Item 44 ibid

the working of Court irrespective of the expiry of the period of limitation for appeal, to be a grounds for initiation & probable conviction in Contempt Proceedings, thereof.

Number 40: Article 212A which relates to the Establishment of Military Court or Tribunal and as such was added through Constitution (Second Amendment) Order, 1979 [P.O. 21 of 1979][351], the RCO of 1985 [352] subjected the omission of this very article on such day as the President may appoint in this regard. Later on it was in pursuance to the [SRO No: 1278(I)/85][353], dated: 29.12.1985 r/w Proclamation of Withdrawal of Martial Law (1985) [354] dated: 30.12.1985, on 29.12.1985, that finally this article stand omitted accordingly. The sole aim of the introduction of Military Courts were to curtail the powers of Judicial Review of the apex Courts and to nullify the effect of Judgment passed in Begum Nusrat Bhutto case empowering the Judges of apex Courts from questioning the illegal actions of non-State Actors[355].

Number 41: Article 213, which originally prescribes the mode of appointment of the Chief Election Commissioner, was amended[356] in such a way by adding the words "in his discretion", after the words "President" thereto, making now its sole prerogative of the President to appoint in his discretion any person as the Chief Election Commissioner, thereof.

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[351] Constitution (Second Amendment) Order, 1979 [P.O. 21 of 1979]: (PLD 1979 Central Statute 567)

[352] Item 45 ibid

[353] Revival of the Constitution of 1973 Order, 1985 (Omission of Article 212A): PLD 1988 Central Statutes page 131

[354] Printed in Gazatte of Pakistan of 1985 Ext Part-I pages 431 to 432

[355] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Pages 351-52.

[356] Article 2, Item 46 to Revival of the Constitution of 1973 Order, 1985 [P.O. 14 of 1985] published in [PLD 1985 Central Statute 456]

Number 42: Article 239 which prescribes the mode, method of moving & the procedure of passing a Constitution Amendment Bill, was totally changed by RCO of 1985[357] whereby if earlier a Constitution Amendment Bill had to be moved in National Assembly only, now the said restriction were removed by authorizing either of the houses (i.e., National Assembly/Senate) to move a Constitutional Amendment Bill; again if in earlier mode, the bill passed by the National Assembly had to be transmitted to the Senate thereof, which if passed by a majority of the total membership, it has to be presented to the President for his assent, whereas under new set up if the bill was passed by the votes of not less than two-third of the total membership of house in which it was originated, it was then transmitted to the other house for similar voting & passage process.

Likewise, if earlier a bill transmitted to the Senate in earlier setup, and the same was not passed by it within ninety days from the day of its receipt the Bill shall be deemed to have been rejected by the Senate, whereas in new setup if it is passed without amendment by the votes of two-thirds of the membership of the House to which it is transmitted, it shall then be transmitted to all Provincial Assemblies. Again under the new setup if it is passed with amendment by the votes of two-thirds of the membership of the House to which it is transmitted, it shall be reconsidered by the House in which it had originated; and if the Bill so amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership, it shall be then transmitted to all Provincial Assemblies. If the Bill so transmitted to the Provincial Assemblies passed by each such Assembly by a majority of the total number of its members present and voting, only then the bill passed thereof was finally sent to the President for assent.

[357] Item 48 ibid

On the contrary under the Original Constitutional Scheme, a bill if passed by both of the Houses, it shall then be finally presented to President for assent within seven days of the presentation of such bill, otherwise on the expiration of the afore said period the bill had to be deemed to have assented thereto. However, the clause which remain common in both setups (i.e., Old & New) was that if a Bill to amend the constitution had effect of altering the limits of a Province it shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership. The surprising move which seems to be in the new setup was the insertion of clauses (6) & (7) to the amending article which provided protection to the amendment so passed from calling into question in any Court on any ground whatsoever, while the another was the removal of doubt with respect to the fact that there is no limitation whatsoever on the power of the Majlis-e-Shoora (Parliament) to amend by way of addition, modification or repeal any of the provisions of the Constitution.

The overall scheme of above referred changes shows that the military dictator if on the one hand, enhanced the role of Senate in Supreme Legislation by allowing it at par with the National Assembly to move & pass a bill relating to amend the Constitution, moreover through his new substituted scheme he also involved the provincial Assemblies in the said legislation too and made the passage of Constitution Amendment more rigid process of the passage of bill rather impossible. However, the introduction of new clauses (6) & (7) seems to be inserted in order to give protections to the amendments carried out by him or that of his puppet Assemblies, as the case may be.

Number 43: Article 242, which per Original Constitutional Scheme prescribed the mode of the establishment of Public Service Commission both for Federal & Provincial level services

through Act of Parliament, was amended through RCO of 1985[358] whereby new clause (1A) added empowered the President to appoint in his sole discretion, the Chairman of Public Service Commission constituted in relation to the affairs of the Federation only, while the appointment of such Chairman with respect to a Province was left unattended.

Number 44: Article 243 which deal with the Command of Armed Forces and per Original Constitutional Scheme vest the control and command authority in Federal Government was amended in such a way that the new clause (1A) inserted therein[359] tilted the Supreme Power of the control and command of the Armed Forces into the hands of President only. The matter does not ends here rather RCO of 1985 made amendments in clause (2) paragraph (c) of the said article, which empowers the key appointment of the posts of Services Chiefs i.e., Chairman Joint Chiefs of Staff Committee, Chiefs of Army Staff, Navel Staff & Air Staff, and the determination of their respective perks and privileges by subjecting it to the sole discretion of the President while eliminating the due role of Federal Government, from screen at all.

Number 45: Article 270A which provides Validation to the President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws and all other laws made in between the period of 05th of July 1977 till the date on which the above referred articles was to comes into force issued in the capacity of President and Chief Martial Law Administrator jointly or severely, were as such give full protection even from its judicial scrutiny thereto. But surprisingly the researchers do feel abrupt change[360] introduced

[358] Item 49 ibid

[359] Item 50 ibid

[360] Item 52 ibid

therein, when the matter came under discussion at the final stage of the Constitution (Eighth Amendment)Act, 1985, wherein not only the marginal title of the said article was got change as "Affirmation of Article 270A of the Constitution", but also additionally the matters pertaining to the RCO of 1985, the Referendum Order of 1984 conducted for the election of military dictator as President, the Revival of Constitution of 1973, Order, 1985, Presidential Orders, Constitution Amendment Orders, Ordinances, enactments, notifications, rules, order or bye-laws or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers, etc., were also protected, there too. It is important to note here that the expressions “affirmed” & “affirmation” used in Article 270A were seems to be used in order to avoid future challenges by judicial scrutiny of the laws, regulations, orders, proclamation etc., thereof.

Number 46: Likewise, the scheme of Article 270B introduced via the RCO of 1985[361], floated in order to validate the elections held under the Houses of Parliament and Provincial Assemblies (Elections) Order, 1977, respectively.

Number 47: Lastly through entry 53 of the RCO of 1985, a new Annexure[362] relating to the Objectives Resolution was again inserted into the constitution after Article 280, likewise, through entry 54 of RCO of 1985 substituted the Original Schedule attached to the Original Constitution with that of the Schedule introduced by the RCO of 1985, thereof.

[361] Item 52 ibid

[362] Item 53 ibid

Besides above the Constitution (Eighth Amendment) Act, 1985 also added[363] new Schedule (i.e., Seventh Schedule) to the Constitution as well while giving legal covers to various Presidential Orders promulgated/made in between 1978 to 1985, respectively.

Conclusion:

The sum up of above cited discussion reveals that Zia's meddling *(both through Chief Martial Law Administrator Orders as well as through President's Orders)* with the Constitution of Pakistan has strengthen his personal position as the President of Pakistan his actions were in line with the previous recipes of his predecessors (military dictators), who while owing to himself absolute powers of appointments relating to keys posts both at Federal & Provincial Level and by shifting the balance of power in favor of the office of President through his controversial RCO of 1985 had escaped himself from being answerable to the Parliament. Not only this but in the struggle of his prolong illegitimate rule in the country, he also used Islamist card too. His interference in the judiciary too is also apparent from appreciating the following facts, when matter pertaining to the illegal detention of his bitter opponent i.e., Mr. Zulfiqar Ali Bhutto came under discussion before the Supreme Court of Pakistan, pursuance to a petition filed by his wife Begum Nusrat Bhutto, which when was as such admitted for regular hearing, wherein orders were passed to transfer of the accused to Rawalpindi; in reaction to that, General Zia even did not hesitated from making re-shuffling of the head of apex Judiciary *(i.e., Justice Yaqub Ali the then Chief Justice of Pakistan)* with that of the puppet of his choice *(i.e., Justice Anwar-ul-Haq, the then Chief Justice of Pakistan)* while practically withdrawing the Constitution's Fifth and Sixth Amendments via issuance of a Martial Law Order[364], in this regard. Hence in nutshell, the amendments made

[363] Section 20 to Constitution (Eighth Amendment) Act, 1985 published in [PLD 1986 Central Statute 1]
[364] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 326.

by him in the Constitution of 1973 through unconstitutional means that too for his petty political gains had de-shaped it and destroyed the genuine political culture, completely.

(C). CONSTITUTIONAL AMENDMENTS INTRODUCED/PASSED BY THE GOVERNMENT OF MUHAMMAD KHAN JUNEJO DURING THE DICTATORIAL RULE OF GENEARL MUHAMMAD ZIA-UL-HAQ (1985 to 1988)

As publically known that pursuance to the General Elections on non-party basis held on 25th February 1985 with respect to the elections of the members of National Assembly and of the members of the Provincial Assemblies[365], that finally on 23rd March, 1985 the military dictator nominated a veteran politician from Province of Sindh namely Mr. Muhammad Khan Junejo, as the Prime Minister of country, whereby a Civilian Government was formed under the umbrella of Martial Law[366], thereto. This Civilian Government has tried to float a Constitutional Amendment Bills besides moving a Constitution Amendment Act, respective which are as follows:-

3.9 Ninth Constitutional Amendment

The Constitution (Ninth Amendment) Bill, 1985 floated by the government of Muhammad Khan Junejo, with an aim to propose amendments in three Articles i.e., 2, 203B & 203D to the Constitution, whereby:-

Number 01: The first in order i.e., Article 2 per the original constitution scheme declares Islam to be the State Religion of the Pakistan, however, the bill in hand made an attempt to enhanced the scope of article further by addition[367] of the words *"and injunctions of Islam as laid down in the Holy Quran and Sunnah (SAW) should be the supreme law and source of*

[365] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 365

[366] Ibid at page 373

[367] Section 2 to Constitution (Ninth Amendment) Bill, 1985 Published in Mazhar Ilyas Nagi Advocate *"The Constitution of the Islamic Republic of Pakistan, 1973"*, By, Vol.II Edition 2013, at page 1852

guidance for legislation to be administered through laws enacted by the Parliament and Provincial Assemblies, and for policy making by the Government", thereof.

Number 02: Likewise the Bill also intends to omit paragraph (c) to Article 203B (i.e., second in order) [368], which defined the term "Law" used for the purpose of interpretation of the newly added chapter 3-A in Part-VII into the Constitution, and exclude in it with specific terms the words *"Muslim Personal Law, any law relating to procedure of any Court or tribunal or until expiration of ten years from the commencement of this chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure"* from the judicial scrutiny of the Federal Shariat Court. So, if the bill in hand would have been permitted to become an Act of the Parliament, the ultimate effect of the same was that the matters specifically excluded from the definition of law would come within the scope of judicial review of the Federal Shariat Court, and the Court could ultimately be able to give its recommendations with respect to the excluded issues, thereto.

Number 03: The Bill further intended to bring changes in Article 203D, (i.e., third in order), which describes the powers, jurisdiction and functions of the Federal Shariat Court, by adding therein new intended clauses (3-A) & (3-B) [369] whereby the Federal Shariat Court in case of former clause (i.e., 3-A), upon declaring any fiscal law or the laws relating to the levy and collection of taxes and fees or banking or insurance practice and procedure of Court, to be repugnant to Injunctions of Islam, it may with the consultation with persons having special knowledge of the subject recommend to the Government specific measures and also fix a reasonable time within which to take adequate steps and amend such laws so as to bring it in

[368] Section 3 Ibid

[369] Section 4 ibid

conformity with the injunctions of Islam, but the intended proviso added there to, would make all such decision of Court's, giving prospective in effects only.

While in the case of later clause (i.e., 3-B), inspite of whatever as has been already stated herein above, protection has also been shown to be extended to the afore referred fiscal issues which despite of the findings of the Courts were being declared ultra vires to the Injunctions of Islamic, they would have continue to hold their respective fields, until the time they were substituted through appropriate enactments by the legislature concern. Hence, the proviso attached to the later clause also extended due protections to assessment made, orders passed, proceedings pending and amount payable or recoverable before the enforcement of the laws, pursuance to the former clause.

3.10 Tenth Constitutional Amendment

The Constitution (Tenth Amendment) Act, 1987[370], gazetted on 29th March, 1987, floated during the term of office of the then Prime Minister Muhammad Khan Junejo, suggesting thereby amendments in two articles i.e., 54 & 61 to the Constitution, which were as follows:-

Number 01: It had brought changes[371] to the earlier amendment inserted in proviso attached to clause (2) to the Article 54, through RCO 1985; increasing thereby the working days of the National Assembly while by legislation through reference, its similar application to the working of Senate by virtue of Article 61, to hold their respective meeting in each year, as enhanced earlier to *"one hundred and sixty"* days by reducing it to *"one hundred and thirty"* days, respectively.

[370] Constitution (Tenth Amendment) Act, 1987, Published in [PLD 1987 Central Statute 23]

[371] Sections 2 & 3 ibid

Conclusion:

The upshot of above cited discussion is that the sitting Prime Minister Muhammad Khan Junejo under the umbrella of the military dictator regime if on the one hand, by introduction of Constitution (Ninth Amendment) Bill, 1985, had tried to take bold initiative with respect to expending the scope of the declaration that Islam being a State Religion of Pakistan, in view of true wishes of every Muslims, besides making efforts for bring the fiscal laws etc., in to the judicial scrutiny net of the Federal Shariat Court, so that the implementation of true Islam be made practical in the society, but unfortunately all his sincere effects into this effect went astray, when the Bill containing such amendment was never passed by the Parliament.

Likewise, on the second the Constitution (Tenth Amendment) Act, 1987 passed during the tenure of same Prime Minister has reduced the period of meetings of National Assembly & Senate in each year, by reducing it to *"one hundred and thirty"* days, from the earlier enhanced period of *"one hundred and sixty"* days.

(D). CONSTITUTIONAL AMENDMENTS & THE FIRST ROUND OF THE GOVERNMENT OF MRS. BENAZIR BHUTTO (1988 TO 1990)

The long military rule of General Zia-ul-Haq was finally came to an end when pursuance to an air crash of 17th August, 1988 and in addition to the General Elections of 1988 held on 16 and 19 November, 1988, the reins of Government came into the hands of Civilian setup, in whole scenario the particular part played by the modification made through the Constitution (Eighth Amendment), Act, 1985 in the discretionary powers of the President for nomination of Prime Minister, that finally Mrs. Benazir Bhutto was elected as Prime Minister of Pakistan and it was in her first round of the Government in which a single amendment Bill i.e., the Constitution (Eleventh Amendment) Bill, 1989 was floated, such is as under.

3.11 Eleventh Constitution Amendment[372]

The Constitution (Eleventh Amendment) Bill, 1989, moved with intent to bring necessary amendment in Article 51, clause (4), which was earlier amended through the RCO of 1985.

Number 01: The Bill sought[373] to restore "twenty" reserved seats for women in the National Assembly, which was introduced in the Senate on 31-12-1989 by Mr. Muhammad Ali Khan, Dr. Noor Jehan Panezai and Syed Faseih Iqbal, Senators. The Bill actually wants to substitute the word "third" occurring before the words "general elections" with that of the word "fourth", thereof. It is important to note here that a report to this effect was placed before the Standing Committee on 29-8-1990, but the Bill was withdrawn on 23-8-1992 by

[372] Constitution (Eleventh Amendment) Bill, 1989 Published in Mazhar Ilyas Nagi Advocate *"The Constitution of the Islamic Republic of Pakistan, 1973"*, By, Vol.II Edition 2013, at page 1855

[373] Section 2 ibid

its movers after assurance given to them by the Minister for Law and Justice, to the effect that the Government intends to introduce the same Bill very soon.[374]

[374] Hamid Ali Khan, *"Amendments to the Constitution of Pakistan"*, Revised Edition: November, 2015, Pakistan Institute of Legislative Development And Transparency (PILDAT) at page 26

(E). CONSTITUTIONAL AMENDMENTS & THE FIRST ROUND OF THE GOVERNMENT OF MR. MIAN MUHAMMAD NAWAZ SHARIF (1990 TO 1993)

It was the rift in between the Presidency occupied by bureaucrat turn President Ghulam Ishaq Khan and the office of Prime Minister held by Mrs. Benazir Bhutto, tilting the center of powers to the office of President by virtue of RCO 1985 & that of the Constitution (Eighth Amendment) Act, 1985, which persuaded the former to use the hanging sword of Article 58(2) (b) introduced into the Constitution of 1973 by his predecessor in office i.e., the then former military dictator General Muhammad Zia-ul-Haq, which dropped scene of the latter's Government on 06th August, 1990 after leveling detail charges of the dismissal. However, it was pursuance to mandate given through the election of October 1990 that finally the Mian Muhammad Nawaz Sharif was got elected as the Prime Minister of Pakistan, and it was in his first round of the Government that a single amendment Act was floated into the Parliament, which was as under.

3.12 Twelfth Constitution Amendment[375]

The Constitution (Twelfth Amendment) Act, 1991, gazette on 28th July 1991 had through its amendments added a new time bound Article 212-B to the Constitution besides amending its Fifth Schedule, while increasing the salaries & perks and privileges of the Judges of Constitutional Courts (i.e., Supreme Court & High Courts).

Number 01: The main purpose of the introduction of Article 212-Bas a new article[376] was to the establishment of Special Courts for the trial of heinous offences in order to overcome the wild spread fire of the crime ratio rapidly emerged throughout of the country, pursuance to the unilateral decisions taken by military dictators with respect to the Soviet Afghan war.

[375] Constitution (Twelfth Amendment) Act, 1991, Published in [PLD 1991 Central Statute 461]

[376] Section 2 ibid

The new article so added provided not only the composition, territorial jurisdiction of the Special Courts but also for appeals against the judgment and sentence rendered by it, which could be agitated before Supreme Appellate Courts, consisting on a judge of the Supreme Court as being its chairman and the two High Court judges who would be presiding over such Courts. This article stands automaticly repealed on July 1994, by virtue of clause (1) paragraph (3) of the said Article i.e., 212B.

Number 02: Likewise other changes which the instant amendments[377] which had brought into the Constitution are the increase in salary of the serving and other perks and privileges (including the pensionary benefits) as well of the retiring judges of the Constitutional Courts, as the case may be.

Conclusion:

The twelfth amendment had created a unique hierarchy of the Special Courts at par to the Constitutional Courts, which enjoyed its Special status as well without being in subordination to either of the Constitutional Courts, thereof.

[377] Section 3 ibid

(F). CONSTITUTIONAL CRISES & THE SECOND ROUND OF THE GOVERNMENT OF MRS. BENAZIR BHUTTO (1993 TO 1996)

Again the tug of war inter se the Presidency and the office of Prime Minister over the exercise of powers particularly with respect to the appointments of military heads, necessitate the then incumbent of Presidency Ghulam Ishaq Khan to again use the sword of Article 58(2)(b) which was entrusted unto him by the former military dictator General Zia-ul-Haq, whereby the former once again shown the door to the incumbent Prime Minister vide using his Presidential Orders of dated: 18th April, 1993, by leveling detail charges for ousting him, as well. This dissolution of the National Assembly was later on challenged initially by the Speaker of Nation Assembly i.e., Gohar Ayub before the Lahore High Court but due to separate challenge put by the outgoing Prime Minister Mian Muhammad Nawaz Sharif through a direct constitution petition under Article 184(3) moved before the Supreme Court of Pakistan, succeeded in getting relief vide judgment of Supreme Court of dated: 26th May, 1993.[378], whereby his Government was again restored thereof. But soon after its restoration the confrontation inter se the office of Presidency and that of the Prime Minister, did not fill the gap of mistrust, which exists among both of the office holders, whereby finally pursuance to the advice of Prime Minister, the President dissolved the National Assembly, besides stepping down himself from his office thereto.

Again as a result of the general elections held on 06th October, 1993 when finally political Government of Mrs. Benazir Bhutto succeeded in reaching to power corridors along with her party's returned candidates and with elected President Farooq Ahmed Leghari. But unfortunately the romance of two office bearers dropped soon, when due to the rift's inter se of them, all of a sudden on 05th November, 1996, the Government of Mrs. Benazir Bhutto was rolled back by the President while using again the same sword of Article 58(2)(b),

[378] *Mian Muhammad Nawaz Sharif vs. Federation of Pakistan*: (PLD 1993 SC 473)

protected by the Parliament of military dictator through the Constitution (Eighth Amendment) Act, 1985. Again the dismissal of National Assembly was challenged initially by the then Speaker of Nation Assembly i.e., Syed Yousaf Raza Gillani, while separately challenged by the outgoing Prime Minister Mrs. Benazir Bhutto, through a direct constitution petition under Article 184(3) moved before the Supreme Court of Pakistan, whereof the Court vide its Judgment upheld the dismissal order[379]. It is important to note here that the centric reason behind the dismissal of each successive civilian government time and again, was as a result of the protection given to the discretionary powers of the President under Article 58(2)(b) by the Constitution (Eighth Amendment) Act, 1985. However, in the Second round of the Government of Mrs. Benazir Bhutto, no bill had ever been moved for making amendment in the Constitution.

[379] *Benazir Bhutto vs. Farooq Ahmed Leghari*: (PLD 1998 SC 27)

(G). CONSTITUTIONAL AMENDMENTS & THE SECOND ROUND OF THE GOVERNMENT OF MR. MIAN MUHAMMAD NAWAZ SHARIF (1997 TO 1999)

However, later on in pursuance to the General Elections of 3rd February, 1997, Mian Muhammad Nawaz Sharif again succeeded in securing majority seats both at center and provinces respectively, which fact paved way for forming his independent and at some place coalition governments thereof. After coming into power for the second time Mian Muhammad Nawaz Sharif elected to be the Prime Minister along with Farooq Ahmed Leghari being President already in office. The former in his second round of Government had introduced as many as four Constitutional Amendments Acts including a Bill, which in seriatim are as follows:-

3.13 Thirteenth Constitution Amendment[380]

The Constitution (Thirteenth Amendment) Act, 1997, gazatted on 04th March, 1997, had introduced amendments in 04 articles to the Constitution of Pakistan 1973, i.e., Articles 58, 101, 112 and 243 respectively. It is important to note here that the amendment moved and passed in a matter of minutes on April 4, 1997 by relaxing the usual rules regarding constitutional amendments, particularly those concerning advance consideration and repeated readings, in both the Houses.

Number 01: The most significant amendment which was made with respect to Articles 58(2)(b) & 112(2)(b) *(i.e., originally inserted into the Constitution through the Constitution (Eighth Amendment) Act, 1985)*, were the omission of Articles 58(2)(b) & 112(2)(b) [381] from the Constitution which vests discretionary power in the office of the President in the

[380] Constitution (Thirteenth Amendment) Act, 1997, Published in [PLD 1997 Central Statute 323

[381] Sections 2 & 4 ibid

Federation while the corresponding powers of the Governor in a Province, to dissolve the National/a Provincial Assembly, as the case may be.

Number 02: Similarly, Article 101, which talks about the appointment of Governor of a Province and inserted earlier vide Constitution (Eighth Amendment) Act, 1985, empowering the President to appoint a Governor of a Province in his discretion, this power of the President was done away, while substituting[382] the words *"after consultation with"* with that of the words *"on the advice of"*, accordingly. So after the Thirteenth Amendment now such appointments have to be made by the President *"on the advice of the Prime Minister"* only. This change effected in the constitution had brought a lot of difference in revival of original scheme, because under the constitutional scheme the advice of the Prime Minister was binding on the President.

Number 03: Likewise, the changes were also made in Article 243 as well, which by virtue of RCO of 1985, empowered the office of President to make appointments in his discretion with respect to the Chiefs of the Armed Forces; however, by omission[383] of the words *"in his discretion"* from clause (2)(C) of the said Article, the discretionary power of the President with respect to the appointments of Services Chiefs were also taken away. This amendment, if on the one hand shifted the center of power from the powerful office of the President to that to the weak office of Prime Minister, while on the other, it had also made, the ever powerful office of the President to a toothless Presidency as well, by putting last nail in the coffin of Constitution (Eighth Amendment) Act, 1985.

[382] Section 3 ibid

[383] Section 5 ibid

Conclusion

The 13th Amendment removed the institutional checks and balances on the Prime Minister's power by giving him immunity from being dismissed by unbridled powers of the President by shifting the Presidential System of Governance with that with the Parliamentary Democratic System of Governance, accordingly.

3.14 Fourteenth Constitution Amendment[384]

The Constitution (Fourteenth Amendment) Act, 1997, gazatted on 03rd July, 1997 had inserted a new Article 63A[385] into the Constitution by the Government of Mian Muhammad Nawaz Sharif, which prescribes disqualification for a Parliamentarian on ground of defection etc., if he commits a breach of party discipline in violation to party's constitution, code of conduct, declared policies or votes contrary to any direction issued by the Parliamentary Party to which he belongs; or abstain from voting in the House against party policy in relation to any bill. To put matters in perspective, the amendment inserted as Article 63-A into the Constitution, prevents legislators from casting or abstained from casting voting contrary to the instructions of their party head. This means that legislators must vote in accordance with party head's instructions even if those instructions my conflict with his individual moral and political convictions thereof, carrying additional penal consequences as well that in the event of failure to do so, the same may results in his disqualification and subsequent removal from Parliament, while the Chief Election Commissioner in turn would have to give effect to the decision of the Party Head within seven days of its receipt. It is important to note here that unlike the Constitution (Thirteenth Amendment) Act, 1997, instant amendment too was also rushed through Parliament in a matter of minutes around midnight.

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[384] Constitution (Fourteenth Amendment) Act, 1997, Published in [PLD 1997 Central Statute 324]

[385] Section 2 ibid

Conclusion

Although the proponents of the Fourteenth Amendment, have advance two arguments in its favour, First one was that it penalizes horse-trading by removing those who engage in that activity from Parliament. Second one, it prohibits defections by parliamentarians thereby lending greater stability to the democratic regime. However, in reality the scheme introduced through the article was against the principles of an ideal Parliament, as such the Party leaders received unlimited power to dismiss any of his legislators from Parliament if they spoke or vote against his party which even includes a vote against the Constitution Amendment as well. Moreover, this article has also virtually eliminated any chance of a Prime Minister of being thrown out of office by a motion of no confidence and practically contributed in increasing the influence of powerful groups in policymaking, for which in normal circumstances it would have to lobby several hundred members of parliament to get its preferred policy passed.

3.15 Fifteenth Constitution Amendment[386]

The Constitution (Fifteenth Amendment) Bill, 1998 commonly known as *"Shariat Bill"* was floated and passed by the National Assembly only on 09th October, 1998 during the prevalent Government of Mian Muhammad Nawaz Sharif.

Number 01: The Bill intends to introduce a new Article 2B[387] into the Constitution of Pakistan, through which the Supremacy of Holy Quran and Sunnah (SAW) were accepted and it was declared that these will be the guiding principles for running the affairs of Government. It further declared that the federal government shall be under an obligation to

[386] Constitution (Fifteenth Amendment) Bill, 1998, Published in Mazhar Ilyas Nagi Advocate *"The Constitution of the Islamic Republic of Pakistan, 1973"*, By, Vol.II Edition 2013, at page 1862.

[387] Section 2 ibid

take steps to enforce the Shariah, to establish Salat, to administer Zakat, to promote *Amer bil ma'roof* and *Nahi anil munkar* (to prescribe what is right and to forbid what is wrong), to eradicate corruption at all levels and to provide substantial socio-economic justice in accordance with the principles of Islam, as laid down in the Holy Quran and Sunnah (SAW). However, it could not came up for debate in the Senate in which the then ruling party Sharif had no majority, and lapse accordingly.

Conclusion

It is evident from the statement of objects and reasons for the movement of Constitution (Fifteenth Amendment) Bill, 1997, which based it on the analogy that as the Objective Resolution had already been made part of the Constitution, therefore, it is necessary that Quran and Sunnah (SAW) be also be declared as the supreme law of the land and Islamic Sharia be enforced accordingly. But the legal scholars term this move of Mian Nawaz Sharif, in the similar directions of dictatorship in the country in the name of Islam, by advancing the reason that Constitution was already having sufficient Islamic Provision therein, for catering the issues of existing or future laws in conformity with Injunction of Islam. Similarly, it would also have the effect of empowering Centre more by weakening the federating units, while jeopardizing the concept of Provincial Autonomy at all. Besides above affecting the Fundamental Rights & Civil Liberties of an individual; the Legislative Business of the Parliament, the independence of Judiciary, under the garb of dictatorial rule based on predesired *fatwas* (Religious Scholar's Opinions) obtained from favourite Faqih or Ulema (i.e., Religious Scholars) as well [388].

[388] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 470

3.16 Sixteenth Constitution Amendment[389]

The Constitution (Sixteenth Amendment) Act, 1999 gazetted on 5th August 1999, introduced changes in Article 27 to the Constitution, which provides protection to the fundamental right of a citizen with respect to safeguarding against discrimination in service.

Number 01: The Act under discussion made amendments in first proviso attached to clause (1) of Article 27 by substitution[390] of the words *"twenty"* with that of the word *"forty"*. The amendment was aimed at to encourage representation of minorities and people from disadvantaged areas in services of Pakistan. It is pertinent to note here that the original Constitution of Pakistan in Article 27 has prescribed10 year quota reserved for backward class of people for induction in government services, the initial period of which was increased through the RCO of 1985 to 20 years, which was through the instant amendment again increased to 40 years extending it to August, 2013.

Conclusion

It is evident from the statement of objects and reasons for the movement of Constitution (Sixteenth Amendment) Act, 1999, that Article 27 of the Constitution which provides safeguards against discrimination in services to people of backwards areas via clause (1) of original constitutional scheme, provides safeguards in service representation for initially a period of twenty years, which was got extended to forty years late on. Hence, while feeling the dire need of equal opportunity of education and other facilities, which were not yet available to such citizen, that's the instant amendment safe guard their such rights over the extended period of forty years, again.

[389] Constitution (Sixteenth Amendment) Act, 1999, Published in [PLD 1999 Central Statute 413]

[390] Section 2 ibid

(H). CONSTITUTIONAL AMENDMENTS & FIRST MARTIAL LAW BY GENEARL PERVAIZ MUSHARRAF (1999 TO 2003)

Pakistan again witnessed third martial law in the year 1999, when due to rift inter se the offices of the then Army Chief General Parvez Musharraf & the Prime Minister Mian Muhammad Nawaz Sharif, ignited over the famous Kargil crises which laid down foundations of distrust among the afore said two offices, which finally culminated into the imposition of military rule[391] under the leadership of former, along with dismissal of the Government of the later one. It is important to note here that General Pervaiz Mushrraf being military dictator while following the footsteps of his predecessor in office *(i.e., General Zia-ul-Haq),* held the Constitution in abeyance without abrogating it completely and secondly by assuming the office of *"Chief Executive"* unto him instead of opting for the office of *"Chief Martial Law Administrator"*, as were the practice in the past. However, things which remain common inter se the dictatorial rules were that the affairs of the government were run through the Provisional Constitution Order No: 1 of 1999, and not by the mandates of Constitution in this regard.

However, during the course of time when the act of military coup vis a vis of the ouster of Prime Minister Mian Muhammad Nawaz Sharif Government were got challenged under Article 184(3), the Supreme Court under the leadership of the then Chief Justice Mr. Irshad Hassan Khan, upheld the same while giving 3 years period to Non-State Actor in order to hold general elections as per his seven point agenda as spelled out in his speech of 17th October, 1999, while applying the doctrine of State necessity and the Principle of *"salus populi suprema lex"*, besides authorizing him to legislate including granting illegally the

[391] Proclamation of Emergency (1999) Published in [PLD 1999 Central Statutes 448]

additional power to amend the Constitution as well[392]. Pursuance to the unauthorized license of the Court, the military dictator in the capacity of Chief Executive at the first instance paved way for his own entry into the throne of Presidency, while forcing the incumbent in office i.e., Mr. Muhammad Rafiq Tarar, to leave without observation of any constitutional or legal formalities thereof.[393] Even, at this moment, the nature also blessed him with an opportunity in making his perpetual entry into the office of Presidency, when the tragic incident of 9/11 took place in the United States of America.

Hence, while following the footsteps of his predecessors in office *(i.e., General Ayub Khan in 1960 & General Zia-ul-Haq in 1984)*, General Pervez Musharraf also managed to elect himself, as the President of Pakistan vis a vis holding the office of Chief Executive, through the conduct of a controversial Referendum which was held on 30th April, 2002[394]. Besides making amendments into the Constitution under the garb of apex Court's permission which had in return badly stroked the will of the people (i.e., The Constitution of 1973). Needless to state that, it was pursuance to marriage inter se the then Government and that of the Military Dictator that finally the Parliament endorsed the LFO of 2002 of the military dictator, through incorporation of the Constitution (Seventeenth Amendment), Act, 2003, which had badly affected the fabric of Constitution, as discussed in detail herein below.

[392] Syed Zafar Ali Shah vs. General Pervez Musharraf, PLD 2000 SC 869

[393] President's Succession Order, 2001 [C.E. Order No. 3 of 2001] Published in (PLD 2001 Central Statutes 392), See also for further details, Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 482.

[394] Referendum Order, 2002 [Chief Executive's Order No. 12 of 2002] Published in (PLD 2002 Central Statutes 218)

3.17 Seventeenth Constitutional Amendment[395],

The Constitution (Seventeenth Amendment) Act, 2003 gazetted on 31th December, 2003, which even lives today had been based on the constitutional amendments introduced by the military dictator through his controversial Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] (herein after called as LFO 2002), gazette on 21st August 2002, whereby through Article 3 of the said order and later on by the issuance of further amendment Orders from time to time; the Constitution of the Islamic Republic of Pakistan, 1973 was got amended with respect to 31 Articles & addition of one Schedule (i.e., Sixth Schedule). That's why LFO 2002 & its amendments as made from time to time can be regarded, with due justification, as an integral part of the Seventeenth Amendment, without appreciation of which in jexta- position, the significance and importance of the Seventeenth Amendment cannot be analyzed in totality.

Number 01: The first ever change[396] introduced by the LFO 2002 was with respect to Article 17 to the Constitution, 1973, guaranteeing thereby to a citizen of his right to have freedom of association, which was amended by insertion of the words *"Public Order"* in to clauses (1) & (2) after the words *"integrity of Pakistan"*, enlarging thereby the scope of restrictions over the formation of association even to the matters of public order & integrity of Pakistan as well. The prominent move of the military dictator with respect to the Freedom of Association was the addition of a proviso to clause (2) to article ibid, restraining thereby the political parties from promoting sectarian, ethnic regional hatred or animosity or to constitute etc., militant group or sections, besides above his positive step of making addition of clause (4) to the article ibid, through which every political party was bound subject to law

[395] Constitution (Seventeenth Amendment) Act, 2003 Published in [PLD 2004 Federal Statute 65]

[396] Item 1 to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604

to hold intra party elections to elect its office bearers and party leaders; repelling thereby the influence of certain individuals including that of the party heads, who were being involved in running the affairs of their respective parties as Single Member Private Limited Company, respectively.

Number 02: Article 41(7), which earlier by virtue of the RCO 1985 of the then military dictator *(i.e., General Zia-u-Haq)* had given protection to his own election conducted through the mode of a Referendum for his being the President of Pakistan; was once again put to further amendments[397] on similar footings the present military dictator had too, similarly got himself fully protected with respect to conduct of his own elections via Referendum as being the office of President of Pakistan.

However, when the Constitution (Seventeenth Amendment) Act, 2003 table before the Parliament, the researchers noticed a surprising change in paragraph (b) to clause (7) of Article 41 wherein a proviso was added to the effect that by virtue of Article 63 (1)(d) to the Constitution, the disqualification incurred by a member of Parliament for holding another office of profit will become operative on Dec 31, 2004, interestingly when there was no such paragraph (b) existed in the Constitution; rather the admitted position on the record reveals that the same had been introduced by the LFO 2002.

Thus, for all practical purposes, the Constitution (Seventeenth Amendment), Act, 2003 had amended the LFO 2002 instead of amending the Constitution, if the issue is examined from the angle of view, that the LFO 2002 had not become part of the basic law. Apart from above the Constitution (Seventeenth Amendment) Act, 2003 had also added clauses (8) & (9) to the article ibid, the former (i.e., clause 8) one endorsed the President's

[397] Item 2 ibid

Election, while the later one (i.e., clause 9) empowered the Chief Election Commissioner to conduct, regulate and manage the vote of confidence in favour of the military dictator, being a transitional provision, with shorter life for current term of the office of President, as depicts from the bare reading of proviso attached to clause (9).

Number 03: Article 51(1) earlier amended by RCO of 1985, increased the number of the members of the National Assembly from 200 (two hundred) to 207 (two hundred and seven), LFO 2002 has re-substituted[398] it with a new clause (1A), increasing further the number of its members from 207 to 332 with specification of the allocation of Provincial and Regional seats, as well. Similarly, clause (2) of Article ibid, which by RCO of 1985 also increased the age of a voter from *"eighteen"* to *"twenty one"* years; the LFO 2002 has once again restored it back to the original figure of *"eighteen"* years.

Likewise clause (2A) of the Article ibid earlier substituted through RCO of 1985 with specifying the allocation of 20 reserved seats non-Muslim community, however, the LFO 2002 re-substituted it with the new clause (2A), by reducing the 20 reserved seats allocated for the non-Muslim community that to 10 reserve seats, once again. Needless to state here that this move of the allocation of 10 reserved seats meant for the non-Muslim *(i.e., Christian, Hindus, Sikhs, Buddhists, Parsi and Quadiani's etc.,)* creates uncertainty with respect to hidden issue, such as how much share would be each community will pocket?

Again clause (4) to Article ibid was also totally substituted with new clause (4) which explained that for the purpose of election to the National Assembly the constituencies for the general seats shall be single member territorial constituencies *(i.e., the whole Province)* and the members who have to fill such seats shall be elected by direct and free votes in

[398] Item 3 ibid

accordance with law. However, the constituency for the seats reserved for non-Muslims shall be the whole country, but the seats reserved for women, allocated to a Province, be filled by proportional representation system of political parties list of candidates on the total number of general seats secured by each political party from the Province concern in the National Assembly.

While likewise seats reserved for non-Muslims were also be declared to be elected through proportional representation system of political parties secured/won by each political party, on the basis of total number of general seats in the National Assembly, including the independent returned candidates or the one who joined such political party within 03 days of the publication of the official gazette of the names of the returned candidates.

It is important to note here that LFO 2002 has also omitted clauses (4) to (6) from the original constitutional scheme, which sets the allocations criteria for the reserved seats for women, the formation of electoral college for filling election of candidates on such reserved seats including allocating reserved seats for the members to be elected from Federally Administered Tribal Areas (FATA) at discretionary of the President.

Number 04: Articles 58 also receive an addition[399] of a new paragraph (b) to clause (2); which in the past was earlier inserted through the Constitution (Eighth Amendment) Act, 1985 but later on omitted through the Constitution (Thirteenth Amendment) Act, 1997, however LFO 2002 once again revived to its original status as had been introduced for the first time through the Constitution (Eighth Amendment) Act, 1985; tilting thereby the center of powers from the office of Prime Minister to that of the office of President once again, by empowering him to dissolve the National Assembly in his discretion. It is also important to

[399] Items 4 & 15 ibid

note here that similar changes were also brought in Article 112 clause (2), with respect to the exercise of discretionary powers of the dissolution of Provincial Assembly, too. However, in the final draft of the Constitution (Seventeenth Amendment) Act, 2003 a new clause (3) was also added[400] in to Articles 58 & 112, providing mechanism for sending a reference to the Supreme Court within 15 days in the event of the dissolution of the National/Provincial Assembly (ies) as the case may be, whose decision was also held to be final.

Number 05: Article 59 defining the composition of the Senate and as such was earlier amended by RCO of 1985/Constitution (Eighth Amendment) Act, 1985, was once again put to further amendment[401] whereby clause (1) was totally substituted by a new clause (1), which increased number of its member from the last increased figure of *"eighty seven"* to that now as *"one hundred"* members, with necessary specification of its further distributive allocation scheme as well. Likewise the LFO 2002 brought changes in clause (3) paragraphs (c) & (d) as well, while defining the term of retirement for each category of member in the first three years and likewise in the next threes, as the case may be.

Number 06: Article 62 which talks about the qualification for being member of Majlis-e-Shoora (Parliament) and equally applicable by reference to the members of Provincial Assembly (Article 113) as well; which under its Original Constitutional Scheme as contained under paragraph (b) puts restrictions, on an intended candidate from seeking membership of Parliament, that he had to be enrolled as voter in electoral roll for election to that very part of the Assembly, but LFO 2002[402] relaxed this restriction on such candidate by allowing all the

[400] Section 3 to Constitution (Seventeenth Amendment) Act, 2003 Published in [PLD 2004 Federal Statute 65]

[401] Item 5 to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604

[402] Item 6 ibid

citizens to contest on general or reserve seats *(i.e., minorities)*, by extending the territorial/geographical limits to any part of Pakistan. However, the criteria for the reserved seats for women in a Province were restricted with the precondition of her enrollment in that very Province only.

Number 07: Article 63 which originally sets 04 grounds of the disqualifications from being member of the Parliament and as such increased with further grounds of such disqualification by the RCO of 1985; was once again put to further amendment via LFO 2002[403] which totally substituted the earlier paragraphs (h) to (j) & (p) to (s) with that of the new paragraphs of (h) to (j) & (p) to (s), while placing life time bar against a person if he/she by virtue of the additional grounds for disqualification in paragraph (h), was convicted on charges of corrupt practices, misuse of power or authority; likewise by virtue of paragraph (i) dismissed from service of Pakistan etc., and also by virtue of paragraph (j) removed or compulsory retired from service of Pakistan etc., which initially puts temporary bar in their way but the new scheme make it permanent, while omitting the specified time for lifting of such bar from the said paragraphs.

Similarly, the newly added paragraphs (p) has also made additional grounds to the disqualification list as well, such as if he was convicted and sentence to imprisonment for having absconded by a competent Court, or by virtue of paragraph (q) has obtained loan for an amount of two million rupees or more, from any bank or financial institution cooperative society or cooperative body in his own name or in the name of his dependents; or likewise by virtue of paragraph (r) he or his spouse or any of his dependents has defaulted in payment of government dues and utility expenses including telephone, electricity gas and water charges in excess of ten thousand rupees, for over six month at the time of nomination papers or he by

[403] Item 7 ibid

virtue of paragraph (s), for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of Provincial Assembly under any law for the time being in force; hence, these all grounds now carry life time bar. This move of the military dictator, while floating such like paragraphs, seems to be made, especially to screen off his bitter opponent from the political scene, particularly the top leadership of the Pakistan Muslim League (Nawaz Group).

Again the LFO 2002 also changed the process of disqualifying a member of the Parliament as well, while substituting of its original clause (2) by splitting it further into two new clauses i.e., (2) & (3) respectively, whereby under the former, to answer the question as to, whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member? the Speaker or as the case may be the Chairman *(being mere as a post office)*, within 30 days from the day of raising such question, were bound to lay such question before the office of Chief Election Commissioner while under later clause (3) the Chief Election Commissioner was bound down to lay such question before the Election Commission which has to give its decision thereon but not later than 03 months from the date of its receipt by the office of Chief Election Commissioner.

This change had actually snatched the discretionary powers entrusted to the office of Chief Election Commissioner of deciding the question of disqualification of a member from being a member of the Parliament in its sole opinion, by now entrusting the same to the Election Commission as a whole body comprising on the members of Provincial Chief Election Commissions as well besides setting a specified time period of 03 months for them to render their decision thereon.

Number 08: Article 63A a newly inserted via Constitution (Fourteenth Amendment) Act, 1997, prescribing in detail disqualification for a Parliamentarian on the grounds of defection; has been once again put to further amendment via LFO 2002[404] by totally substituting the text of original Article prescribing new scheme thereof, while explaining with clarity about the fate of the member of a Parliamentary Party which composed of a single political party in a House, if even resigns from membership of his political party or joins another Parliamentary Party; votes or abstains from voting in the House contrary to any direction issued by the Parliamentary party to which he belongs in relation to:-

(a). election of the Prime Minister or the Chief Minister;

(b). vote of confidence or a vote of no confidence, or that of

(c). the Money Bill.

In all such eventuality such delinquent candidate may be served with a show cause notice and subsequently be declared in writing by the Head of the Parliamentary Party to have defected from the political party, who additionally was also bound down to forward a copy of his such declaration to the Presiding Officer (i.e., Speaker of National/Provincial Assembly & Chairman of the Senate as the case may be) besides serving the same on the delinquent member thereto. It is only then that such Presiding Officer within two days of the receipt of such declaration, refer the matter to the Chief Election Commissioner who shall lay it before the Election Commission for its final decision thereon, within 30 days. However, it is upon confirmation of the declaration by the Election Commission of Pakistan , that the seat of delinquent candidate stands vacant & the person ceases to be member any more. Needless to state here that it also provides mechanism to the aggrieved person as well, who may agitate the impugned orders of Election Commission by preferring an appeal to the Supreme Court

[404] Item 8 ibid

within 30 days, which shall decide such appeal within a period of 03 months from the date of filing of such appeal.

Hence, keeping in view the above, the amendment in hand on the face of it seems to be against the true democratic principles, as such it does not allow even a member of Parliamentary Party composed on single political party in the House upon his election even to tender resignation of his seat upon his own sweet will, even if he does not intend to join another political party nor he could be as such allowed to cast his vote with free mind as per his conscious decision in respect of the election of a Prime Minister, Chief Minister or vote of confidence or vote of no confidence, or even to a money bill, as the case may be.

Number 09: Article 70 relating to introduction and passing of bills with respect to any matter in the Federal Legislative List or in the Concurrent Legislative List and as such was earlier amended via RCO of 1985, was once again put to further amendment via LFO 2002[405], whereby in clause (2) of the article ibid, the words of *"considered in a joint sitting"* were substituted with that of the words and figures *"referred to a Mediation Committee constituted under Article 71 for consideration and resolution thereon"*.

Likewise changes were also introduced in clause (3) to Article 70, by totally substituted it with a new clause (3), which state that the bill referred to the Mediation Committee under clause (2) shall be considered by it within ninety days, which shall formulate an agreed bill which is likely to be passed by both Houses of the Majlis-e-Shoora (Parliament) and finally placed it before the office of President for his final assent. In nut shell the LFO 2002 the probable differences inter se both the Houses were tried to be settled

[405] Item 9 ibid

via new mechanism of the Mediation Committee instead of referring it to the earlier scheme of considering the issues in Joint Sitting of the Houses.

Number 10: Article 71 being a new Article via LFO 2002[406], prescribing in detail the working of the Mediation Committee which is composed on eight members nominated from each Houses, headed by the Chairman, who being one of the nominee of the House originating the bill and a Vice-Chairman being one of the nominee of the other House takes decision by majority with respect to matter in issue, which were referred to them. While, the President was authorized, to make rules with consultation of the Speaker of National Assembly and Senate for regulating it's such business.

Number 11: Article 73 prescribing the procedure with respect to Money Bill and as such minutely amended in text of the Original Constitutional Scheme via RCO 1985, was again put to further amendment by LFO 2002 in clause (1) by re-substituted it with the new clauses (1) & (1A) respectively[407], the former of which via its proviso entrusted due role to the Senate by allowing it to take part in the law making process in respect of Money Bill including that of the Finance Bill which contains the Annual Budget Statement therein, by binding the National Assembly to transmit a copy of it's such bill to the Senate which shall within seven days of the receipt, make recommendations thereon; while by virtue of the later clause the National Assembly was bound down to considered those recommendations accordingly. So by this way the Original Constitutional Scheme providing sole discretion of the presentation and passage of the Money Bill exclusively vesting in the domain of National

[406] Item 10 ibid

[407] Item 11 ibid

Assembly was diluted by entrusting due role of legislation in this respect, to the Senate as well.

Number 12: Article 75 prescribing the method for the President's assent to Bills, which initially was amended by RCO of 1985 and later on by the Constitution (Eighth Amendment) Act, 1985[408], respectively, has once again put to further amendment via LFO 2002[409], which brought changes in clause (2) as substituted by the Constitution (Eighth Amendment) Act, 1985 only, where from the words used *"in joint sitting"* were totally omitted, besides substituting the words and comma *"by the votes of the majority of the members of both Houses present and voting"* with that of the words and figure and comma *"in accordance with Article 70"*, therein to. The reasons of such change were obvious, as after the introduction of new mechanism for the consideration of disputed Bill in a newly constituted body (i.e., Mediation Committee) as introduced by the LFO 2002, all such disputes inter se the Houses were now been dealt with through the Mediation Committee instead of referring it to the joint sitting of the Houses.

Number 13: Article 101 pertaining to the appointment of Governor, which earlier amended via RCO of 1985 then again by the Constitution (Eighth Amendment) Act, 1985 and thereafter by the Constitution (Thirteenth Amendment) Act, 1997; was once again put to further amendment via LFO 2002[410] in its clause (1) by re-substituting the words *"on the advice of"* as lastly introduced by the Constitution (Thirteenth Amendment) Act, 1997, with that of the words *"after consultation with"*, thereof.

[408] Section 8 to the Constitution (Eighth Amendment) Act, 1985

[409] Item 12 ibid

[410] Item 13 to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604

By this way the LFO 2002 had actually revived the dictatorial amendment as introduced through the Constitution (Eighth Amendment) Act, 1985, while overruling the amendment effected with respect to clause (1) as lastly introduced by the Constitution (Thirteenth Amendment) Act, 1997, by civilian government accordingly. So, by this change the President has been given absolute authority of making discretionary appointment of a Governor of a Province while having formal consultation (which was not binding as) with the Prime Minister and not on his advice, thereof.

Number 14: Article 106 via LFO 2002[411] substituted clause (1) by introducing new scheme for the Provincial Assemblies of federating units, by increasing the number of General Seats and reserve seats for women and non-Muslims respectively, for each of the respective Provinces. Similarly, it also substituted clause (2) in paragraph (b) the words "twenty-one" with that of the words "eighteen" by minimizing & restoring the age limit to its originally fixed per original Constitutional scheme. Likewise clause (3) to it was totally substituted with new clause (3), while explaining that for the purpose of election to the Provincial Assembly the constituencies for the general seats shall be single member territorial constituencies *(i.e., the respective whole Province)* and the members who have to fill such seats shall be elected by direct and free votes in accordance with law.

However, each Province as a whole was also held to be a single constituency for the seats reserved for women and non-Muslims, who were as such to be elected through proportional representation system of political parties secured/won by each political party, on the basis of general seats secured by them in the Provincial Assembly, which includes the independent returned candidates or the one who joined such political party within 3 days of

[411] Item 14 ibid

the publication of the official gazette of the names of the returned candidates, as well. IT is worth to point out here that unlike the changes effected under Article 51, the instant amendment too has omitted the original Constitutional Schemes in clauses (4) to (6), as well.

Number 15: The LFO 2002[412] also added a new Article (140-A) under the marginal title as "Local Government" to the Constitution through which it made it mandatory for each Province to establish a Local Government system and devolve authority to the elected representatives of the local governments, thereof. Through this move General Pervaiz Musharraf had tried to revive the concept of Basic Democracy System as similarly introduced in the past by earlier military dictator General Ayub Khan, in order to dilute the influence of political resistance.

Number 16: Apart from above the LFO 2002[413] had also introduced a new Article (152A) under the marginal title as "National Security Council", establishing thereby a forum comprising over the members of the Civilian and the Military Leadership for having joint consultation on strategic matters pertaining to the sovereignty, integrity and security of the State; and the matter relating to democracy, governance and inter-provincial harmony, as the case may be. However, the Constitution (Seventeenth Amendment) Act, 2003 had later on deleted this provision[414], thereof, which as a matter of fact never remains as the provision of the Constitution at all.

[412] Item 16 ibid

[413] Item 17 ibid

[414] Section 5 to the Constitution (Seventeenth Amendment) Act, 2003 published in [PLD 2004 Federal Statutes 65]

Number 17: Similarly, LFO 2002[415] also amended Articles 179 & 195 in its clause (1), whereby the retiring age of a Judge of Supreme Court and that of a High Court were increased from their respective original ages of the retirements *"Sixty Five"* & *"Sixty two"* to that of *"Sixty Eight"* & *"Sixty Five"* respectively, ostensibly extending illegal benefits to the PCO Judges who supported the martial law. However, the Constitution (Seventeenth Amendment) Act, 2003 had once again erased[416] the undue enhancement of 03 years in retiring ages of the Judges of Apex Court, as introduced through the LFO 2002 by reviving the original constitutional positions of the retiring age of the Judges of Supreme & High Court to *"Sixty Five"* & *"Sixty Two"* years, respectively.

Number 18: Article 193, which talks about the appointment of High Court Judges and by virtue of its clause (2) prescribes certain qualification for becoming judge of High Court was substituted through the LFO 2002[417], whereby the original minimum age limit fixed at the time of framing of the Constitution as *"forty years"* was substituted to *"forty five years"* thereof.

Number 19: Article 199 wherein via Constitution (Fourth Amendment) Act, 1975 clause (4A) was inserted, curtailing thereby the jurisdiction of High Courts in the matter of stay of recovery, assessment or collection of public revenue, as by virtue of it the stay so granted would stand ceased upon the expiry of the Sixtieth Day, unless the matter was finally decided

[415] Items 17A & 17C to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604

[416] Sections 6 &7 to Constitution (Seventeenth Amendment) Act, 2003 Published in [PLD 2004 Federal Statute 65]

[417] Item 17B to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604.

once for all by such Court. The LFO 2002[418] limited the period of the grant of an injunction to six months only while substituting the words and commas *"unless the case is finally decided or the interim order is withdrawn by the Court earlier"* with that of the comma and words *"provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made"*. It is important to note here that the same LFO 2002 while merging the legislative intent of clauses (4A) and (4B) into a single clause (4A) also omitted clause (4B) therefrom which was earlier inserted through the RCO of 1985.

Number 20: Article 203C talking about the composition of the Federal Shariat Court which was inserted through the Constitution (Amendment) Order, 1980 [P.O I of 1980], was once again subject to further amendment whereby LFO 2002[419] brought changes in its clause (9), replacing the expression *"salary"* with that of the word *"remuneration"*, thereof, besides adding a proviso to the same, explaining thereby that where a Judge is already drawing a pension for any other post in the service of Pakistan the amount of such pension shall be deducted from the pension admissible under this clause.

Number 21: Article 209 which speaks about the composition and function of the Supreme Judicial Council, a body which inquire into issues of the misconduct against the Judges of apex Court, was put to further amendment via LFO 2002[420] in its clause (5) whereby the original text of which was substituted for the words *"received from the Council or from any other source"* with that of the commas and words *"from any source, the Council or"* , while similar insertions of the words *"or the Council may, on its own motion"* in place of the words

[418] Item 18 ibid

[419] Item 19 ibid

[420] Item 20 ibid

"Council to" therein, by virtue of which it allowed the Supreme Judicial Council to act on its own motion too, with respect to the disciplinary matters of the Judges of Superior Courts, as well.

Number 22: Article 218 which prescribed the constitution and functioning of the Election Commission, with a temporary constituting scheme, as introduced by the framers of Constitution, with entrustment of the specific duties of the conduct of each general elections to the National and Provincial Assembly only, was substituted in clause (1) via the LFO 2002[421] providing constitution of a permanent Election Commission scheme, which not only given to it, the mandate of conducting the elections of both the Houses of the Majlis-e-Shoora (Parliament) and of the Provincial Assemblies but also the conduct of elections for such other Public Offices too, as may be specified by Act of Parliament in this regard or until such law is made, by the Orders of the President as the case may be.

It is also worth to mention here that the LFO 2002 also substituted the words *"two"* with the words *"four"* in clause (2) paragraph (b) besides inserting the words *"from each Province"* in the Article, increasing the number of the Judges of the High Courts as being members of the Election Commission, by raising it from the initial figure of "two to four", in addition to giving equal representation to each of the Province thereof. This was a positive move of the equal representation to Provinces advanced by military dictator's among his unauthorized amendments made into the Constitution.

[421] Item 21 ibid

Number 23: Article 224 which prescribes the time of election and bye election, was subjected to further amendment via LFO 2002, [422] in its clause (1) while substituting the words *"preceding"* with that of the words *"following"*, making the correct sense of its clause which earlier reads as follows :

> *the general election to the National Assembly or a Provincial Assembly shall be held within a period of sixty days immediately preceding [but after the change through LFO now change with the words* ***"following"*** *(emphasis supplied)] day on which the term of the Assembly is due to expire,.....*

It is also important to note here that the LFO 2002 also added a proviso to clause (1) as well, which empowered the President or as the case may be the Governor with previous approval of the President, to appoint caretaker Cabinet, in the event of the dissolution of an Assembly.

Likewise, LFO 2002 also made changes in clause (4) besides making addition of new clauses (6) & (7) into it, whereby the *first in order* [i.e., clause (4)] inserted the words *"general"* after the words and commas *"Provincial Assembly, a"*, making it clear that only the general seats if become vacant before one hundred and twenty days to the expiration of a running Assembly, in that eventuality the general seat will be filled within sixty days thereof, while the *second in order* [i.e., clause (6)] explained the mode of filling reserve seats for women including of the minorities, which had fallen vacant due to death, resignation or disqualification of a member, which was stated to be filled by the person in order of precedence from the party list submitted to the Election Commission for the last general election, without conducting any fresh elections thereof as is the case with respect to the

[422] Item 22 ibid

general seats. Similarly, the *last in order*, debarred the caretaker Prime Minister or as the case may be the caretaker Chief Minister from contesting the immediate following election of such Assembly, if the assembly was dissolved pursuance to powers exercise under Articles 58 or 112 to the Constitution as the case may be.

Number 24: Article 243 which talks about the Command of Armed Forces, was also subjected to further amendment via LFO 2002[423] in its clause (2) paragraph (a), (b) besides omitting and substituting of the new paragraph (c) with that of the earlier paragraph (c) as well, whereby it has change the Original Constitutional Scheme of the powers vesting in the office of President of raising maintaining the Military, Naval and Air Force of Pakistan etc., subject to law with that of the total discretion of the President in respect to the appointments of the Chiefs of the Armed Forces referred above, besides the determination of their salaries and allowances as well. However, this scheme was subsequently got reversed in final draft of the Constitution (Seventeenth Amendment) Act, 2003, in clause (3) to it, by substitution of the words *"in his discretion"* with that of the words *"in consultation with the Prime Minister"*,[424] once again.

Number 25: Article 260 defining the definitions of different terms used in the constitution was subjected to further changes[425] whereby the new word *"consultation"* was inserted therein, while explaining the meanings in the following terms, that it *"shall, save in respect of appointments of Judges of the Supreme Court and High Courts, mean discussion and*

[423] Item 23 ibid

[424] Section 8 to the Constitution (Seventeenth Amendment) Act, 2003 published in [PLD 2004 Federal Statutes 65]

[425] Items 24 to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604.

deliberation which shall not be binding on the President". The apparent object of such insertion seems to protect the use of autocratic cum discretionary powers vested in the office of the President by the Constitution, without any hindrance, while creating confusion, in this regard.

Number 26: Likewise, Article 268 describing the continuance in force and adaptation of certain laws, the clause (2) of which maintains detail lists of the laws enumerated in the Sixth Schedule attached to that Constitution, which as per the Original Constitutional Scheme were declared not to be altered, repealed or amended without the previous sanctions of the President thereof. The LFO 2002[426] has brought amendment therein by insertion of the words *"expressly or impliedly"* after the words *"amended"* while similar insertions of the words *"accorded after consultation with the Prime Minister"* after the words *"President"*, therein, with an apparent object to protect the legislation carried out & protect under Sixth Schedule made during the course of his military regime; besides clarifying additionally that an amendment even express or implied cannot repeal the legislation which is carried out by the military dictator ostensibly after the consultation of Prime Minister, thereof.

However, through the Constitution (Seventeenth Amendment) Act, 2003, by addition of a proviso to clause (2) of Article 268[427], had initially provided full protection to the laws mentioned inserted through its entry No. 27 to 30 and that of entry No. 35, *[i.e., the Provincial Local Government Ordinances of 2001 and the Police Order of 2002]*, but

[426] Item 25 ibid
[427] Section 9 to the Constitution (Seventeenth Amendment) Act, 2003 published in [PLD 2004 Federal Statutes 65]

later on its permanent protection were reduced to a period of six years, only, through sunset clause ipso facto.

It is important to note here that surprisingly the political deal effect inter se the military dictator and the then Mutahida Majlis-e-Ammal (MMA) lead government had never join any issue with respect to the insertion of entries at entry Nos. 25, 26, 31 to 34, i.e., of the State of Pakistan Act, 1956, or the National Accountability Bureau Ordinance, 1999, or the Election Commission Order 2002, or the Conduct of General Elections Order 2002 (which revived the joint electorate, and bars non-graduates from contesting elections to assemblies and the Senate), and the Qualification to Hold Public Offices Order, 2002 (which bars Prime Minister/Chief Minister from holding their respect office for the third term thereof), as the case may be. This attitude of the politicians depicts the tendency of their bargain in violation to the dictates of merits.

Number 27 Article 270AA which provides Validation to the President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, proclamations, rules, orders or bye-laws and all other such laws which were made in between the 12th of October 1999 till the date on which the above referred articles was to comes into force issued in the capacity of President and Chief Executive jointly or severely were give full protection even from its judicial scrutiny thereof. However, a broader changes were witnessed when through the Constitution (Seventeenth Amendment) Act, 2003, the text of Article ibid inserted via LFO 2002[428] was totally substituted[429], more specifically with certain differentiating characteristics

[428] Item 26 to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604

[429] Section 10 to the Constitution (Seventeenth Amendment) Act, 2003 published in [PLD 2004 Federal Statutes 65]

i.e., firstly the actions taken & laws etc., made since 1999 till the passage of instant amendment, have not only been validated but they have also been affirmed by the Parliament as well; secondly, that in the latest version the expression *"amendments in the Constitution"* has been added at four places with an object to protect, validate and affirm the actions taken by Gen. Pervez Musharraf after October 12, 1999, with providing protection of judicial scrutiny of such action by any of the available legal forum, thereof.

Number 28: Article 270B which earlier validated the elections of parliament held under the military regime of previous dictator was once again amended via LFO 2002[430], whereby after the figures and comma "1977", the words commas, the figures, brackets and letters "the Conduct of General Elections Order, 2002 (Chief Executive's Order No: 7 of 2002)" were inserted thereto, where through the general elections conducted during the military regime of Parvez Musharraf were also given due protections as well.

Number 29: Likewise Article 270C being new Article was also inserted via LFO 2002[431] , in order to protect the consequences of the Oath of Office (Judges) Order, 2000, under which a number of judges of the Constitutional Courts (i.e., Supreme Court, High Court or Federal Shariat Court) were either appointed, given oath or not having been given or taken oath under that very order or who have as such ceased to continue to hold such office were declared to be validly appointed, ceased under the Constitution. This move bar the legal anarchy of the validity of such judges actions, which they perform in the capacity of being judges of the apex Courts.

[430] Item 27 to Schedule attached to Legal Framework Order, 2002 [C.E. Order No. 24 of 2002] published in [PLD 2002 (Supplement-Part-III) Federal Statute 1604

[431] Item 28 ibid

Number 30: Lastly the Sixth Schedule to the Constitution which provided protection to the laws listed therein vis a vis even the similar laws (24 in number) which were enforcement before coming into force of the LFO 2002 as well, besides adding [432] 11 more laws via LFO 2002 to the list referred above, thereto.

Conclusion

Hence from the above discussion it is clear that General Pervez Musharraf has proved to be one up on his predecessors in uniform, i.e., Field Marshal Ayub Khan, General Yahya Khan and General Zia-ul-Haq, in the constitutional schemes. As apparent that the amendments made to the suspended Constitution of 1973, were undoubtedly of him, by him and for him only. Musharraf was not the first "soldier statesman" to attempt a "political revolution" through constitutional changes, but there is a major difference in his case, as General Ayub Khan and General Zia-ul-Haq, who gave the nation their own versions of the Constitution, put on the pretense of securing the "consent of the people" by getting them ratified by the chosen National Assembly of the day. On the contrary, the interesting thing to be noted with respect to the Mushrraf's LFO 2002 is that it had introduced various amendments during the course of the suspension of the Constitution, as by virtue of Article 1(2) it came into force at once, i.e., the day on which it is gazette thereof 21st August, 2002, while the provisions of the Constitution were came into force later on in piece meals[433]. Leaving space for the hot debate among the legal experts, as to the fact that, could the LFO 2002 which came at once, be mean the revival of the Constitution as amended by Musharraf,

[432] Item 29 ibid

[433] Legal Framework Order, of 2002 (date of coming in force of provisions of the Constitution) of dated 16th November, 2002: [PLD 2003 (Supplement-1, Part-I) Federal Statutes 952 & Legal Framework Order, of 2002 (date of coming in force of provisions of the Constitution) of dated 23rd November, 2002: [PLD 2003 (Supplement-1, Part-I) Federal Statutes 952

particularly, when its different provision came into effect later on, practically. Similarly, pursuance to a deal effected inter se the then Government and that of the military dictator, the then Parliament endorsed the Constitution (Seventeenth Amendment) Act, 2003, while putting the seal of ratification over the Referendum of 2002 and swallowing over 90 per cent of the LFO 2002, into the Constitution, which has pushed the system of country closer to the Presidential Form of Government.

However, it can be said that some of these provisions, such as holding intra party elections, lowering of the voting age, and increase in the strength of Assemblies and the Senate *(by over burdening the national exchequer)* or reservation of seats for women, conferring powers unto Supreme Judicial Council to enquire misconduct of the apex Court's Judge suo motu, enjoyed democratic support, as well. On the other hand reviving the controversial powers of the President under Article 58(2)(b) to dissolve the National Assembly in his discretion; introduction of the institution of National Security Council (NSC) through the LFO subordinating the civilian authority to the Military authority; the insertion of important laws in the Sixth Schedule had badly affected the legislative powers of the Parliament and that of the Provincial Assembly too, while depriving both the legislature of their prime duty of legislating in addition to affecting the Provincial autonomy as well.

(I). CONSTITUTIONAL AMENDMENTS & SECOND MARTIAL LAW BY GENEARL PERVAIZ MUSHARRAF (2007-2008)

The Second Martial Law of the General Pervaiz Musharraf came as a result of the challenge cast to the acceptance of nomination papers of General Pervaiz Musharraf for his candidature for the Presidency while having been in army uniform, when the matter was under discussion before the 11 member bench of the Supreme Court[434]. In which before the Court could reach to its final conclusion, that all of a sudden the military dictator i.e., General Musharraf has issued a Provisional Constitutional Order (PCO) by imposing emergency rule throughout of the country, holding the Constitution in abeyance while restricting the emergency to this time to the dissolution of apex judiciary only, while leaving the Assembly intact, after leveling the charges thereon of overstepping its limits and interfering with the war on terror and also assuming unto it the executive and legislative functions[435], respectively.

Pursuance to the above move, bulk of the sacked judges of the apex Courts were either given oath of office or likewise were not offered such oath at all , while in other cases even the one who refused to take oath under PCO were shown the doors[436] respectively, besides putting curbs on the Lawyers community in general there too, while making unauthorized amendments into the Bar Council Acts; withdrawing thereto the disciplinary

[434] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Pages 518 & 519

[435] Proclamation of Emergency (2007) of dated: 3rd November, 2007, published in [PLD 2008(Federal Statutes) 108]

[436] Oath of Office (Judges) Order, 2007, dated: 20th November, 2007, published in [PLD 2008(Federal Statutes) 112]

powers exclusively vested with the Provincial & Pakistan Bar Councils and entrustment of the same to the High Court(s) & Supreme Court respectively[437].

As usual again when the matter relating to the imposition of second martial law against the judicial institution, came before the judicial scrutiny of the Supreme Court, headed by the PCO Judges, we find that those Judges too have gave due shelter to the misdeeds of military dictator, while validating the Proclamation of Emergency of the 3rd November, 2007, besides illegally entrusting him the powers of making amendments into the Constitution once again[438]. It was pursuance to the illegal license given by the Supreme Court, that the military dictator *(in order to indemnify his unconstitutional acts and order)* once again amended the Constitution through his controversial Constitution (Amendment) Order, 2007[439] (hereinafter called as former order) and later on through Constitution (Second Amendment) Order, 2007[440](hereinafter called as later order), respectively, which had introduced the following amendments into the Constitution of 1973, such as:

(i). However, before proceeding further it is important to note here that through the **former order** the military dictator had introduced amendments in 07 Articles to the Constitution which includes Article 175, 186A, 198, 218, 270AAA, 270B and 270C, respectively.

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[437] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Page 524

[438] *Tikka Iqbal Muhammad Khan vs. General Pervaiz Musharraf*: (PLD 2008 SC 6)

[439] Constitution (Amendment) Order, 2007, [Presidents' Order No: 5 of 2007] of dated: 20th November, 2007, published in [PLD 2008(Federal Statutes) 114]

[440] Constitution (Second Amendment) Order, 2007, [Presidents' Order No: 6 of 2007] of dated: 14th December, 2007, published in [PLD 2008(Federal Statutes) 117]

Number 01: The article *first in order* has brought changes[441] in clause (1) to Article 175, which talks about the establishment and jurisdiction of the Constitutional Courts, by inserting after the words *"Province"* the words *"and a High Court for the Islamabad Capital Territory"* along with insertion of an explanation to the effect that the words *"High Court"* wherever occurring throughout of the Constitution shall means and includes *"the High Court for Islamabad Capital Territory"*. This was a positive move of the military dictator, keeping in view the necessity of catering large scale litigation of the territory forming part of the Federal Capital thereof.

Number 02: The *Second in order* brought changes[442] in Article 186A which empowers the Supreme Court to transfer cases from one High Court to another High Court, by adding there in the words *"or withdraw any case, appeal or other proceedings pending before a High Court to it and dispose of the same"*. Enlarging scope of the jurisdiction of the Supreme Court to hear the cases, appeals or other proceedings pending before a High Court by transferring it to itself and further to decide the same.

Number 03: The *Third in order* receive changes[443] in Article 198 which prescribes the Seats of the High Court, by inserting a new clause (1A) after clause (1), setting out thereby the Principal seat for the High Court for Islamabad Capital Territory as Islamabad. Interestingly the names in usual which are used in the Constitution with respect of the High Court of Provinces as, Lahore, Sindh, Peshawar and Balochistan but for the Islamabad High Court, the words "the High Court for Islamabad Capital Territory" were used.

[441] Article 2 to Constitution (Amendment) Order, 2007, [Presidents' Order No: 5 of 2007] of dated: 20th November, 2007, published in [PLD 2008(Federal Statutes) 114]
[442] Article 3 ibid

[443] Article 4 ibid

Number 04: Article 218, *forth in order* which prescribes the composition of the Election Commission, was amended[444] in sub-clause (b) to clause (2) of Article 218, by substitution of the words *" Four"* with that of the words *"Five"* besides insertion of the words *" and Islamabad Capital Territory"* after the words *"Province"*, respectively. Hence, through the intended change the composition of the Election Commission was enlarged by addition of the fifth member from the Islamabad Capital Territory, as well.

Number 05: The *fifth in order* added a new Article 270AAA[445] into the Constitution which provides Validation & Affirmation to the President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, proclamations, rules, orders or bye-laws and all other laws of 3rd November, 2007 till the date on which the above referred article was revoked, which were issued in the capacity of President and Chief Executive jointly or severely, they were also given full protection even from its future judicial scrutiny thereof.

Number 06: The *sixth in order* i.e., Article 270B[446] which earlier validated the elections of Parliament held in 1977 under the military regime of previous dictator, while again extending similar benefits via LFO 2002 to the General Elections of 2002; had now once again given similar protection to the General Elections of 2008 of the National Assembly and Provincial Assemblies, lastly conducted during the military regime of Parvez Musharraf, as well.

Number 07: Likewise the *seventh in order* Article 270C being new article[447] inserted via LFO 2002, providing protection to the consequences of the Oath of Office (Judges) Order,

[444] Article 5 ibid

[445] Article 6 ibid

[446] Article 7 ibid

[447] Article 8 ibid

2000, under which a number of judges of the Constitutional Courts (i.e., Supreme Court, High Court or Federal Shariat Court) were either appointed, given oath or not having been given or taken oath or who as such have ceased to continue to hold such office, were all declared to be validly appointed, ceased as the case may be.

Hence, once again similar protections with same consequences were also extended as a result of the promulgation of Oath of Office (Judges) Order, 2007, whereby numerous judges were either appointed via PCO, given oath or not having been given such oath including those who have taken oath under that order or likewise who have ceased to continue to hold such office, as well.

(ii). Similarly, through the later order the military dictator had again introduced amendments in 06 articles of the Constitution which include Articles 41, 44, 193, 194, 208 and 270C, respectively[448], which are as follows.

Number 01: Whereby the article *first in order*, omitted[449] in clause (3) to Article 41, the words, brackets and figures *"to be elected after the expiration of the term specified in clause (7)"*, while undoing the earlier requirement that Musharraf could only run for the office of President after completion of his term on 15th November, 2007.

Number 02: The *second in order* substituted[450] clause (2) to Article 44 for the words *"subject to the Constitution"* with that of the words *"Notwithstanding anything contained in*

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[448] Constitution (Second Amendment) Order, 2007, [Presidents' Order No: 6 of 2007] of dated: 14th December, 2007, published in [PLD 2008(Federal Statutes) 117]

[449] Article 2(1) Item 1 ibid

[450] Item 2 ibid

the Constitution", allowing the Musharraf to seek re-election for a fresh term of five years irrespective of any constitutional bar thereof.

Number 03: The *third in order* added[451] proviso to clause (1) of 193, which clarified the constitutional mandate of consultation of the Governor with respect to the appointment of a Judge of the High Court for Islamabad Capital Territory, according to which as such no office of the Governor exists in the Federal Capital so this requirement shall not be observed. Besides above, clause (2) to the same article prescribing certain qualification for becoming judge of the High Court, which earlier substituted through the LFO 2002 while increasing the minimum age limit from *"forty years"* to *"forty five years"* now through later order, it again restored the minimum age limit to the its original constitution position i.e., *"forty years"*.

Number 04: The *fourth in order* added[452] proviso to Article 194, which clarify the position of the administration of oath to the Chief Justice of the High Court for Islamabad Capital Territory, which as per new amendment has to be made before the President or a person nominated by him, as the Original Constitutional Scheme was silent in this regard.

Number 05: The *fifth in order* added[453] , proviso to Article 208 which empowered the High Court for Islamabad to make its own rules with the approval of the President.

Number 06: Likewise, the *sixth in order* inserted a new[454] clause (2) to Article 270C, stating through which that the judges of the Constitutional Courts (i.e., Supreme Court, High

[451] Item 3 ibid

[452] Item 4 ibid

[453] Item 5 ibid

[454] Item 6 ibid

Court or Federal Shariat Court) who were by virtue of the Oath of Office (Judges) Order, 2007, either appointed, given oath or not having been given or taken any oath under PCO or who have ceased to continue to hold such office, were declared to be validly appointed, ceased since the date of the enforcement of emergency i.e., 03rd November, 2007, as the case may be.

Conclusion

General Pervez Musharraf's targeted emergency cum mini martial law imposed against the Judicial institution depicts veracity of the pressure and anxiety of the military dictator, who under the expression of an unfavourable decision, as expected to be the natural outcome of the results of petitions pending before the 11 member bench of the Supreme Court, challenging thereby the issue of his Presidential contest in army uniform[455] and saving his own skin from his future disqualification, thereof. At the cost of creating judicial crises throughout of the country, whereby 53 out of the total 95 Judges of the apex Courts who finally defy Musharraf were put to house arrest, illegal confinement etc., leading to agitation of mass movement of the Lawyers community and finally the gradual restoration of the Judiciary to its 02 November, 2007 position thereof[456].

However, later on the Constitution which was held in abeyance was again revived, after lifting the said emergency but unfortunately with self-interested constitutional amendments which were made therein in between the period of 03rd November till 15th December 2007, thereof. Among whom, the only positive move of the military dictator, was the creation of a High Court for the Islamabad Capital Territory, which was lest appreciable

[455] *Wajihuddin Ahmed vs. Chief Election Commissioner, Islamabad and others*: (PLD 2008 SC 13 & 25).

[456] Hamid Khan, *Constitutional and Political History of Pakistan,* (Karachi: Oxford University Press, Second Edition, 2009) Pages 521, 522 & 534

act for the obvious reasons that these were incorporated into the Constitution contrary to the constitutional mandate via a questionable mode, while rest of the amendments either served the vested interest of military dictator or that of the politicians who took benefits of the notorious National Reconciliation Ordinance, 2007 (NRO).

(J). CONSTITUTIONAL AMENDMENTS & GOVERNMENT OF MR. ASIF ALI ZARDARI (2008 TO 2013)

As stated above that the NRO 2007 of the Musharraf extended benefits to the leadership of political parties with in the country in general and to the Pakistan People Party in particular by paving way for their leaders to return to the country after ending their self-exile, coupled with the green signal given on 11th November, 2007 by Musharraf as to holding general elections before 09th January, 2008 and during the wave of political campaign for upcoming elections, the tragic incidence of the assassination of the top leader of Pakistan People Party i.e., Mrs. Benazir Bhutto on 27th December, 2007, afforded an opportunity to her husband Mr. Asif Ali Zardar to inherit her political legacy. Consequent upon of which the general elections postponed to 18th February, 2008, given edge to Pakistan People Party, in securing major share of seats in National & Provincial Assemblies. The new setup of Pakistan People Party Government along with allied forces compels the military dictator to sit down from Presidency by replacing him finally with that of Mr. Asif Ali Zardari.

3.18 Eighteenth Constitutional Amendment[457]

After assuming powers the Pakistan People Party lead Government constituted a Parliamentary Committee on Constitutional Reforms headed by Senator Raza Rabbani which finally lead a draft of the Constitution (Eighteenth Amendment) Bill, 2010 before the Parliament, the preamble of which shows intention behind the scene to undo the amendments to the Constitution of 1973, which had been brought therein during the military rule of General Pervaiz Musharraf. The Bill became Act of the Parliament and finally gazette on 20th April, 2010; which had introduced as many as 102 amendments besides affecting 83 articles

[457] Constitution (Eighteenth Amendment) Act, 2010: Published [PLD 2010 (Federal Statutes) 1]

such as: 1, 6, 10, 17, 19, 25, 27, 29, 38, 41, 46, 48, 51, 58, 62, 63, 70, 71, 73, 75, 89, 90, 91, 92, 99, 100, 101, 104, 105, 112, 116, 122, 129, 130, 131, 132, 139, 140, 142, 143, 144, 147, 149, 153, 154, 155, 156, 157, 160 , 167, 168, 170, 171, 172, 175, 177, 193, 194, 198, 199, 200, 203, 209, 213, 215, 216, 218, 219, 221, 224, 226, 228, 232, 233,234, 242, 243, 246, 260, 267, 268, 269 & 270, in addition to deletion the Concurrent Legislative List and while making addition of the subjects to Part II of the Federal Legislative List, surprisingly without holding any debate in the Parliament, which are as follows:

Number 01: Article 1 which prescribes in details the Republic and its territories known as to be the State of Pakistan, receive changes[458] of the correction in the spellings of two Provinces i.e., from *"Baluchistan"* and *"Sind"* to *"Balochistan"* and *"Sindh"* besides renaming the name of the Province of North West Frontier with that of the new one as "Khyber Pakhtunkhwa", a name being considered controversial among people of the Hazara Division.

However, interestingly the spellings of the Provinces of Baluchistan and Sindh, which have been changed in Articles 1, 51, 106 and 246 to "Balochistan" and "Sindh", but no such correction of the spelling of the name of these two Provinces occurring in other Articles of the Constitution such as in Article 106 to the extent of Baluchistan only; while in Articles 192 and 198, to the extent of both Baluchistan and Sind, have ever been corrected so far.

Number 02: Article 6 which define the act of *"High Treason"* and was as such inserted into the Original Constitutional Scheme in order to prevent the derailment of democracy of future Governments, receive further amendment[459] while extending the definition of the term

[458] Section 3 ibid

[459] Section 4 ibid

"High Treason" by including in its clause (1), the acts of the suspension of the Constitution or holding it in abeyance or even an attempt to do so, besides similar insertion of the words "collaborating" in its clause (2), as well. Apart from the above a new clause (2A) was also added there to while barring any Court including the Supreme Court and a High Court from validating the act of High Treason as was the practice in vague in the past[460] .

It is also interesting to note here that the use of the word *"and"* in between *"Supreme Court"* and *"a High Court"* in the new sub clause (2A) to Article, shows a serious drafting error which under the principles of interpretation would mean both the Courts jointly and not severally prohibited from validating an act of high treason. Therefore in that eventuality the word *"or"* should have been the choice of the drafter of the Act to bring clarity in the provision.

Number 03: The 18th Amendment also increased new list of the fundamental rights[461] as well such as the right to fair trial (Article 10A), the right to information (Article 19A) and the right to education (Article 25A), respectively.

Likewise, Article 17 guaranteeing to a citizen of his right of the Freedom of Association which earlier substituted by the Constitution (First Amendment), Act, 1974, was once again substituted with the new redraft, while adding there in the words *"Public Order or morality"* as additional grounds on which the right of a citizen can now be reasonably restricted as well. It is important to note here that although the new substituted article retained

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[460] As did in the past by the then Chief Justice Munir & colleagues who validated the coup of 1958; again by the then Chief ustice Anwarul Haq and colleagues validated the coup of 1977, similarly by the then Chief Justice Irshad Hasan Khan and his colleagues validated the coup of 1999 and finally by the then Chief Justice Abdul Hameed Dogar and his colleagues validated the coup of 2007, respectively.

[461] Sections 5 to10 of Constitution (Eighteenth Amendment) Act, 2010: Published [PLD 2010 (Federal Statutes) 1].

the same scheme as had been introduced via the Constitution (First Amendment), Act, 1974 & to some extent the scheme introduced by the LFO 2002, except the minor changes as referred hereinabove. But, the major change which the researchers would find there in was the omission of clause (4) from Article 17, which earlier inserted by the military dictator via LFO 2002 while making it constitutional obligations for each of the political parties to hold their respective intra-party elections.

Again Article 27 guaranteeing safeguard against discrimination in services to the citizen of backward areas, was as such amended in clause (1) by inserting a third proviso therein, authorizing the Majlis-e-Shoora (Parliament) to determine by Act, the appropriate measures which had to be taken with respect to the citizen of backward areas being un-represented of any class or area, for making measures of their due representation in the service of Pakistan.

Number 04: Article 29 setting Principles of Policy for organs and authorities of the State which had to be followed as such, was further amendment[462] by substitution in its clause (3) for the words *"National Assembly"* with that of the words and brackets *"each House of Majlis-e-Shoora (Parliament)"* besides insertion of the words *"Senate"* respectively; enlarging in return the role of Senate to scrutinize the annual report placed by the President in relation to the affairs of Federation and the Governor of each Province in relation to the affairs of the his Province, which per earlier Constitutional Scheme was only placed before the National Assembly alone.

[462] Section 11 ibid

Number 05: Article 38 which binds the state to take care for promotion of social and economic well-being of its people, was amended[463] with omission of the words *"and"* from paragraph (e) and addition of the same at the end of paragraph (f) along with further addition of a new paragraph (g) thereafter, which at the behest of the State ensures the share of the Provinces in all federal services including the federal autonomous bodies and corporations.

Number 06: Article 41 prescribing the mode and procedure of the election of the President of country, was amended[464] in clause (3) by partially retaining the text as substituted by RCO of 1985 of the then military dictator (i.e., General Zia-ul-Haq) except omitting therefrom of the words, brackets and figure *"to be elected after the term specified in clause (7)"* . Besides, omitting clauses (7) to (9) therefrom, which were earlier inserted via LFO 2002 and the Constitution (Seventeenth Amendment) Act, 2003 of the then military dictator (General Pervaiz Musharraf), providing thereby undue protection & affirmation through Parliament to his Presidential Elections held by the mode of a referendum?

Number 07: Articles 46 & 131, which cast duty on the office of Prime Minister and on the Chief Minister of a Province, to keep the President or as the case may be the Governor of a Province, to be informed by the former on all matters of internal and foreign policy and on all legislative proposals which the Federal Government intends to bring before Majlis-e-Shoora (Parliament) while by the later, on matters relating to Provincial administrative and legislative proposals etc., respectively. However, instant amendment[465] revived the Constitutional Scheme of the original Articles 46 & 130 respectively, by shifting the center of

[463] Section 12 ibid

[464] Section 13 ibid

[465] Sections 14 & 44 Ibid

power from the offices of President and of the Governor of a Province by entrusting the same that to the office of Prime Minister and the Chief Minister of a Province, respectively.

Number 08: Articles 48 & 105 which per Original Constitutional Scheme oblige the President and the Governor of a Province; to act on advice of the Prime Minister and that of the Chief Minister of a Province; were as such subjected to further amendment[466] by partially restoring the very Original Constitutional Scheme once again while omitting therefrom the effect of binding force of the Presidential advice inserted through the dictatorial amendments; besides retaining the innovation introduced by the earlier dictator (i.e., General Zia-ul-Haq) coupled with making slightest changes of substitution therein. Particularly in proviso attached to clause (1) which via newly amended scheme prescribed fifteen days period, within which the Cabinet in the Federation headed by the Prime Minister and likewise in the Province headed by the Chief Minister of a Province, to reconsideration any such advice on directions of the President or as the case may be of the Governor of a Province besides binding additionally the offices of President and of the Governor to act on such reconsidered advice within a period of ten days there to.

Another change which has also been brought there in, with respect to the Federal Government, is the substitution of clause (5); while with respect to the Provincial Government, similar substitution of the clause (3); both of which via the RCO 1985 of the military regime fixed period of *"hundred days"* for holding of general elections has now per new scheme reduced it to the *"ninety days"*, thereof; besides retaining the dictatorial innovative concept of the Caretaker Cabinet as well.

[466] Sections 15 & 35 ibid

Similarly clause (4) to Article 105 which vests discretionary powers in the office of President with respect to running the affairs of Provincial Government was also omitted.

Likewise changes were also introduced in clause (6) to Article 48 as well which was substituted with a new clause (6) once again, retaining thereby the innovation of referendum introduced by RCO of 1985 of the then military dictator (i.e., General Zia-ul-Haq's), but with making slightest changes therein, whereby now at this time the power to hold a referendum on any matter of national importance, is transferred from the office of President and entrusted that to the office of Prime Minister while additionally subjecting it to the pre-condition that the Prime Minister must secure prior approval of both the Houses of Parliament in joint sitting. So by this way the powers shifted through the military dictator's constitutional amendments to Presidential Form of Government were once again restored to the Parliamentary Form of Government.

Number 09: Articles 51 & 106 which prescribe the composition of the National Assembly and that of the Provincial Assemblies and was as such lastly amended[467] via LFO 2002 were re-substituted with ditto copy, but this time by renumbering its respective clauses only.

Number 10: Articles 58 & 112 which per original constitution scheme empowers the President and the Governor of a Province, to dissolve the National Assembly and the Provincial Assembly, pursuance to advice given by the Prime Minister or of as the case may be the Chief Minister of a Province, which admittedly per pervious scheme of the RCO of 1985 additionally empowers the President or the Governor of a Province to dissolve the National Assembly or as the case may be a Provincial Assembly, in the former case in the discretion of the President or likewise in the latter case with the prior approval of the

[467] Sections 16 & 36 of Constitution (Eighteenth Amendment) Act, 2010: Published [PLD 2010 (Federal Statutes) 1]

President, thereof, the scheme of which retained not only through the Constitution (Eighth Amendment) Act, 1985 but also by the LFO 2002 as well; which was once again subjected to further amendment[468] whereby although the new amendment shorn the President or as the case may be the Governor of a Province, of his legitimate discretion on dissolution of the National/Provincial Assembly, but surprisingly it restore the same (i.e., Articles 58 & 112) with half/half adoption i.e., half portion contains the full original text of the article ibid while second half contains the text of the clause (2) to the articles ibid as inserted through the Constitution (Eighth Amendment) Act, 1985, respectively.

Number 11: Article 59 which talks about the composition of the Senate, was substituted with the new text via instant amendment[469] whereby while retaining the textual scheme by the RCO 1985, the Constitution (Eighth Amendment) Act, 1985 and that of the LFO 2002, respectively, an additional four seats were created for the non-Muslims (one from each Province), increasing thereby the members of the Senate from the last increased figure of LFO 2002 from *"one hundred"* that to *"one hundred and four"*, accordingly. This move is appreciable indeed for the obvious reasons that for the first time the non-Muslims citizens were given their due share in legislative process in the upper house, but there is still an ambiguity which exists with respect to filling of these vacancies, particularly whenever the issue crop up with respect to which of the community among the minorities as existed throughout of the country, would be given first chance or preference over the other minority communities. The Eighteenth Amendment is silent to this effect.

[468] Section 17 & 37 ibid

[469] Sections 18 & 19 ibid

Article 61, prescribing the working of the days, of the Senate through legislation by reference, has once again via instant amendment increased the number of the working of days from the previously reduced period of *"ninety days"* to that of now *"one hundred and ten days"* accordingly.

Number 12: Article 62 prescribing in detail the list of qualification for being member of Majlis-e-Shoora (Parliament), which was as such extended by the RCO of 1985 and later on further extended by the LFO 2002, as the case may be, but strange enough the instant amendment[470] substituted it with the new one, but surprisingly while retaining in original the four grounds *[i.e., (d) to (f)]* among them, as was added by the earlier military dictator (i.e., General Zia-ul-Haq) in this regard.

Number 13: Article 63 which sets criteria for the disqualification of a person from being membership of the Majlis-e-Shoora (Parliament), which earlier expanded by RCO of 1985 and later on by the LFO 2002, respectively, the same was once again re-substituted with new article[471] unfortunately with textual modification of the scheme introduced by the military regime of two dictators in the years 1985 & 2002 respectively. However, it do contain serious drafting error therein, when researcher goes through the plain reading of its substance particularly of the Clause (l) in paragraph (c) to Article ibid, wherein use of the word "or" makes a Pakistani citizen to be disqualified from being elected as member of the Parliament if he acquires citizenship of a Foreign State, but the paragraph does not disqualify a foreign citizen who if acquires the citizenship of Pakistan, so in my humbly view this anomaly, could be laid to rest by adding an explanation to this effect at the end of paragraph.

[470] Section 20 ibid

[471] Section 21 ibid

Similarly clause (3) to Article 63, which makes the Speaker of the National Assembly or as the Case may be the Chairman of the Senate to decide the question of disqualification by itself, or unless they decide that no such question has arisen, refer the same within thirty days to the Election Commission, being the sole and final arbiter with respect to the alleged disqualification of a member. In that eventuality the researchers would again do not find a single provision for an aggrieved person of having any remedy of an appeal against the said decision of Election Commission, which is contrary to the fundamental rights as guaranteed by Articles 10 & 10A to the Constitution.

Number 14: Article 63A initially via the Constitution (Fourteenth Amendment) Act, 1997 & later on substituted via the Constitution (Seventeenth Amendment) Act, 2003, prescribing in detail the reasons for disqualification on grounds of defection for the Parliamentarian, which has been once again put to further amendment whereby the text lastly substituted was totally substituted with that of the new text[472], prescribing thereby almost the similar scheme as had earlier been introduced by the Constitution (Seventeenth Amendment) Act, 2003 but with slightest modification in clause (1) of Paragraph (b) (iii) with respect to the Constitution (Amendment) Bill thereof. So now the member of Majlis-e-Shoora, even could not cast a vote per his conscience and against the party policy to which he belongs with respect to the Constitution (Amendment) Bill, otherwise he would have to bear the consequences in shape of losing his seat accordingly.

It is also important to note here that the explanation attached to clause 1 to Article 63A also do creates anomaly as well, while stating that any person could be a *"party head"*, which means even a non-Parliamentarian could also hold this portfolio, who can easily run

[472] Section 22 ibid

the affairs of Parliament per his monopolies even while sitting out of the screen. Moreover, even the expression party used in the explanation does not complete its sense, which should have been substituted with the clear term "Political Party" thereof.

Number 15: Article 70 which prescribe the mode & method of the Introduction and passing of Bills, which lastly amended via LFO 2002, defining different role of legislative bodies with respect to introduction and passage of the Bills relating to Part-I of the Federal Legislative List and in the event of legislative process, the resolution of any dispute, by supervisory role entrusted to the Mediation Committee thereof, this scheme was once again totally substituted by introduction of the new article[473], prescribing thereby simple method of the introduction and passage of the bills relating to the Federal Legislative List while completely deleting the role of a Mediation Committee therefrom as earlier introduced by the Constitution (Seventeenth Amendment) Act, 2003.

Number 16: Likewise Article 71 which was added into the Constitution via LFO 2002 and contained provisions for the Mediation Committee for the consideration of a bill rejected by the House was also omitted from the Constitution as well.

Similarly, Article 73, which prescribe the procedure with respect to the origination and passage of Money Bill, was also got changed[474] by substituting it with a new article, surprisingly, with reproduction of the ditto copy of the text lastly amended by the LFO 2002 but with a slightest change therein of the enhanced period for making the recommendation by the Senate, which was initially fixed as *"seven days"* by increasing it to *"fourteen days"* accordingly.

[473] Section 23 ibid

[474] Sections 24 & 25 ibid

Number 17: Article 75 which originally talks about the assent to a bill by the President; by fixing the period of *"seven days"* from the date of its presentation to him; this initial period of the assent was subsequently enhanced via RCO of 1985 to *"forty five days"* but later on reduced to *"thirty days"* when the article ibid was considered under Constitution (Eighth Amendment) Act, 1985; now the instant amendment[475], reduced the said period once again further to a period of "ten days", thereof. It is also worth to note here that amendments were also made in clause (2) as well substitution, by which actually the ditto copy of the text lastly incorporated initially via RCO of 1985 and later on by the Constitution (Eighth Amendment) Act, 1985, as the case may be, but with minor changes introduced thereto, explaining thereby that the President shall give his assent to a bill within ten days, failing which such assent shall be deemed to have been given, accordingly.

Likewise, changes were also introduced in clause (3) to the article ibid as earlier incorporated via the RCO of 1985, the text of which interestingly retained as it is once again, but with insertions of the words *"or deemed to have assented"*, therein. It is important to note here that ditto amendments were also affected in Article 116, which pertains to the procedure of the Governor's Assent to a Bill passed by the Provincial Assembly.

Number 18: Article 89 elaborating the legislative powers of the President to promulgate an ordinance in case the National Assembly is not in session, by making changes[476] in clause (1), of the insertion of the words *"Senate or "* before the words of "National Assembly"; enlarging thereby the scope of legislative powers of the President to promulgate ordinance, as now per new scheme, when both of the Houses *(Senate or National Assembly)* were not in session, only then the President can promulgate an Ordinance, thereof.

[475] Section 26 ibid

[476] Section 27 ibid

Interestingly amendments were also introduced in clause (2) paragraph (a) to sub-paragraph (i) by substituting the words *"four months"* with that of the words *"one hundred and twenty days"*, besides inserting two new provisos to sub-paragraphs (i) & (ii), as well, authorizing thereby through resolution of the National Assembly or as the case may be of both the Houses, either to extend the life of the Presidential Ordinance to further period of one hundred and twenty days, which will be expired on the expiry of the extended period thereof or before the expiration of the same, the National Assembly or the Senate as the case may be, disapproves such Ordinance by passing a resolution thereto. In addition to above clarifying via second proviso added through sub paragraph (ii), to the effect that, an extension for further period which may be made is only for once, in time.

Similarly clause (3) to the article was also totally substituted with a new clause, explaining thereby the situation that the Ordinance laid before the National Assembly under sub-paragraph (i) would be deemed to be a Bill introduced by the National Assembly while similar Ordinance laid before both the Houses under sub-paragraph (ii), would also be deemed to be a Bill introduced in the House where it was first laid, accordingly.

Again similar changes were also effected in parallel Article 128 as well, which elaborates the legislative powers of the Governor to promulgate an ordinance, whereby in its sub clause (2) it had substituted the words *"three months"* with that of the words *"ninety days"*, besides inserting therein two new provisos to sub clause (2) as well, authorizing thereby the Provincial Assembly to extend the life of the Ordinance through its resolution, for a further period of ninety days, which shall either stand expire on the expiry of such extended period or otherwise before the period of its expiration, the Provincial Assembly may disapprove such Ordinance by passing a resolution thereto. In addition to above it further clarified through the second proviso [added to sub clause (2)], that an extension for further

period may be made for once only. So, now by this way the Federal or Provincial Ordinance could have been given one time extension only.

Number 19: Article 90 which talks about the composition & exercise of the executive authority in the name of President by the Federal Government, consisting on Prime Minister and the Federal Ministers; and as such substituted[477] with a new article consisting on two clauses (1) & (2) only; whereby surprisingly it do had restored the original text of the clauses (1) & (2) per the Original Constitutional Scheme but deliberately omitting therefrom the original text as contained in its clause (3) thereof, which binds the Prime Minister and the Federal Ministers in discharge of their respective duties, to be collectively responsible to the National Assembly, which has now been added in Article 91(6) via the Constitution (Eighteenth Amendment) Act, 2010.

Similar, changes were also affected with respect to Article 129 as well, which talks about the composition & exercise of the executive authority in the name of Governor by the Provincial Government, consisting on Chief Minister and the Provincial Ministers, whereby similar substitution of the new article were made therein, which too comprises over two clauses i.e., (1) & (2) only, restoring thereby the original texts of the same as was initially introduced by the Original Constitutional Scheme, while again omitting the original text of clause (3) therefrom as well, which similarly binds the Chief Minister and the Provincial Ministers in discharge of their respective duties, to be collectively responsible to the Provincial Assembly, which after its such omission has now been added in Article 130(6) through the Constitution (Eighteenth Amendment) Act, 2010.

[477] Section 28 ibid

Number 20: Article 91 being an idea of the military regime of General Zia-ul-Haq talks about the composition of the Cabinet, consisting on Prime Minister and other State Ministers to aid and advise the President in the exercise of his functions, which was initially substituted by the RCO 1985 and later on by the Constitution (Eighth Amendment) Act, 1985, was once again further amended by substitution[478] slightly by partially retaining/full modification or likewise retaining and mixing of the original texts of the Original Constitutional Scheme with the RCO 1985 and that of the Constitution (Eighth Amendment) Act, 1985, [i.e., clauses 1 & 8 of Article 91 as substituted by CO 1985, clauses 2, 3,4 to Article 91 & clause (3) of Article 90 of the Original Constitutional Scheme and clause (5) as substituted by the Constitution (Eighth Amendment) Act, 1985] , respectively. However, the important factor which is to be noted here is the insertion of a proviso to clause (5) substituted via the Constitution (Eighteenth Amendment) Act, 2010, which lifts ban on the third time and so on and so forth, of the election of Prime Minister-ship thereof. This addition of the new proviso seems to be against the democratic norms, person specific and would only serve the purpose of top party heads of the ruling and opposition parties, while creating their complete autocracy, accordingly.

Similar changes were again introduced with respect to Article 130 which talks about the composition of the Cabinet, consisting on the Chief Minister and other Cabinet Ministers to aid and advise the Governor in the exercise of his functions, wherein the researchers do find similar substitution *[i.e., clauses 1 & 8 of Article 130 as substituted by RCO 1985; clause 1 with certain modification while clauses 2,3&4 to Article 131 & clause (3) to Article 129 of the Original Constitutional Scheme and clause (5) to Article 130 as substituted by the Constitution (Eighth Amendment) Act, 1985]*, etc., as carried out with respect to Federal

[478] Sections 29 & 43 ibid

Government Cabinet as envisaged under Article 91 ibid. Besides insertion of a proviso to clause (5) through instant amendment which lifts ban on the third time and so on and so forth, of the Chief Minister-ship thereof. This addition of the new proviso seems to be against democratic norms, person specific and would only serve the purpose of top party heads of the ruling and opposition parties, while creating their complete autocracy over Parliamentary proceedings, accordingly.

Number 21: Article 92 which deals with the appointments of Federal Minister and Ministers of State, and as such earlier materially changed with respect to its Original Constitutional Scheme via RCO of 1985, was once again subjected the above referred appointments[479] to the provisions contained in clauses (9) & (10) of Article 91 instead of previous provisions as contained under clauses (7) & (8) of Article 91. Similarly through substitution of the proviso to Article 92, the size of the Cabinet fixed by the Original Constitutional Scheme of the Senators who has to be inducted in the Cabinet were stated not to be exceeding one fourth of the total numbers of ministers, has now been changed again via instant amendment whereby now the total strength of the Cabinet including that of Ministers of State cannot exceeds 11 percent of the total membership of the Parliament (i.e., 48 Ministers).

Again similar changes were also brought in Article 132 which deals with the appointments of Provincial Ministers, by subjecting the appointment referred above to clauses (9) & (10) of the newly substituted Article 130. It is also strange enough that unlike the newly added proviso inserted to Article 92, which fixes certain limits of the Federal Ministers which have to appointed thereof, the researcher will do find missing, similar changes in the instant Article (i.e., Article 132) as well, which admittedly does not prescribe

[479] Sections 30 & 45 ibid

fixation of the size of the Cabinet for the Provincial Ministers. Hence, due to afore said silence, now the Provincial Ministers could be appointed without any specific limits thereof.

Number 22: Article 99 discussing the conduct of the business of Federal Government, the Original Constitutional Scheme of which was subjected to change by substitution via RCO of 1985; however the instant amendment[480] had been once again retained its textual material but with slightest modification made therein, not in its clause (1) as it was never changed but in clause (2) by substituting the word *"President"* with that of the words *"Federal Government"*, besides totally substituting the clause (3), while entrusting to the Federal Government the powers to make rules for the allocation and transaction of its business, ultimately shifting the center of power from the Presidency that to the office of Prime Minister and his Cabinet.

Likewise, similar changes were also made in Article 139 which talks about the conduct of business of Provincial Government, whereby earlier change made therein via RCO of 1985 were reversed in the similar manner as were did with respect to Article 99 ibid, by slightest modification in clause (2) to Article 139, by substituting the word *"Governor"* with that to the words *"Provincial Government"* and again by totally substituting the clause (3) to Article ibid while entrusting to the Provincial Government the powers to make rules for the allocation and transaction of its business, again ultimately shifting the center of powers, from the office of the Governor that to the Chief Minister and his Cabinet, thereof.

Number 23: Articles 100 & 140 which talks about the composition and duties of the office of Attorney-General for Pakistan & that of the Advocate General for a Province, were

[480] Section 99 & 46 ibid

subjected to changes[481], whereby clause (2) of the articles ibid added the words *"and shall not engage in private practice so long as he holds the office of the Attorney-General"* or as the case may be similarly applying the same principle to the office of Advocate General for a Province, by putting a clear bar on the principal law officers of the land i.e., the Attorney General & Advocate General, from continuing their respective private practice while still being in offices, the spirit behind this move was indeed to insulate the Attorney General/ the Advocate General's offices from "private practice", in order to avoid the remotest conflict of interest between an individual private vis a vis of his official capacity, which may clash with government policy, but surprisingly no such restrictions has/had ever been placed over the other law officers, who are parallel engaged to share the over burden work of the offices of Attorney General or the Advocate General respectively, which includes but not limited to the offices of the Additional Attorney Generals, Additional Advocate Generals & the Deputy Attorney Generals or Deputy Advocate Generals as the case may be.

Number 24: Article 101 which talks about the appointment of the Governor of a Province, and as such via RCO of 1985 of military dictator become subservient to the sole discretion of the President besides putting a clog put over it via the Constitution (Fifth Amendment) Act, 1976, in respect to the candidature for Governorship, that he cannot be appointed in the Province of his permanent residency; both these clogs were done away by the instant amendment[482] by making necessary changes in clauses (1) & (2) therein; whereby now a Governor of a Province could only be appointed by the President on the advice of the Prime Minister and he even may be appointed at the place of his permanent residence, where he is a registered voter too.

[481] Sections 32 & 47 ibid

[482] Sections 33 & 35 ibid

Article 104 which as per Original Constitutional Scheme talks about the appointment of an Acting Governor either during the period of the absence of an incumbent Governor from Pakistan or due to his inability to perform his duties thereof, in that eventuality the President may in his discretion, appoint any such other person as he may directs in this regard. Now through the instant amendment, not only the marginal heading of Article ibid were changed as *"Speaker Provincial Assembly to act as, or perform functions of Governor in his absence"*, but also the original text of the same as well by substitution thereof, whereby now the Speaker of Provincial Assembly could act as Acting Governor of the Province, but surprisingly the new scheme once again vest discretionary powers with the office of President, in case if the Speaker of Provincial Assembly fails to act due to any of afore said reason. This move has blocked the corridors of Governor House for the Chief Justice of the High Court of a Province concern, which per past practice and in the event of absence of the Governor could step into shoes of an absent Governor and discharge his functions as Acting Governor thereof.

Number 25: Article 122 prescribing procedure relating to Annual Budget Statement, through instant amendment[483] omitted the proviso attached to clause (2), surprisingly with the legislative drafting errors therein whereby the amendment is made in Article 122(2) by omitting proviso without substituting the colon with a full-stop at its end.

Number 26: Article 127 which talks about the application of the provision relating to National Assembly etc., to apply similarly to Provincial Assembly etc., via instant amendment[484] added clause (g) to article ibid, which through legislation by reference to the

[483] Section 39 ibid

[484] Section 40 ibid

proviso attached to clause (2) of Article 54, clarified that the Provincial Assemblies were also bound to meet not less than "one hundred" working days in a year.

Number 27: Article 140A which prescribe the composition of the Local Government, an idea of the former military dictator General Pervaiz Musharraf, through the instant amendment[485] has once again retained by substituting the same as lastly substituted through the LFO 2002 with ditto copy thereof, however, only clause (2) of it was introduced with its newly substituted shape, which authorize the Election Commission of Pakistan to conduct Local Government Elections thereof.

It is worth to point out here that this article too contain drafting error therein as is apparent from appreciating the following facts that the Constitution which consistently uses the words "Election Commission" throughout in various articles (i.e., Article 218) but the drafter of instant amendment have been found to be using the words "Election Commission of Pakistan" instead thereof.

Number 28: Article 142, which prescribes powers of the law making of the Parliament and Provincial Assembly, respectively; the instant amendment[486] had brought drastic changes in the previous legislative scheme of the Federation or its Federating units, whereby under the previous scheme if the former was competent to legislate with respect to the matters enumerated in Federal and Concurrent Legislative Lists, while the residuary matters were fall within the Legislative competence of the Provinces.

This earlier scheme has now been changed by substitution of paragraph (b) to (d) to Article 142. Although paragraph (b) retain the scheme of concurrent powers of the legislation

[485] Section 48 ibid

[486] Section 49 ibid

of Majlis-e-Shoora (Parliament) besides of the parallel powers of the Provincial Assembly to make laws with respect to criminal law, criminal procedure and evidence, similarly paragraph (c) provides that *"Subject to paragraph (b) a Provincial Assembly shall and the Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List"*, likewise, paragraph (d) *"Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province"*.

These last two paragraphs when read together, holds that it abolished the Concurrent Legislative List from the Constitution. The net outcome of such changes result in a conclusion, that a large number of subjects and activities which were previously being handled by Ministries/Divisions in the Federal Government were now being administered exclusively by the provincial governments. But amazingly this abolishment creates no obligation for the Federal Government to transfer any assets or institutions of the Federal Government to the Provincial Governments.

Number 29: Article 143, which per Original Constitutional Scheme explains the scenario, where there was any inconsistency between a Federal and Provincial Law pertaining to the laws enumerated in Concurrent Legislative List, in that eventuality the Law framed by the Federal Government whether passed before or after the Act of Provincial Assembly shall prevail to the extent of such inconsistency. This earlier scheme was substituted[487] whereby after the abolition of the Concurrent Legislative List, the new Article still recognize the dominance of the Federal Statute over the Provincial Statute, if the law enacted by the Provincial Assembly clashes with the Federal enactment. The serious implication of this change is that Federal Legislature can override any legislation passed by the Provincial

[487] Section 50 ibid

Legislature even those laws that are in Provincial jurisdiction, so by this way the concept of the Provincial Autonomy got vanished.

As self-evident from appreciating the following facts that per new scheme an act which is passed by a Provincial Assembly as being falling exclusively within its legislative competence, can be considered void if the Federal Legislature on similar footing legislate similar law through an Act of Parliament, with a simple majority. Needless to state here that before the Constitution (Eighteenth Amendment) Act, 2013, such an act would have required a constitutional amendment, thereof. So in a country like ours where one Province had more members in the National Assembly than the combined total of other Provinces, this change gives the largest Province to override any Provincial Laws with ease as it could easily muster simple majority from that Province alone.

Number 30: Article 144, which per the Original Constitutional Scheme empowers the Majlis-e-Shoora (Parliament) to legislate for two or more Provinces by their consent; the instant amendment[488] has brought changes not only in its marginal title but also in clause (1) as well, whereby the words *"two"* and *"either list"* were substituted with that of the word *"one"* & *"Federal Legislative List"* respectively.

Number 31: Article 147 whereby the Provincial Government, with consent of the Federal Government could entrust, either conditionally or unconditionally, to the Federal Government or to its officers, the functions in relation to any matter to which the executive authority of the Province extends, however, the instant amendment[489] substituted the same with respect of the full stop (.) at its end with that of the colon(:) and there after a new proviso was got added,

[488] Section 51 ibid

[489] Section 52 ibid

binding thereby the Provincial Government to get the functions so entrusted to the Federal Government etc., ratified by the Provincial Assembly as well within a period of sixty days.

This newly added proviso had actually gives rise to a hot debate among legal fraternity, according to which the power to entrust functions under Article 147 is an independent executive power of the Provincial Government. So, a resolution cannot affect a constitutional power by placing conditions in its way which is the prime job of executive. That's why the Provincial Government cannot take refuge behind the provincial assembly as the former is created after a vote of confidence from the latter. It is further argued that if the power is given in the main clause of the article under discussion, a proviso cannot nullify that very power, at all. As there exists, no division of sovereignty inter se the Provinces and the Federal Government unlike the case of US constitution. On the same footings our Federal Government does have constitutional obligations to prevent any of its part, from all threats to the peace, tranquility and economic prosperity, as the case may be. So, keeping in view the above, if any function of a Province is entrusted to the Federal Government, then it is alone, who is empowered to make its decisions thereof, independently.

Number 32: Article 149 was amended[490] with omission of its clause (2), which authorize the executive authority of the Federation also extends to the giving of directions to a Province as regards the execution of any Federal Law which relates to a matter in the concurrent list provided that the law authorizes the giving of such directions.

Number 33: Article 153, composing the Council of Common Interest, a body set out to settle the disputes of the nature prescribed under Article 154, inter se the Provinces or as the

[490] Section 53 ibid

case may be of the Province and Federation. Instant amendment[491] has brought changes in clause (2) of article ibid, whereby the Prime Minister is permanently nominated as the Chairman of the Council, while substituting the earlier Original Constitutional Scheme wherein any Federal Minister would have been nominated by the President in the past, to act as the chairman of the Council. Perhaps this is the reason which leads to omission of the original clause (3) from the article ibid. Besides amending clause (4) as well directing the Council to submit its annual reports to both of the Houses of Parliament, thereto.

Number 34: Article 154 which prescribe functions and rules of the procedure of the Council of Common Interest in detail was through instant amendment[492] substituted in its clause (1), giving thereby mandate to the Council to formulate and regulate policies in relation to matters enlisted in Part II of the Federal Legislative List besides exercising supervision and control over related institutions. Besides inserting two new clauses i.e., (2) & (3) therein, by virtue of which the former binds the President to constitute the Council of Common Interest within thirty days of the Prime Minister's taking oath of his office, while the later established permanent secretariat, with explaining the procedure of the convene of its meetings upon the request of a Province in case of an emergency. In addition to above, it also renumbered the original clauses along with its text contained under clauses (2), (3), (4) & (5) with that of clauses (4), (5), (6) & (7) respectively. It is important to pin point here that unfortunately the dream of establishing it independent Secretariat has so far not seen light of the day, till todate.

[491] Section 54 ibid

[492] Section 55 ibid

Number 35: Article 155 which deals with the matters of complaints arising out of the disputes of water supplies from natural resources; however, instant amendment[493] has expand the jurisdiction of Council of Common Interest over disputes pertaining to usage and sharing of water inter se the Provinces, from its Original Constitutional Scheme of *"natural source of supply"* by including the disputes with respect to *"reservoirs"* of the water supplies, therein as well.

Number 36: Article 156, relates to the National Economic Council, which as per Original Constitutional Scheme had two clauses only, clause (1) of which described the composition while clause (2) its functions, only. Instant amendment[494] has now enlarged its scope, by substitution of clause (1), whereby the Prime Minister & four Chief Ministers of the Provinces in addition to four other members as the Prime Minister may nominate from time to time, were permanently nominated as the Chairman & members of the Council, respectively. The body so constituted, per clause (2), gives mandate of reviewing the overall economic activity of the country as whole and give advice to the Federal and Provincial Government(s), in this regard. Similarly, clause (3) prescribes the mode of summoning the meeting of Council, while clause (4) schedule its meeting at least twice in a year besides setting minimum quorum of the one-half of its members for such meeting. Likewise, clause (5), directs the Council to submit its annual reports to each House of the Majlis-e-Shoora (Parliament), as well.

Number 37: Article 157 dealing with the issue of Electricity, which per the Original Constitutional Scheme comprised on two clauses only, had brought further changes[495] in

[493] Section 56 ibid

[494] Section 57 ibid

[495] Section 58 ibid

clause (1) by substituting full stop (.) at the end with that of colon (:) where after a new proviso was inserted thereto, which binds the Federal Government to consult the Provincial Government before taking a decision to construct or cause to be constructed, hydro-electric power stations in any Province. Similarly, clause (2) retains the Original Constitutional Scheme of the powers of the Provincial Government with respect to generation, supply, distribution and levy of tax on its consumption within the Province, as such. While clause (3) newly added thereafter, provides mechanisms of the resolution of dispute over electricity arise if any inter se the Federal Government and a Provincial Government, to be settled via the Council.

Number 38: Article 160 which talks about the composition and functions of the National Finance Commission, a constitutional body aimed at to distribute the financial resources among Provinces with an intervals not exceeding five years, was put to further amendment[496] by insertion of new clauses as clause (3A) & (3B) therein. The former gives protection to the minimum share of the Provinces in each Award of the National Commission, which shall not be less than the share given to the Province in the previous Award, while the later authorizes the Federal Finance Minister and Provincial Finance Ministers to monitor the implementation of the Award biannually and lay their reports before both Houses of the Majlis-e-Shoora (Parliament) and the Provincial Assemblies, respectively.

Number 39: Article 161 which talks about, the net proceeds of the federal duty of excise on natural gas levied at well-head as well as the royalty collected by the Federal Government which has to be paid to the Province in which the well-head is situated. Instant amendment[497]

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[496] Section 59 ibid

[497] Section 60 ibid

revised it by substituting clause (1) with that of the new clause (1) and paragraph (a) & (b), according to which Notwithstanding the provisions of Article 78 the net proceeds of the Federal duty of excise on natural gas levied at well head and the royalty collected by the Federal Government shall be paid *(100%)* to the Province in which the well-head of natural gas is situated. Likewise, according to the later, the net proceeds of the Federal Duty of excise on oil levied at well-head and collected by the Federal Government shall also be paid *(100%)* to the Province in which such well head of oil is situated. And both of such collections shall not become part of the Federal Consolidated Fund.

Number 40: Article 172, which talks about the ownership of ownerless property located in a Province, deemed to be the property of that very Province while in every other case; it will be considered the property of the Federal Government. Instant amendment[498] had made changes in clause (2) of the article ibid by substituting the word *"within"* occurring for the second time with that of the word *"beyond"*, besides inserting new clause (3) therein which gives due protection to the existing commitments and obligations with respect to mineral oil and natural gas find place with in the Province or the territorial waters adjacent thereto, which by virtue of the newly added clause (i.e., 3) held to be vests jointly and equally in that Province and the Federal Government, respectively.

It is important to note here that the comparative analysis of the newly revised Articles 161 and 172 seems to be contradictory to each other. For the reason that if on the one hand the revised Article 161 provides for the payment of 100% royalty on natural gas to the Province on the other hand the revised Article 172 speaks contrary by stating that the ownership of the said resources vests in jointly and is to be shared equally between the Federal Government and the Provinces.

[498] Section 65 ibid

Deeper analyses of the same, also reveals the fact that by virtue of Sr. No. 51 to Part-I of the Federal Legislative List; the legislative, regulatory, management and administrative authority vests in the Federal Government, which by virtue of entry regarding taxes on mineral oil, natural gas and minerals for use in the generation of nuclear energy, exercises its jurisdiction over the same. Likewise, in Part-II of the said Federal Legislative List it also makes additional reference at Sr. No. 2 to mineral oil and natural gas, liquids etc. again vesting the institutional and policy control over the said mineral oil, natural gas, liquids etc. with the Federal Government.

Therefore retention of these said two entries, (at Sr. No. 51 of Part-I and other at Sr. No. 2 of Part–II of Federal Legislative List) clearly demonstrates the intent of the legislature to retain administrative, institutional and policy control on such resources with the Federal Government as per past practice. In view of the above, I am of the considered view that although pursuant to Article 172(3) ownership of mineral oil and natural gas now vests jointly and equally in the Provinces and the Federal Government, policy control and the legislative authority continues, by virtue of the Federal Legislative List, to vest in the Federal Government. Hence, there is no requirement or justification for any change in the existing institutional framework, which should remain intact, subject always to administrative improvements, wherever required, to ensure implementation of the revised Article 172 in letter and spirit.

Number 41: Article 167 relating to the borrowing power of the Provincial Government upon the security of the Provincial Consolidated Fund; which while retaining the Original Constitutional Scheme as prescribed under its clauses (1) to (3), had now also inserted a new

clause (4) [499] therein, empowering thereby the Provincial Government to raise domestic and international loans or gives guarantees on the security of the Provincial Consolidated Fund, subject to pre-conditions as fixed by the National Economic Council, in this regard.

Number 42: Article 168 which talks about the appointment of the Auditor General for Pakistan; instant amendment[500] has substituted its clause (3) by adding the missing elements into its Original Constitutional Scheme; enabling thereby now the Auditor General for Pakistan to exercise the option of resignation besides fixing the term of his office to four years from the date of the assumption of his duties or till the maximum age of limit for the service as sixty five years, as the case may be.

Likewise another important change in clause (6) of the words *"such other person as the President may direct shall"* with that of the words *"the President may appoint the most senior officer in the office of the Auditor General to"*, a positive move of this kind which restored the Principles of Seniority and Legitimate Expectancy, of the experienced senior most competent person waiting in queue to shouldering heavy responsibilities of the portfolio, in case of any emergent vacancy.

Number 43: Article 170, envisages the power of Auditor-General for Pakistan as being watchdog for and on behalf of the people of Pakistan, in order to ensure that the hard earned income of citizens of the country is being spent for lawful purposes. Instant amendment[501] renumbered its Original Constitutional Scheme, with addition of the new clause (2) thereof, enlarging scope of the audit to the accounts of Federal and of Provincial Governments

[499] Section 61 ibid

[500] Section 62 ibid

[501] Section 63 ibid

including of any other authority or body established by or under the control of the Federal or Provincial Government, as the case may be.

Number 44: Article 171 to the Constitution, 1973 which per Original Constitutional Scheme, binds the Auditor General(s) for Pakistan/of a Province, to submit their respective reports to the President and Governor, respectively, who shall there after cause them to be laid before the National Assembly/the Provincial Assembly as the case may be. Instant amendment[502] has brought changes therein by substituting the words *"the National Assembly"* with that of the words and brackets *"both Houses of Majlis-e-Shoora (Parliament)"* thereof. As a consequence thereof empowering both Houses of Majlis-e-Shoora (Parliament) to examine, discuss, scrutinize and make recommendations on such reports accordingly.

Number 45: Article 175 providing establishment and jurisdiction of the Constitutional Courts, instant amendment[503], revived the ditto provision of the article ibid as was earlier amended by the Constitution (Amendment) Order, 2007 [P.O. 5of 2007][504], by inserting therein clause (1) as well as in the explanation attached thereto, with the words *"and a High Court for the Islamabad Capital Territory"*. By this way a High Court for the Federal Capital was re-constituted, once again.

Number 46: Article 175A, newly inserted through the instant amendment[505], established a Judicial Commission for the inductions of the Judges of Superior Judiciary, i.e.,

[502] Section 64 ibid

[503] Section 66 ibid

[504] Constitution (Amendment) Order, 2007 [P.O. 5of 2007]: Published in [PLD 2008 (Federal Statutes) 114]

[505] Section 67of Constitution (Eighteenth Amendment) Act, 2010: Published in [PLD 2010 (Federal Statutes) 1]

For the appointment of a Judge of Supreme Court, a Judicial Commission headed by the Chief Justice of Pakistan and consists of two most senior apex Court's judges, a former Chief Justice or a former Judge of the Supreme Court being nominee by the Chief Justice in office with consultation of the two member Judges, for a period of two years, the Federal Law Minister, the Attorney General for Pakistan (AGP) and a Senior Advocate of the Supreme Court of Pakistan to be nominated by the Pakistan Bar Council, for a term of two years, respectively.

Likewise for the appointment of the Judges of a High Court the Commission consists on the members referred to in clause (2), besides additional members as well, which includes the Chief Justice of the High Court to which the appointment is being made, the most senior Judge of that High Court, a Provincial Minister for Law and a Senior advocate to be nominated by the Provincial Bar Council for a period of two years.

Similarly for the appointment of the Judges of Islamabad High Court, the Commission set to be consists on the members referred to in clause (2), along with the following additional members as well, which includes the Chief Justice of the High Court to which the appointment is being made, the most senior Judge of that High Court, as the case may be.

Moreover for the appointment of the Judges of a Federal Shariat Court the Commission consists on the members referred to in clause (2), were also having the following additional members as well, which includes the Chief Justice of the Federal Shariat Court to which the appointment is being made, the most senior Judge of that Federal Shariat Court, a Provincial Minister for Law and a Senior advocate to be nominated by the Provincial Bar Council for a period of two years.

These Commissions by majority of its decision shall send nominations, one against each vacancy, to the Parliamentary Committee (PC) consisting of four members from the Senate and Four Members from the National Assembly *(four each from treasury and opposition benches)* and the Secretary of the Senate to act as Secretary to the Committee. The Parliamentary Committee so farmed may or may not conform the nominees forwarded by Judicial Commission by its three-fourth majority within fourteen days failing which the same shall be deemed to have been confirmed by it and will be sent to the President for appointment. However, if it do not conform the nominee of the Judicial Commission it shall then send another nomination thereof. The nominees approved by the aforesaid procedures were finally sent to the President for their respective appointments thereof.

It is worth to point out here that although the instant amendment vide clause (3) to Article 175A, do recognize the principle of seniority and legitimate expectancy as enunciated in the Al-Jihad case (PLD 1996 SC 34), with respect to appointment of the Senior Most Judge of the Supreme Court to be the future Chief Justice, but this criteria does not practically seems to be followed with respect to the appointments of the Chief Justices of High Courts or that of the Federal Shariat Court, respectively.

Number 47: Articles 177 & 193, which per the Original Constitutional Scheme of its clause (1) vests the appointing authority *(with respect to the Chief Justice of Pakistan and as the case may be of the Chief Justice of High Courts)* in the office of President, while that of the other Judges with the consultation of the Chief Justice, this process of such appoint has now been totally done away[506] by substituting the original text of clause (1) with that of the new clause (1), by making the new appointments of the Chief Justice and of the other Judges of

[506] Sections 68 & 69 ibid

the Supreme Court or that of the High Courts, in accordance with the procedure laid down in Article 175A to the Constitution only.

It is also going without saying here that with respect to clause (2) of Article 193 we do observe an interesting change as well, whereby for becoming eligible for the appointment as Judge of a High Court, the minimum age limit of *"forty years"* fixed by the Original Constitutional Scheme was substituted by increasing it to *"forty-five years"* now.

Number 48: Article 194, which prescribes the formalities of taking oath for the Chief Justice and other Judges of the High Court before assuming their respective offices; Instant amendment[507] while substituting the original text of Article 194 the full stop (.) at the end with that of the colon (:), added thereafter a new proviso therein, which provide that the Chief Justice of Islamabad High Court, shall make oath before the President and other Judges of that very Court shall make oath before the Chief Justice of Islamabad High Court, respectively.

Number 49: Article 198 which talks about the seat of the High Court in federating units, received new insertion[508] therein by way of clause (1A), which declare that the High Court for Islamabad Capital Territory shall have its principle seat at Islamabad. Besides, additionally amending the clause (3) as well, whereby two new benches with respect to the Peshawar High Court at *"Mingora"* and another with respect to High Court of Balochistan at *"Turbat"* were also created.

Number 50: Article 199 which was earlier amended particularly with respect to insertion of clause (4-A) therein, via the Constitution (Fourth Amendment) Act, 1975, receive further

[507] Section 70 ibid

[508] Section 71 ibid

amendment[509] whereby it has once again revived the same scheme but with slightest omission of the words *"...unless the case is finally decided, or the interim order is withdrawn, by the court earlier"* therefrom and by making certain modification therein while introducing proviso to the same which bind the High Court to finally decide the matter subjudice before it within a period of six months from the date on which the interim order is so made.

Number 51: Article 200 which talks about the transfer of High Court Judges and as such was earlier substituted vide Constitution (Fifth Amendment) Act, 1976, by a proviso added at the end of its clause (1), authorizing thereby the President of Pakistan to transfer a Judge of a High Court to another High Court, without his (transferee Judge) consent & consultation of the Chief Justices of the apex Courts, if the services of such intended transferee judge does not exceed the maximum period of one year, this initial scheme was done away via instant amendment[510] by omitting the said proviso therefrom. Besides above omitting the provisions of clause (4) as well, which was earlier added through the Constitution (Third Amendment) Order, 1985 [P.O. 24 of 1985] of the military dictator (General Zia-ul-Haq), prescribing penal consequence for a Judge of High Court, who in the event of refusal to accept his transfer to another High Court was deemed to have been retired from his office, accordingly.

Number 52: Article 203C, dealing with composition of the Federal Shariat Court, received further amendments[511] too by virtue of which its clause (2) was also brought at par with the provisions of Articles 177 & 193 to the Constitution, whereby the appointments in the Federal Shariat Court were also declared to be made in accordance with the procedure laid down in Article 175A, as well. Likewise, Clause (3A) of the Article 203C, inserted through

[509] Section 72 ibid

[510] Section 73 ibid

[511] Section 74 ibid

Constitution (Third Amendment) Order, 1985 [P.O. 24 of 1985] also received changes with respect to the qualifications of Ulema's as set under the military dictator's Constitutional Scheme of being *"well-versed in Islamic law"* were substituted with now by setting specific qualifications thereof whereby a person could only be eligible for appointment as a Judge of Federal Shariat Court, if he is *"having at least fifteen years' experience in Islamic law, research or instruction"*, as the case may be.

Another change made with respect to the proviso attached to clause (4) of the Article 203C, is the omission of the words *"for a period exceeding two years"*, removing thereby the earlier mandatory clog in the ways of a Judge of a High Court, who could be appointed as Judge of the Federal Shariat Court without his consent if his such appointment was intended to made for a period not exceeding two years. Now through this omission a Judge of the High Court cannot be appointed as a Judge of the Federal Shariat Court without his consent.

Likewise clause (4B) to the Article ibid, earlier inserted via RCO of 1985 authorizing thereby the President by his order in writing, to modify the term of appointment of a Judge; assign to a Judge any other office and require a Judge to perform such other functions as the President may deem fit, this scheme was totally substituted with that of the new one as introduced through clause (4B), according to which the Chief Justice and a Judge of the Federal Shariat Court shall now only be removed from their respective offices in the like manner and on like grounds as a Judge of the Supreme Court (i.e., Article 209) is removed.

Lastly clause (9) to the Article ibid also changed the earlier scheme as introduced by the Constitution (Amendment) Order, 1980 [P.O. I of 1980] with that of a new scheme, whereby a Chief Justice who is not a Judge of the Supreme Court or a Judge of a High Court, shall be entitled to the same perks and privileges as are admissible to a Judge of the Supreme

Court or of a High Court, as the case may be. However, the proviso attached to the said clause made a clarification to the effect that a Judge already drawing a pension for any other post in the service of Pakistan, the amount of such pension shall be deducted from the pension admissible to him under this clause.

Number 53: After the deletion of the Concurrent Legislative List from the Constitution, through the instant amendment, Article 203D was subjected to amendment[512] whereby in clause (1A) the words *"or the Concurrent Legislative List"* were omitted while for the words *"in either of those lists"* the words *"in the Federal Legislative List"* were substituted thereof.

Number 54: Article 209 which speaks about the composition and function of the Supreme Judicial Council, a body which inquire into issues of misconduct against the Judges of apex Court, which as such was lastly amended by LFO 2002, has once again re-substituted[513] ditto copy of the text of clause (5), allowing thereby the Supreme Judicial Council to act on its own motion too, to initiate disciplinary matters of the Judges of Superior Courts, as well.

Number 55: Article 213 which prescribes the mode of appointment of the Chief Election Commissioner and by the military dictator's package of amendments introduced via RCO 1985, added the words *"in his discretion"*, after the words *"President"* to clause (1); has now been once again omitted the words *"in his discretion"* therefrom by reviving the Original Constitutional Scheme thereto. Apart from the above, it had also added[514] two new clauses (i.e., 2A & 2B) therein as well, outlining thereby the process of the appointment of Chief Election Commissioner, the former of which prescribes the mode of consultation by the

[512] Section 75 ibid

[513] Section 76 ibid

[514] Section 77 ibid

Prime Minister with that of the Leader of Opposition in the National Assembly, requiring them to forward three names to the Parliamentary Committee for conformation of the one person; Likewise the later one prescribes the mode & method of the constitution of Parliamentary Committee, constituted by the Speaker of National Assembly, consisting on fifty percent members from the Treasury Benches and fifty percent from the Opposition Parties, based on the strength in Majlis-e-Shoora (Parliament), to be nominated by the respective Parliamentary Leaders. In case if no consensus is reached among the Prime Minister and the Opposition Leader, the new scheme requires that they will forward separate lists to the committee for consideration and confirmation of any one of the individual among it. Needless to state here that the later provision also caters with the situation in which a vacancy is occurred during the course of the dissolution of the National Assembly; in that eventuality the Parliamentary Committee so constituted, would be comprising on the members of the Senate only, who will follow the same procedure thereof.

However, the interesting thing to be noted here with respect of the afore referred new clauses is that, these two news clauses uses the terms *"Treasury Benches"*, *"Opposition Parties"* and *"Parliamentary Leaders"* without defining them anywhere, likewise they also do not provide solution to a case of a deadlock in the Parliamentary Committee, as well. Again these new additions also fails in completing the chain with respect to the appointment of the Chief Election Commissioner, as admittedly it has to be made by the President, on the advice of the Prime Minister, but the Article seems to be silent to the effect that after its deliberations to whom the Parliamentary Committee will forward its recommendation, i.e., to the President or Federal Government.

Similarly, clause (2A) of Article 213 also does not bind the Parliamentary Committee to confirm one person from the names forwarded by the Prime Minister in consultation with

the Leader of Opposition in the National Assembly. The article also seems to be silent with respect to the event of dissolution of National Assembly and a Parliamentary Committee is constituted as result thereof on the members of Senate, so in that eventuality whether the President would step into shoes of the Prime Minister and would be going through the entire process all alone or the Caretaker Government would take such exercise independently.

Number 56: Article 215 which determines the term of office of the Election Commissioner, had received changes in its clause (1) whereby the word *"three"* used therein were substituted[515] with that of the word *"five"*; increasing thereby the term of the office of the Chief Election Commissioner for a term of five years, besides above it also substituted earlier proviso by addition of a new one which states that, the amendment shall be effective after the expiry of current tenure of the present incumbent in office.

Number 57: Article 216, was amended[516] in paragraph (a) with respect of the proviso attached to clause (2) by substituting the semi colon (;) and the word *"and"* with a full stop (.) at the end, in addition to omitting the paragraph (b) to clause ibid.

Number 58: Article 218, dealing with composition of the Election Commission, substituted its clause (1) by instant amendment[517] by now providing permanence to the Election Commission, for the purpose of holding the elections to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for Local Governments as well. Likewise the amendment in clause (2) re-substituted it, which describes in detail the composition of the Election Commission, consisting on the Commissioner being the Chairman of the Commission and four (04) members each of whom has been a Judge of a High Court from

[515] Section 78 ibid

[516] Section 79 ibid

[517] Section 80 ibid

each Province, appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213, thereof.

However, strange enough that although on the one hand clause (2) to Article 218 made the retired Judges of the High Court's to become eligible for the appointment as members of the Election Commission, but on the other it also seems to be silent with respect to specifying their term/tenure of appointment and method or manner of removal and resignation, as well. Similarly, the Article 218 also did not cater, for including the retired Judge of the High Court from the Islamabad Capital Territory (i.e., Federal Capital) being the representative of the Federal Capital, as the fifth member of the Commission too, which looks discriminatory. Therefore, these important missing factors are required to be inserted therein in order to complete the Commission in its real sense.

Number 59: Article 219, which enlists the detail duties of the Commission, received further amendments[518] while substituting the words used as *"Commissioner"* with that of the words *"Commission"* thereof. It also enlarged further the scope of duties of the Commission, while making changes in it paragraph (c) by substituting for the full stop (.) at the end with a semi colon along with further addition of the new paragraphs (d) & (e) thereto. The former (i.e., paragraph (d)) of which empowers the Commission to hold general elections to the National Assembly, Provincial Assemblies and the local governments, while the latter of which (i.e., paragraph (e)) entrust such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament), upon it. But it is strange enough that the new paragraphs (d) & (e) were added to the Article ibid, without omitting the words *"and"* occurring at the end of paragraph (b) to Article 219. The unfortunate part of the fact is that this drafting error still holds field, without

[518] Section 81 ibid

going through any rectification so far, which is necessary if the new paragraphs (d) and (e) are to be inserted therein.

Number 60: Article 224, setting time of election and bye-election was substituted in its clause (1) with the that of the text of Original Constitutional Scheme, whereafter new clauses (1A) and (1B) were inserted[519]. The former (i.e., 1A) of which authorize the President or to the Governor to appoint care-taker Cabinet besides giving authority of the selection of care-taker Prime Minister or of the Chief Minister; to the office of President or as the case may be to the office of Governor, who in consultation with the outgoing Prime Minister or the Chief Minister and the Leader(s) of the Opposition in the outgoing National Assembly or that of the Provincial Assembly, in addition to the appointment of the Members of Federal and Provincial care-taker Cabinets on the advice of the care-taker Prime Minister or the care-taker Chief Minister as the case may be. While the later (i.e., 1B) puts bar on the members of care-taker Cabinets including the Prime Minister and the care-taker Chief Minister and their immediate family (spouse and children) members not to contest the immediate following elections to such Assemblies.

Again strange enough that the later amendment which disqualify the family members of the care-taker Prime Minister, Chief Minister or member of their Cabinet, this act in fact penalizes a person who may not be the beneficiary of the care-taker Government. This could have been avoided by disqualifying the members of care-taker Cabinets to hold the position if any of their family members is contesting the elections during their tenure. Further, the amendment, while making the Prime Minister and Chief Ministers being the Chief Executives, also do not cater for the situation of their absence from office due to any cause like death etc., too.

[519] Section 83 ibid

Similarly, Article 224 also received amendment by insertion of a new clause (6), which speaks about the seats reserved for women or non-Muslims in the National Assembly or a Provincial Assembly falls vacant, on account of death, resignation or disqualification of a member. In that eventuality such vacant seat shall be filled by the next person in order of precedence from that party list of the candidates to be submitted to the Election Commission by the political party whose member has vacated such seat.

Number 61: Article 226, which per Original Constitutional Scheme requires that all the elections held under the Constitution other than those of the Prime Minister and the Chief Minister shall be made by secret ballot. The wording of which to the extent of *"other than those of the Prime Minister and the Chief Minister"* were earlier omitted via the constitution amendment[520] introduced by the military dictator[521], thereof, this omission has been once again restored to the old Original Constitutional Scheme, whereby now except the balloting of Prime Minister and Chief Minister all voting would be held through secret balloting only.

Number 62: Article 228 talking about the composition of the Islamic Council, was amended[522] with respect to paragraph (c) in clause (3), for substitution of the words *"four"* with that of the words *"one-third"*, so now the President while appointing members of the Islamic Ideology Council, shall ensure that not less than one-third of the members are persons each of whom has been engaged for a period of not less than fifteen years in Islamic research or instructions.

[520] Section 84 ibid

[521] Constitution (Third Amendment) Order, 1985 [P.O. 24 of 1985] published in PLD [Mazhar Ilyas Nagi Constitution Text Book page 1837 at 1838

[522] Section 85of Constitution (Eighteenth Amendment) Act, 2010: Published [PLD 2010 (Federal Statutes) 1]

Number 63: Article 232 to the Constitution which allows the President to issue a Proclamation of Emergency under grave circumstances, via instant amendment[523] received two new provisos to its clause (1), the first in order of which subjected the imposition of emergency by the President to the Resolution from the Provincial Assembly of that Province.

While , the second in order authorizes the President to acts on his own with respect to the Proclamation of Emergency, which shall later on be placed before both Houses of Majlis-e-Shoora (Parliament) separately for approval within ten days.

Number 64: Article 233 which allows the State to suspend Fundamental Rights during the period of emergency this provision further amended[524] in clause (3) by substituting the words "*a joint sitting"* therefrom with that of the words *"both Houses of Majlis-e-Shoora (Parliament) separately"*.

Although Article 233 do vests absolute discretionary power of the suspension of Fundamental Rights in the office of President (subject to Parliamentary approval within two months), in addition to suspending the right of individual to move the Court for the enforcement of such right, particularly in gross contravention to the international covenant *(i.e., International Covenant on Civil and Political rights (the "ICCPR")* ratified by our country too.

Number 65: Article 234 empowering the President to proclaim emergency in case of failure of the constitutional machinery, also receive amendment[525] in clause (1) by omitting the words *"otherwise"* besides substituting of the words *"at a joint sitting"* with that of the

[523] Section 86 ibid

[524] Section 87 ibid

[525] Section 88 ibid

words *" by each House separately"*, respectively. The effects of the omission of words *"otherwise"* from clause (1) had created imbalance inter se the central and provincial powers with respect to imposition of the proclamation of emergency on account of failure of the constitutional machinery, ostensibly removing the discretionary powers of the President by subjecting his proclamation to the Governor's report of disturbance in the respective Province (art 234(1)), compromising thereby the concept of provincial autonomy thereof.

Number 66: Article 242, which per Original Constitutional Scheme prescribed the mode of the establishment of Public Service Commission both for Federal & Provincial level services through an Act of the Parliament while substituting[526] the earlier scheme of the new clause (1A) added via RCO of 1985, of the words *"in his discretion"* therein, with that of now again re-substituting the same with that of the words *"on the advice of the Prime Minister"*, subjecting the process with the concurrence of the office of Prime Minister again.

Number 67: Article 243 dealing with the composition and Command of Armed Forces received further amendments by substitution[527] , renumbering and retaining the mixture of the Original Constitutional Scheme to the extent of clause (1), besides the scheme introduced by the military dictator Zia-ul-Haq via RCO of 1985 to the extent of clause (1A) and later on by the General Parevez Musharraf, via his LFO of 2002 to the extent of clause (3), respectively, additionally with slightest modification made in the newly renumbered clause (4), to the effect that the office of President was bound down subject to the advice of Prime Minister with respect to key appointments and determination of the perks and privileges of the

[526] Section 89 ibid

[527] Section 90 ibid

Services Chiefs i.e., Chairman Joint Chiefs of Staff Committee, Chiefs of Army Staff, Navel Staff & Air Staff.

Number 68: Article 246, which describes the Tribal Areas forming part of the territory of Pakistan, received further amendments[528] in its paragraph (a), sub-paragraph (i) by substitution of the words *"Baluchistan"* and *"North West Frontier"* with that of the words *"Balochistan"* and *"Khyber Pakhtunkhwa"*, respectively. It also omitted the word *"and"* at the end of sub-paragraph (i) ibid, in addition to above it also included the Tribal Areas adjoining Lakki Marwat and Tank District(s) by way of new sub-paragraphs (iii) & (iv) to paragraph (b), respectively.

Number 69: Article 260 containing the definitions of different terms used under the Constitution was subjected to further amendment[529] whereby the words *"consultation"* inserted through LFO 2002 giving meanings as *"shall, save in respect of appointments of Judges of the Supreme Court and High Courts, mean discussion and deliberation which shall not be binding on the President"* were omitted accordingly.

Number 70: Article 267A, newly inserted[530] into the Constitution in order to cater with the situations and difficulties arises in giving effect to the provisions of the Constitution (Eighteenth Amendment) Act, 2010, by refereeing and determination through a resolution of such matter by the joint sitting of both the Houses, while fixing the shortest life period of such modification, addition or omission, for a period of one year, from the date of the commencement of the instant Act *(i.e., till 30th June 2011)*.

[528] Section 91 ibid

[529] Section 92 ibid

[530] Section 93 ibid

Number 71: Article 267B newly inserted[531] declaring that the Articles 152A omitted and Articles 179 and 195 as substituted through the Constitution (Seventeenth Amendment) Act, 2003 shall be deemed always to have been so omitted and substituted.

It is important to recall here that although section 2(b) of the Constitution (Eighteenth Amendment Act, 2010 (10 of 2010) repealed the Constitution (Seventeenth Amendment) Act, 2003 (3 of 2003) and as the said repeal was subject to Art. 264 of the Constitution. That's why Art. 267B of the Constitution was inserted in order to continue the effect of the omission of Art. 152A, by section 5 of the Constitution (Seventeenth Amendment) Act, 2003, (w.e.f. December 31, 2003) and deem Arts. 179 and 195 of the Constitution as substituted by sections 6 and 7 of the said Amendment Act, (w.e.f., December 31, 2003) to have been retained, notwithstanding its repeal, accordingly.

Number 72: Article 268 describing the continuance in force and adaptation of certain laws, clause (2) of which maintains detail lists of the laws in its Sixth Schedule which per the Original Constitutional Scheme were not to be altered, repealed or amended without the previous sanctions of the President in this regard, was as such omitted[532] completely from the Constitution.

Number 73: Article 270A, providing validation to the President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws and all other laws made and protected by RCO of 1985 and the Constitution (Eighth Amendment) Act, 1985, in between the military rule of General Zia-ul-Haq (i.e., 05th of July 1977 till 09th

[531] Section 93 ibid

[532] Section 94 ibid

November, 1985), the instant amendment[533] only omitted the Presidential Referendum of General Zia-ul-Haq held on 19th December, 1984, therefrom. Similarly, clause (6) of the Article 270 was also substituted with a new clause (i.e., clause (6)), empowering the appropriate legislature to amend the laws referred to in clause (1) of Article ibid.

Number 74: Article 270AA providing validation to the President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, proclamations, rules, orders or bye-laws and all other laws made and protected by LFO 2002 and the Constitution (Seventeenth Amendment) Act, 2003 in between the military rule of General Pervaiz Musharrf (i.e., 12th of October 1999 31st of December, 2003) were as such declared to be have been made without any lawful authority and of no legal effect[534]. It also given protection to the Judges of the Constitutional Courts including of the Supreme Court, High Courts and the Federal Shariat Court who were either appointed or given oath under the Oath of office (Judges) Order, 2002 by the then military regime, to have been validly appointed and deemed to have been continued to hold their respective offices.

Besides above it also recognize the pensionary right of the retired Judges of the Constitutional Courts who have either not been given oath or have refused to take oath or likewise who have been deemed to be ceased thereof. In addition to above it also protects the orders made, proceedings taken appointments including secondments and deputations, acts done by any authority, or by any person which were made, taken, done, purported to have been made, taken, done, in exercise or purported exercise of powers derived from any authority or laws *(i.e., martial laws)* etc., deemed to be validly made. It also provided protection of judicial scrutiny of such action by any of the available legal forum, inspite of

[533] Section 95 ibid

[534] Section 96 ibid

the omission of the Concurrent Legislative List, it also protects the Federal Legislation, made with respect to the matter enumerated in Concurrent Legislative List, until it has been altered, repealed or amended by the competent authority, while giving effect to the Eighteenth Amendment. The new amendment also sets time frame for the completion of devolution process till 30th June, 2011, besides constitution of the Implementation Commission, within 15 days of the commencement of Constitution (Eighteenth Amendment) Act, 2010 as well. However, strange enough that Article 270AA(8) only provides the process of devolution of the matters mentioned in the Concurrent Legislative List but does not authorize adaptation of the Federal laws made in pursuance to those matters.

Number 75: Article 270B received further amendments[535] which validated the elections held under the Conduct of General Elections Order, 2002 (Chief Executive's Order No: 7 of 2002), thereof.

Number 76: Article 270BB a new article inserted[536] which validated the General Elections of 2008.

Number 77: Instant amendment[537] had also made changes in the annexure attached to the Constitution, whereby the word 'freely' has been once again re-inserted, which was as such had earlier been removed by Gen Zia, depriving the minorities community to freely profess and practise their religion and develop their cultures.

[535] Section 97 ibid

[536] Section 98 ibid

[537] Section 99 ibid

Number 78: The Third Schedule which contains the specimen of the Oath of various constitutional posts was subjected to amendment whereby in the Oath prescribe for the Prime Minister, likewise Oath prescribe for the Chief Minister, the figure of "(3)" to Article 91was substituted[538] with the new figure of "(5)" to the Article 91 & for the figures "131(4)", the new figures "131(5)" respectively. Similarly in the Oath prescribed for the Speaker of a Provincial Assembly, for the words *"I will discharge"* the new words and comma *"and whenever I am called upon to act as Governor, I will discharge"* were also substituted, besides providing new Oath for the Chief Justice or Judge of the Federal Shariat Court, as well.

Number 79: The Fourth Schedule which per Original Constitutional Scheme prescribe details of legislative business among the Federation and Provinces, by classifying them into two broadly headings of "Federal Legislative List" & "Concurrent Legislative List", respectively. The instant amendment[539] has makes amendments into the Fourth Schedule of the Constitution, while abolishing not only the Concurrent Legislative List there from but also shifted certain items from the Concurrent Legislative List to that of the Federal Legislative List, as well, altering thereby the political, administrative and fiscal authority of the Federal and Provincial Governments.

Number 80: Sixth Schedule to the Constitution which provided protection to the laws listed therein including the laws inserted via LFO 2002, while the Seventh Schedule to the Constitution, which was added through the Constitution (Eighth Amendment) Act, 1985

[538] Section 100 ibid

[539] Section 101 ibid

giving legal covers to various Presidential Orders made in between 1978 to 1985, respectively. However, the instant amendment[540] has omitted both of them.

Conclusion

From the above cited discussion it is concluded that the 18th Amendment which per its objective statement read with section 2 of the Constitution (Eighteenth Amendment) Act, 2003, was initially floated with notable policy parameters of attaining the ideals of a Federal, Islamic, democratic, parliamentary and modern progressive Welfare State, recognizing the Provincial Autonomy, ensuring an independent and impartial Judiciary with equal sharing of resources inter the Provinces and Federation, particularly to undone one point agenda only i.e., the constitutional amendments introduced by the military dictator (General Pervaiz Musharraf) introduced via the Legal Frame Work Order, 2002, as amended by the Chief Executive's Order No: 29 and Chief Executive's Order No: 32 of 2002, be declared as having been made without lawful authority and of no legal effect, and the Constitution (Seventeenth Amendment) Act, 2002 (Act No: III of 2003), be repealed.

On the contrary the Constitution (Eighteenth Amendment) Act, 2010 had only restored Articles 46, 179 & 195, words by words, per the Original Constitutional Scheme, while rest of the Articles were either ditto copied per the texts as originally introduced by the military dictators or likewise mixed with the text of Original Constitutional Scheme as well, which fact totally negates the bold stance of the Chairman of Parliamentary Committee on Constitutional Reforms (PCCR) taken by him to the effect that they have actually restored the Constitution of 1973 in its original shape. It is also interesting to note here that while reading the opening statement of object and the provision contained in Section 2 to the Constitution (Eighteenth Amendment) Act, 2003 together, the researchers do find that it also does not give

[540] Section 102 ibid

any such mandate to the Parliamentary Committee for Constitutional Reforms (PCCR), of undoing the impact of constitutional amendments particularly introduced by the earlier military dictator (General Zia-ul-Haq) through the Constitution (Eighth Amendment) Act, 1985, but even then we do see changes with respect to the amendments introduced by him as well.

Hence, keeping in view the above, it can be safely held that although the Constitution (Eighteenth Amendment) Act, 2010, is an example of bad drafting which opens flood gates for different interpretations for times to come, do restore ostensibly the parliamentary form of government with a face wash assurance of the provincial autonomy; but admittedly at the cost of swelling most of the controversial constitutional scheme introduced by the dictatorial regimes.

3.19 Nineteenth Constitutional Amendment

At the very outset it is important to point out here that the changes introduced by the Constitution (Eighteenth Amendment) Act, 2010 in general while particularly with respect to the Article 175A, created rifts inter se the Government and Judiciary, over the two tiers process of the appointment of the Judges of the apex Courts by formation of Judicial Commission for scrutinizing the suitability of a candidate for Judgeship of the apex Court, the nominees of which were subject to the final conformation of 08 members Parliamentary Committee, comprising over the ruling and opposition parties, respectively, with a veto powers thereof.

This clash of interest moved the legal community including the Supreme Court Bar Association of Pakistan to put challenge to those amendments specifically the insertion of Article 175A through the Constitution (Eighteenth Amendment) Act, 2010, for seeking declaration to the effect of its being ultra vires of the basic features and basic structure of the

Constitution. It is for the above cited reasons that the then Chief Justice (i.e. Justice Iftikhar Muhammad Chaudhry) had constituted seventeen members larger bench, headed under his own supervision., which finally vide its interim order of dated: 21.10.2010, referred the matter for reconsiderations to the Parliament in view of the enabling provision of Article 267A to the Constitution[541].

Quite amazing that instead of taking up the matter in joint sitting of both the Houses; the Parliament in compliance to the Court's order was forced to introduced the Constitution (Nineteenth Amendment), Act 2010, which was gazetted on 04.01.2011 by amending total 06 Articles to the Constitution of 1973 i.e., Articles 81, 175, 175A, 182, 213 and 246 respectively[542], again without having any debate over it, which are as follows:-

Number 01: The first in order i.e., Article 81, has placed an additional charge[543] on the Federal Consolidated Fund by inclusion of the expenditures relating to the remunerations payable to the Judges of the Islamabad High Court, besides making addition of the name of Islamabad High Court, therein.

Number 02: The second in order i.e., Article 175, substituted[544] explanation attached to it by changing the name given through the Constitution (Eighteenth Amendment) Act, 2010, to the High Court for Federal Capital, as *"High Court for the Islamabad Capital Territory"* with that of the new name as *"Islamabad High Court"*.

[541] *Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others*: (PLD 2010 SC 1165)

[542] The Constitution (Nineteenth Amendment) Act, 2010: (PLD 2011 Federal Statutes 19)

[543] Section 2 ibid

[544] Section 3 ibid

Number 03: The third in order, i.e., Article 175-A, prescribed the mode & method of the appointment of Judges of the Supreme Court, High Courts and of the Federal Shariat Court by making changes in clause (2) paragraphs (ii) & (iii) for the words *"two"* with substituted[545] words *"four"*, increasing thereby the number of judges of the Supreme Court on the Judicial Commission.

Similarly, paragraph (iv) of clause (5) to article ibid sets also qualification for an advocate being the nominee of the Provincial Bar Council who has fifteen years practice at his credit for his becoming eligible as member of the Judicial Commission. Likewise, two provisos were also added to the paragraph ibid, whereby the first one barred the senior most judge of the High Court, from being member of the Judicial Commission, in case if his personal nomination is under consideration to the post of Chief Justice of that very High Court, while the second one caters the situation of the non-availability of the Chief Justice of a High Court being the designated member of the Judicial Commission, in that eventuality he would be substituted with that of the nominee of the Chief Justice Pakistan *(after its consultation with four members Judges)*, who even could be a former Chief Justice or former Judge of the that very Court.

Moreover, clause (6) to article ibid, also received changes in its first proviso by insertion of the words *"Chief Justice and the"* after the words *"the"* occurring for the first time; providing thereby mechanism for the initial appointment of the Chief Justice and other Judges of the Islamabad High Court, by a Judicial Commission comprising over the Chief Justices of the four Provinces.

[545] Section 4 ibid

Similarly, clause (9) to article ibid by substitution of the colon (:) at its end, received an insertion of a proviso thereto, catering again the situation with respect to formation of Judicial Commission, in case if the country was facing the menace of the dissolution of the National Assembly, in that eventuality the proviso clarifies that the Judicial Commission constituted in such period, would be comprising over the members of the Senate only.

Again clause (12) to article ibid received three folded amendments whereby at the first it has substituted a proviso, where through it had authorized the Parliamentary Committee not to conform the nomination so received, through three-fourth of the majority of its total membership within the stipulated period of fourteen (14) days; while the newly inserted first proviso to clause ibid binds the Parliamentary Committee to record its reasons for the non-conformation of the candidature for judgeship thereof. Similarly the newly inserted second proviso to clause ibid, authorizes the Commission to send another nomination in case the earlier nomination is not conformed so, respectively.

The present amendment also substituted clause (13) to the article ibid, again binding thereby the Parliamentary Committee to send the name of the nominee confirmed by it or deemed to have been so confirmed, to the Prime Minister, who shall then forward the same to the President for appointment, thereof.

Similarly, clauses (15) & (16) newly inserted also introduced changes therein whereby the former had made it mandatory that the meetings of Parliamentary Committee's to be held in camera and the record of its proceedings to be maintained, while the later removed the application of bar as contained in Article 68 *(restricting discussion in Majlis-e-Shoora (Parliament) with respect to conduct of any Judge of Supreme Court or of a High Court)*, over the deliberations of the Parliamentary Committee's meetings. Lastly, the former

clause (15) was renumbered as clause (17), authorizing the committee to make its rules for regulating its proceedings, thereof[546].

Number 04: Article 182 which prescribe the mode and method of the appointment of the Adhoc Judges in the Supreme Court was amended[547] by subjecting its method of appointments similar to the method of the appointment of routine Judges as has already been made through the Judicial Commission of Pakistan (Article 175A) but with the consultation of the Chief Justice of Pakistan.

Number 05: Article 213 receive amendments in clause (2B) by substitution of its second proviso[548], which filled the drafting error left at the time of the passage of the Constitution (Eighteenth Amendment) Act, 2010, besides giving due role to the Upper House (Senate) in the appointment of the Chief Election Commissioner; providing thereby the total strength of the members of Parliamentary Committee as twelve (12) members, out of which one-third shall be from the Senate.

Number 06: The last in order had amended[549] article 246 settling thereby the disagreement arose pursuance to the Constitution (Eighteenth Amendment) Act, 2010, over the inclusion of Tribal Areas, adjoining Lakki Marwat and Tank Districts to PATA, which now once again relocated by making it the part of FATA.

[546] It is pursuance to the above clause that the Judicial Commission of Pakistan framed *"Judicial Commission of Pakistan Rules, 2010"*, Published in [PLD 2011(Federal Statute) 1]

[547] Section 5 to The Constitution (Nineteenth Amendment) Act, 2010: (PLD 2011 Federal Statutes 19)

[548] Section 6 ibid

[549] Section 7 ibid

Conclusion

Analyzing the above cited amendments viz a viz the challenge cast to the vires of the Constitution (Eighteenth Amendment) Act, 2010, particularly objecting the role given to the Parliamentary Committee in the appointments of the Judges of the apex Courts through the new Constitutional Scheme as envisaged under Article 175A; that finally the Supreme Court by its interim order passed in *"Nadeem Ahmed Advocate's"* case (PLD 2010 SC 1165) did not agreed over losing its dominance/power sharing viz-a-viz the dominance/powers given to legislature in the process of the appointments in the Apex Court's, which ultimately forced the Parliament to introduce & pass the Constitution (Nineteenth Amendment), Act 2010. That's why this amendment could have been rightly termed as the Court's Recommended Amendment. It is also worth to pin point here that although the Court do enjoy, its power of remand with respect to the cases which came before its adjudication domain arising out of an appeal or revision as the case may, from its Courts subordinate to it, but the kind of remand which took place from one pillar of the State to another pillar of the State, via the case supra, itself speaks the volume of an admission on the part of the apex judiciary, of the fact of the existence of trichotomy of powers, within the Constitutionally Settled Area's of the scheme, as will be highlighted in more detail in the next chapter herein below, otherwise per its own precedents it was within the domain to render any authoritative law to this effect, but on the contrary it had deliberately observed the policy of judicial restraint.

3.20 Twentieth Constitutional Amendment[550]

The Constitution (Twentieth Amendment) Act, 2012, gazette on 29.02.2012, had introduced amendments in 08 Articles in addition to two of the schedules i.e., Second and Third Schedule, attached to the Constitution. The major portion of the amendments which

[550] The Constitution (Twentieth Amendment) Act, 2012: (PLD 2012 Federal Statutes Supplementary-I at page 355)

were incorporated into the Constitution, in compliance with the directions of the Judgment of Supreme Court issued in response to a lis subjudice before it[551], questioning thereby the legal status of the 28-lawmakers who had been elected in bye-elections held at a time when the Election Commission of Pakistan was incomplete due to non-appointment of its member as required by the Constitution (Eighteenth Amendment), Act, 2010. It is in order to meet such anomaly that instant amendment was passed by the Parliament without having any debate over it, which is as follows:-

Number 01: Article 48 which per the latest constitutional scheme[552] (i.e., 18th Amendment) binds the President of the country to act on and in accordance with the advice of the Cabinet or the Prime Minister; received further amendment in its clause (5) paragraph (b) by addition of the words *"in accordance with the provisions of Article 224, or as the case may be, Article 224A"* therein, shifting thereby the sole discretionary powers vested in the office of President in the event of dissolution of the National Assembly to appoint a care-taker Cabinet and making it subservient to the procedures laid down in Articles 224 & 224A respectively.

Number 02: Article 214 to the Constitution which talks about the oath of the office of the Commissioners, also receives an amendment[553] in its marginal notes, omitting thereby the words *"Commissioner's"*, thereof, besides above inserting the comma's and words *", and a member of the Election Commission shall make before the Commissioner"*, therein providing thereby mechanism for taking of an oath of the four members of the Election, with respect of which the Original Constitutional Scheme, was admittedly silent thereof.

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[551] *Imran Khan vs. Election Commission*: (2012 SCMR 448)

[552] Section 2 of the Constitution (Twentieth Amendment) Act, 2012: (PLD 2012 Federal Statutes Supplementary-I at page 355)

[553] Section 3 ibid

Number 03: Article 215, as lastly amended[554] through the Constitution (Eighteenth Amendment) Act, 2010, leaving behind the drafting errors by making the article ibid to be applicable to the office of Commissioner only, has now been once again received further amendments therein, whereby the first change made in its marginal note were to the effect of the words *"Commissioner"*, with that of the words *"and the members"* thereafter. The article also receive changes in its clause (1) & the proviso attached thereto, wherein after the words *"Commissioner"* the words *"and members"* were inserted, while in the proviso, after the words *"incumbent"* the words *"Commissioner"*, were added, through which protection has been extended to the term of office of the incumbent Commissioner only.

Needless to state here that changes were also made in clauses (2) & (3) of the article ibid as well, whereby with respect to the former, after the word *"Commissioner"*, occurring for the first time, the words *"or a member"* were inserted besides the addition of the words and commas *"or, as the case may be, a member"* after the word *"Commissioner"*, at its end, while the later inserted the words *"or a member"* after the word *"Commissioner"*, respectively. The effect of these changes rests in prescribing detail procedures with respect to the appointments, term of office, removal and resignation of the Commissioner and of the members, as the case may be.

Number 04: Article 216 as lastly amended[555] through the Constitution (Eighteenth Amendment) Act, 2010, similarly received further amendments, whereby the first change made with respect to its marginal note, was that after the words *"Commissioner"*, the words *"and members"* were added thereof; secondly in clause (1) after the words *"Commissioner"*

[554] Section 4 ibid

[555] Section 5 ibid

the words *"or a member"*, while in clause (2) , after the words *"Commissioner"* occurring for the first time the insertion of the words *"or a member"*, were inserted as well. Hence now by this change, the restrictions of having any other office of profit during the subsistence of holding the office of Commissioner at par, is equally made applicable to the members of Election Commission as well.

Number 05: Article 218, which pursuance to the Constitution (Eighteenth Amendment) Act, 2010, provided a permanent Election Commission but containing certain drafting over sightness leaving behind lacunas with respect to permanent characteristic of the Election Commission therein; the instant amendment[556] has removed such lacuna by making changes in in clause (3) attached to it, while omitting the words *"constituted in relation to an election"*, therefrom, completing thereby the sense of its permanence, in all respect thereof.

Number 06: Article 219 as lastly amended through the Constitution (Eighteenth Amendment) Act, 2010, has once again receive changes[557] whereby paragraph (e) at its end, substituted the full stop (.) with that of a colon (:), where after a new proviso was inserted therein, which provided legal cover to the interregnum period, according to which till the time of the first appointments of the members of Commission were being made per the mandates of the Constitution (Eighteenth Amendment) Act, 2010, the Commissioner in office will discharge all his duties as envisaged in paragraphs (a) to (c) to the Article ibid, till arrival of his successor in office.

[556] Section 6 ibid

[557] Section 7 ibid

Number 07: Article 224 lastly amended through the Constitution (Eighteenth Amendment) Act, 2010, received further amendments[558] to first proviso attached to clause (1A) by substituting the words *"selected"* with that of the words *"appointed"*, removing thereby the grammatical mistake with respect to the appointment of the care-taker Prime Minister, which per 18th Amendment empowers the President to *"select"* instead of *"appointing"* in consultation with the Prime Minister and leader of the Opposition in the outgoing National Assembly, thereof, to make it at par with the process of the appointment of the care-taker Chief Minister in the Provinces.

Instant amendment had also added a new proviso after the first proviso attached to clause (1A), catering thereby the circumstances leading to the events of disagreement of the Prime Minister or Chief Minister with their respective leader of Opposition over the appointment of care-taker Prime Minister or over such appointment of the care-taker Chief Minister; in that eventuality the new scheme states that the procedure already provided under Article 224A would be followed. Similarly, the second proviso to clause (1A) *[i.e., before it's present substitution]* also received changes by substitution of the word *"further"* with that of the word *"also"*, thereto.

Likewise in clause (6) for the full stop (.) at the end a colon (:) was substituted thereafter a new proviso was added therein, which provides that in case of the exhausting of the party list, the concerned political party may submit a name for any vacancy which may occur thereafter.

[558] Section 8 ibid

Number 08: Article 224A being a new article inserted[559] into the Constitution, catering the circumstances relating to the events of the disagreement of the Prime Minister or Chief Minister with their respective leader of Opposition over the appointment of care-taker Prime Minister or over the appointment of care-taker Chief Minister as the case may be, in that eventuality the new scheme prescribes that within three days of the dissolution of that very Assembly, they (i.e., the incumbent) shall forward two nominees each to the committee to be immediately constituted by the Speaker of National Assembly, comprising over the eight members of the outgoing National Assembly or the Senate[560] while in case of the Provincial Assembly such committee would be consisting on six member, which is so constituted by the Speaker of the Provincial Assembly having equal representation from the treasury and the opposition, nominated by the outgoing Prime Minister or the Chief Minister and their respective Leader of Oppositions. The committee so constituted will finalize the name within three days of the referral of the matter to it. Moreover, even such committee if fails to decide the same, then the names of the nominees would be referred to the Election Commission for its final decision within two days.

The new article through its clause (4) also make it clear that until the process of the appointments of care-taker Prime Minister or that of the care-taker Chief Minister is completed, the incumbent Prime Minister or likewise the Chief Minister in a Province shall hold their respective offices respectively. Again clause (5) to the article ibid clarifies that if the members of the Opposition are less than five in the National Assembly and less than four in any Provincial Assembly, then all of them shall be members of the said committee.

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[559] Section 9 ibid

[560] Note: The use of word *"or"* in between National Assembly and the Senate creates confusion as the later house is never subjected to dissolution although it provides itself mechanism for the retirement of its member upon expiry of certain period thereof]

Number 09: This amendment[561] also brought changes into the Schedule attached to the Constitution, whereby in the Second Schedule set out into the Constitution in paragraph 1 was substituted for the words *"Chief Election Commissioner"* with that of the words *"Election Commission of Pakistan"* while another change in the same paragraph is also made after the word *"and"* occurring for the second time, with that of the words *"Chief Election Commissioner"*. Paragraphs 2 & 22 to the schedule ibid also receive changes whereby the words *"Chief Election Commissioner"* were substituted with that of the words *"Election Commission of Pakistan"*.

Likewise in Third Schedule prescribing the oath for Chief Election Commissioner, also receive similar changes, whereby in its title after the word *"COMMISSIONER"*, the words *"OR MEMBER OF THE ELETION COMMISSION OF PAKSITAN"* were added, besides making ditto changes in the body of the oath by the insertion of the words *"or as the case may be, member of the Election Commission of Pakistan",* respectively.

Conclusion

The Constitution (Twentieth Amendment) Act, 2012, as per its statement of objects and reasons was escalated pursuance to the directions of the Supreme Court of Pakistan, directing thereby the Federation to constitute Election Commission of Pakistan in accordance with the amended provision of the Constitution of the Islamic Republic of Pakistan and to give legally cover to the bye-elections conducted by the Chief Election Commissioner in the interregnum period, besides above it also mandates to give due independence to the Election Commission of Pakistan besides providing the manifestation of the Interim Cabinets thereof. Although it does took certain steps forward in the formation of an independent and

[561] Sections 10 & 11 ibid

autonomous Election Commission by prescribing the appointment mechanism of the care-taker government, but it is still silent with respect to the mandate and functioning of care-taker Government so formed.

(K). CONSTITUTIONAL AMENDMENTS & THE THIRD ROUND OF THE GOVERNMENT OF MR. MIAN MUHAMMAD NAWAZ SHARIF (2013 TILL TODATE)

After successful completion of the term of office of the government of Mr. Asif Ali Zardar and pursuance to general elections of 2013, finally the reign of political affairs once again came into the hands of Mian Muhammad Nawaz Sharif giving him an opportunity to serve as the third time Prime Minister of the country. It was during the Nawaz Shairf laid government that pursuance to the deadliest attack carried out by the militants (Talibans) on innocent children as well as of the school staff & administration of the Army Public School at Peshawar, resting in life loss of hundreds of people, which rocked entire country and provide the nation an opportunity of being united to set its future course and to fight such menace, accordingly, as a result of which the constitutionally protect military Courts were introduced on similar pattern as were introduced in the past through the Constitution (Twelfth Amendment), Act, 1991.

3.21 Twenty-First Constitution Amendment[562]

The Constitution (Twenty-First Amendment) Act, 2015, gazette on 8th January, 2015 had through its amendments added a new proviso along with an explanation to clause (3) of Article 175, fixing 02 years life line as a maximum period of its effectiveness besides amending its First Schedule in sub-part III of Part I, with the new entries thereof. This amendment was passed by the Parliament, again without having any kind of debate over it, which is as follows:

Number 01: Article 175, establishing Constitutional Courts again receive amendments[563] at the end of clause 3 by substitution of the full stop (.) with that of a colon (:) where after a

[562] Constitution (Twenty-First Amendment) Act, 2015, Published in [PLJ 2015 Federal Statute 83]

proviso and an explanation were inserted thereto. The former create exception to the applicability of the articles with respect to the trials of the persons under the Acts mentioned at serial No: 6, 7, 8 and 9 of sub-part III of Part I of the First Schedule, who claims, known to belong to any terrorist group or organization using the name of religion or a sect, as the case may be, while the later explain the term *"sect"* used therein to mean that a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.

Number 02: The Act also amended[564] the first schedule attached to it, by including new entries from serial 6 to 9, in to sub-part III, Part I of The Pakistan Army Act, 1952, The Pakistan Air Force Act, 1953, The Pakistan Navy Ordinance, 1961 and The Protection of Pakistan Act, 2014, respectively.

Conclusion:

The twenty-first amendment was a show of national solidarity as well as iron fisted response to the horrific incident of Army Public School Peshawar attack of 16th December 2014, paving way for establishment of military Courts, presided over by the military judges, for trying hardcore civil militants. Although the establishment of such Courts was need of the hours but still its constitutional emergence would also shows the acceptance of the failure of the Criminal Justice System of our country as well, as is self-evident from the verdict of the Supreme Court, render in response to a challenge cast to Constitution (Eighteenth) & Twenty First Amendments jointly, endorsing the validation of those amendment[565]. Needless to state

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[563] Section 2 ibid

[564] Section 3 ibid

[565] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401)

that the sunset clause included through Section (1)(3) to the Act under consideration stands automatic repeal by operation of law on 06th January, 2017, accordingly.

3.22 Twenty-Second Constitution Amendment[566]

The Constitution (Twenty-Second Amendment) Act, 2016, gazette on 10th June, 2016 had brought changes in 09 Articles to the Constitution, such as Articles 81, 213, 215, 216, 217, 218, 219, 221 & 222, respectively.

Number 01: The first in order i.e., Article 81, described in detail the constitutional bodies, whose remuneration were to be payable from the Federal Consolidated Fund, had received changes[567] in its paragraph (b) by substitution of the word *"servants"* with that of the word *"staff"*, used for the staff hired by various constitutional bodies which includes, the staff of Supreme Court, the Islamabad High Court, the department of the Auditor General, the office of the Chief Election Commissioner, the Election Commission, the Secretariats of the Senate and that of the National Assembly, respectively.

Number 02: The amendment[568] also changed the heading of Chapter 1, Part VIII to the Constitution by substituting the word *"COMMISSIONS"* with that of the word *"COMMISSION"*.

Number 03: Article 213 describing in details the mode of the appointment of Chief Election Commissioner, received changes in clause (2), which was totally substituted[569] with that of a new clause (2) along with two explanations attached thereto; by virtue of which in

[566] Constitution (Twenty-Second Amendment) Act, 2016, Published in [PLD 2016 Federal Statute 183]

[567] Section 2 ibid

[568] Section 3 ibid

[569] Section 4 ibid

addition to serving or retired judges of the Supreme Court, now the bureaucrats, government officers and technocrats have also become eligible for their proposed appointments as the Chief Election Commissioner (CEC), if they have qualify the minimum thrash hold of the age limit, which is fixed as sixty-eight years, thereof. Likewise explanation 1 defines the term *"senior civil servant"* to means a civil servant who has served for at least twenty years under Federal or Provincial Government and has retired in BPS-22 or above. Similarly, explanation 2 defines *"technocrat"* a person who is the holder of a degree requiring at least sixteen years of education, recognized by the High Education Commission and has at least twenty years of experience, including a record of achievements at the national or international level.

Amendments were also made in clauses (2A) & (2B) respectively, whereof in the former (i.e. 2A), at the end full stop (.) was substituted with that of the colon (:) along with addition of a new proviso, which prescribe mechanism catering the cases in which if no consensus between the Prime Minister and Leader of Opposition reached, in that eventuality the new scheme states the each of them shall separately forward their respective lists to the Parliamentary Committee for consideration which may confirm any one name; while the later one (i.e., 2B) omits the first proviso, besides omitting the word *"further"* from its second proviso, likewise in third proviso for the word *"also"* the word *"further"* were substituted, as well. It is also worth to point out here that by making amendments in clause (3) to Article 213, in shape of the insertion of the words *"or a member"* after the word *"Commissioner"* thereof, the new scheme had brought the powers and functions of *"a member"* of the Election Commission at par with that of the powers & functions of the Chief Election Commissioner as per the mandates of Constitution and law accordingly.

Number 04: Article 215 receive changes[570] in clause (1) by substitution of its proviso with a new one, in order to give continuity to its formation etc., enunciating thereby the mechanism for the retirement of its members with intervals of two years, with the scheme as, among of whom two will be retired on the expiry of first two and a half 2(1/2) years, while the remaining two will be retired after the expiry of the next two and a half years, respectively. Similarly the newly substituted second proviso to the same clause, prescribes the mechanism for the Commission selecting by draw, a lot of two its members, who shall retire after the expiry of the period of first two and a half years. Likewise the newly substituted third proviso to the same clause caters the situation with respect to filling the casual vacancies with respect to the seats of its members, which according to it will be filled for the un-expired term of office of the member, whose vacancy has been intended to be filled so.

It is also worth to point out here that the present amendment also inserted a new clause (4) to the Article ibid as well, which sets forty-five days as the period for filling vacancies with respect to the Commissioner or of a member, as the case may be.

Number 05: Article 216 lastly amended through the Constitution (Twentieth Amendment) Act, 2012, has once again received changes[571] in its clause (2) by substitution of the colon (:) with that of a full stop (.), in addition to omission of the proviso attached thereto. It is also worth to point out here that the present amendment on the fact of it seems to be an example of the bad legislative drafting as no specific reference has been made with respect to the substitution of the colon(:) used therein, particularly when it must be made clear that the colon used at its end is going to be substituted with that of the full stop thereof.

[570] Section 5 ibid

[571] Section 6 ibid

Number 06: Article 217 talking about the appointment of Acting Commissioner, in case of the absence or inability of the Commissioner to perform the functions of his office due to any cause, the present amendment[572] substituted the word *"a Judge of the Supreme Court nominated by the Chief Justice of Pakistan"* with that of the words *"the most senior member in age of the members of Commission"*, excluding the Judge of Supreme Court from becoming eligible to serve as Acting Chief Election Commissioner.

Number 07: Article 218 has also received changes[573] in its paragraph (b) to clause (2), by substitution of a new paragraph (b), by virtue of which in addition to serving or retired judges of High Courts, now the bureaucrats, government officers and technocrats have become eligible for appointment as the member of Election Commission if they are not more than sixty-five years of age. Likewise the explanation attached to it gives similar meaning to the terms *"senior civil servant"* and *"technocrat"* used therein, as has already been given to those in clause (2) of Article 213, thereof.

Number 08: Article 219, which enlist the detail duties of the Commission, has also receive further amendments[574] whereby in its marginal heading for the word *"Commissioner"* the word *"Commission"* is substituted. Besides substituting paragraph (a) to Article ibid with a new paragraph (a) entrusting thereby additional role to the Election Commission to prepare & revise periodically the electoral rolls for the elections to National Assembly, Provincial Assemblies and local governments, and to keep them uptodate respectively.

[572] Section 7 ibid

[573] Section 8 ibid

[574] Section 9 ibid

Number 09: Article 221, was also put to amendments[575] in its marginal heading for the words *"servants"* the word *"staff"* was substituted, likewise in the body of the Article for the words *"Election Commission"* occurring for the second time the word *"Commissioner"* and for the word *"servants"* the word *"staff"* were also substituted.

Number 10: Article 222, also amended it paragraph (b) after the word *"Commission"* occurring at the end with the addition of the word *"including delimitation of constituencies of local governments"*[576]. Similarly, in paragraph (f) after the word *"Houses"* a comma (,) was inserted and the word *"and"* occurring thereafter was omitted there too. Likewise the word *"Assemblies"* occurring at the end the words *"and local governments"* were added, besides above, for the word *"an"*, appearing before the words *"Election Commission"* occurring for the second time the word *"the"* was also substituted, respectively.

Conclusion

From the above cited discussion it is concluded that Constitution (Twenty-Second Amendment) Act, 2015, do have prescribed the detail qualification and procedure for making appointments of key posts in the office bearers of Election Commission of Pakistan and its 04 Provincial Election Commissions respectively. It also removed the condition of hiring the judges of apex Courts only, as being the members of Election Commission by allowing the retired senior bureaucrats and technocrats to become eligible for the portfolio of Chief Election Commissioner and members of the Election Commission. In addition to above, it also entrusted the office of Acting Chief Election Commissioner to the Most Senior Member in age, during the course of absence or inability of the Chief Election Commission. The amendment also enhance the period of tenure for its 04 Provincial Members to maximum

[575] Section 10 ibid

[576] Section 11 ibid

period of five years besides increasing the maximum age limits of its members and that of the Commissioner to 65 & 68 years, respectively. It also enhanced the responsibilities of Election Commission for conducting elections for the National Assembly, Provincial Assemblies or that of the elections of local governments as well. The amendment also empowers the Election Commission with respect to the issues of delimitation of the constituencies of the local government, preparation of electoral rolls etc., on periodical revision and updates. In nut shell, the Election Commission was given maximum from its permanent status to that of independence in all administrative affairs except that of the financial independence, thereof.

3.23 Twenty-Third Constitution Amendment[577]

The Constitution (Twenty-Third Amendment) Act, 2017, gazette on 31st March, 2017 had brought changes once again by inserting a new proviso along with an explanation to clause (3) of Article 175, making extension of the further period of 02 years in the life line of the establishment of military Court's besides amending its First Schedule in sub-part III of Part I, with new entries thereof. Needless to state here that due to sunset clause incorporated through the Constitution (Twenty-First Amendment) Act, 2015, the Parliament unanimously agreed over the further extension of the working of military Courts in order to root out the extremist elements from the society who were indulged in waging war against the state of Pakistan. It is in this context that the instant Act introduced following amendments into the Constitution of Pakistan, 1973 such as:-

Number 01: Article 175, establishing Constitutional Courts again receive the ditto amendments[578] as prescribed through the Constitution (Twenty-First Amendment), Act, 2015,

[577] Constitution (Twenty-Third Amendment) Act, 2017, Published in [PLJ 2017 Federal Statute 323]

[578] Section 2 ibid

where through at the end of clause 3 the full stop (.) was substituted with that of a colon (:) where after a proviso and an explanation were inserted thereto. The former with slightest change create exception to the applicability of the articles with respect to the trials of persons under the Acts mentioned at serial No: 6, 7, 8 and 9 of sub-part III of Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization *misusing*[579] (Emphasis Supplied) the name of religion or a sect, while the later explain the term *"sect"* used therein to mean that a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.

Number 02: The Act also amended[580] the first schedule attached to it, by adding new entries after the existing entry 5, such as:

6. The Pakistan Army Act, 1952 (XXXIX of 1952)

7. The Anti-Terrorism Act, 1997 (XXVII of 1997), only to the extent of sub-clause (iv) of clause (d) of sub-section (1) of section 2 of the Pakistan Army Act, 1952 (XXXIX of 1952), added through the Pakistan Army (Amendment) Act, 2017 (XI of 2017)

It is also important to note here that instant amendment deliberately excluded the consideration of the previous entries at 7 to 9 made into sub-part III of Part I of the following Acts, i.e., The Pakistan Air Force Act, 1953, The Pakistan Navy Ordinance, 1961 and The Protection of Pakistan Act, 2014, respectively, which were previously included through the 21st Amendment; perhaps for the sole reason that most of the illegal combats were waging war through the land route only.

[579] The change is with respect to the following fact that the Former Act (i.e., 21st Amendment) used the word "using" in its proviso, which has now been change with the word "misusing", therein

[580] Section 3 to Constitution (Twenty-Third Amendment) Act, 2017, Published in [PLJ 2017 Federal Statute 323]

Conclusion:

The Twenty-Third amendment extended the life line of the military Courts, once again while showing unanimity of the entire nation to wipe out and eradicate terrorists from its soil, besides above it also gave befitting response to the failure of the Criminal Justice System of our country as well, as is self-evident from the verdict of the validation of Constitution (Eighteenth) & Twenty First Amendments by Supreme Court[581]. However, the sunset clause included through Section (1)(3) to the Act under consideration would once again stands automatically repeal by operation of law on 06th January, 2019, accordingly.

3.24 Twenty-Fourth Constitution Amendment[582]

The Constitution (Twenty-Fourth Amendment) Act, 2017, gazette on 24th December, 2017 had brought changes into Article 51 only, which is as follows:

Number 01: Article 51 receive changes[583] in its clauses (3) & (5) respectively, the former of which prescribed in detail the allocation of seats to the each Province, the Federally Administered Tribal Areas and the Federal Capital, subjected it to major shifts in allocation of seats particularly reduction 07 general & 02 women Seats from its earlier total figure of the 183 *[i.e., General (148) & Women (35) seats]*, allocated to the Province of Punjab, by now reducing it to the total strength of 174 seats *[i.e., General (141) & Women (33) seats]*.

The amendment also increased both seats *(of the general as well as the women)* of the Provinces; of Balochistan from its previous total figure of 17 to now 20 *[i.e., General (16) & Women (4) seats]* and of the Khyber Pakhtoonkhwa from its previous total figure of 43 to

[581] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc*: (PLD 2015 SC 401)

[582] The Constitution (Twenty-Fourth Amendment) Act, 2017: (PLJ 2018 Federal Statutes 167)

[583] Section 2 ibid

now 48 *[i.e., General (39) & Women (9) seats]*, besides increasing the general seats of the Federal Capital from its previous total figure of 2 to now 3 *[i.e., General seats]*. It is worth to point out here that no change has ever been made with respect to the total number (i.e., 332) of seats in the National Assembly, thereof.

Furthermore it also substituted clause (5) with a new clause and proviso thereto, which saved the seats specifically meant for the Federally Administered Tribal Areas as allocated through clause (3), besides stating that the seats in the National assembly allocated to each Province and the Federal Capital shall be based on population in accordance with the last preceding census officially publish, thereof. Moreover, the proviso states too that for the purpose of the next general elections to be held in 2018 and bye-elections related thereto, the allocation shall be made on the basis of provisional results of the 2017 census which shall be published by the Federal Government.

Conclusion:

The Twenty-Fourth Amendment removed the bottle neck of the constitutional problem in allocation of seats in the National Assembly inter se the Federation and its units through out of the country, in which the un-amended provision as contained in Article 51(5), prescribe the mode of the allocation of seats in the National Assembly to each Province, the Federally Administered Tribal Areas and the federal capital, on the basis of population in accordance with the last preceding census officially published, created hurdle. It is also worth to point out here that the Constitution also mandates for carrying out census after passage of every ten years but since the last delayed census carried out in the year 1998, admittedly no such official census were ever been carried out until the year 2017, so the instant amendment coupled with the legislation with respect to the delimitation carried thereof, has actually fulfilled the constitutional requirement of conducting a census in the country; which requires

that the new elections if are not based on new delimitations, then they would be considered unconstitutional and illegal.

CHAPTER-IV

D. JUDICIAL REVIEW OF THE CASE LAWS REALTING TO CONSISTITUTIONAL CRISES AND CONSTITUTIONAL AMENDMENTS (FIRST TO TWENTY-FOURTH)

In the preceding chapter I have analyze the Constitutional Amendments and their effects on the will of the people, now I will be examining all the case law from our own jurisdiction rendered by our apex Courts with respect to the Constitutional Crises and the Constitutional Amendments respectively whereby our learned apex Courts, had time and again illegally validated the Civil & Military coups against the elected Civilian Government(s), besides above it also by usurping the Constitutional Powers which vests exclusive in the domain of Parliament *(i.e., Article 238 & 239)*, illegally empowered the military dictator(s) to badly effect the fabric of Social Binding Contract (Constitution) through incorporation of the illegal Constitutional Amendments thereto, while applying the draconian Doctrine of Civil and State necessity, Separation/Trichotomy of Powers, Final Arbitrator, Judicial Duty in view of the Constitutional Scheme, Supremacy of Constitution and Rule of Law respectively; this exercise would be conducted with a view to ascertain as to how far such judicial decisions *(with a few exceptions)* affected the Social Binding Contract *(i.e., Constitution of 1973)*. While searching the judicial dictums, efforts would also be made to pinpoint most important cases of our Constitutional & Legal history, which to great extent either halted the Constitution making process or totally changed the nature of Constitution. So, when I digs out the history, it reveals that with certain exceptions our judicial history is full of such decisions that always sided with the powerful dictators etc., rather than standing for justice; in this respect the cases laying down the foundations of the constitutional & legal crises were as follows:-

1. Moulvi Tamizuddin Khan Cases [584]

Moulvi Tamizuddin Khan Case was the first ever challenge after the independence of our country, which was put up before the apex Courts while calling in question the dissolution of Constituent Assembly pursuance to the proclamation of the then Governor General orders of 24th October, 1954, as well as questioning the reconstitution of the Council of Ministers, by invoking the Jurisdiction of Chief Court of Sind under Section 223-A of the Government of Indian Act, 1935. The crux of the arguments in the above cited case revolves around the Preliminary Objection raised on behalf of the Federation before the Chief Court of Sind was two folded (i). that Chief Court had no Jurisdiction to entertain the writ petition and also (ii). that the Section 223-A which was incorporated into the Government of India Act, 1935, was invalid due to non-assent of the Governor General which is mandatory for validation of all laws, although the legal battle was wined by the petitioner initially whereby the Chief Court of Sind under the leadership of Justice Constantine the then Chief Justice, declared the step of the dissolution of Constituent Assembly and the Cabinet as void and illegal while restoring the same to its original position, but upon an appeal by the Federation to the Federal Court, the learned Federal Court under the leadership of Political Jurist [585] i.e., Justice Muhammad Munir, the then Chief Justice *(with dissenting view of the Justice A. R. Corneilus who endorsed the Chief Court's decision)* in deviating to the jurisprudence already settled by the Federal Court as well as even set by himself as well[586] that the Constituent Assembly of Pakistan as a Constitution making body was the Supreme legislature in the State, enjoying unfettered and complete legislative sovereignty; surprisingly reversed

[584] *Moulvi Tamizuddin Khan vs. Federation of Pakistan:* (PLD 1955 Sindh 96) and *Federation of Pakistan vs. Moulvi Tamizuddin Khan*: (PLD 1955 FC 240)

[585] For details please read Chapters 1, 2,3, 5 & 6 of Syed Sami Ahmad Senior Advocate Supreme Court on *The Judiciary of Pakistan and it's role in Political Crises*, (First published in 2012) Royal Book Company Karachi

[586] *Ex-Major General Akbar Khan and Faiz Ahmed Faiz vs. The Crown*: (PLD 1954 FC 87); *Sarfarz Khan and another vs. Crown*: [PLD 1950 (Lahore) 384].

the findings of the Chief Court of Sind on technical grounds only, i.e., the Constituent Assembly also performs its functions as legislature and all laws pass by it requires assents of the Governor General, so on the above analogy even the insertion of Section 223-A into the Government of India Act, 1935, was also held to be not valid as it has no such backing of the consent of the Governor General, that's why the Chief Court of Sindh has no Jurisdiction to issue writ under Section 223-A, the Court also held that the Constituent Assembly was not sovereign rather it is Governor General who is a Sovereign Authority, in the state. Needless to state here that the judgment pronounced by the Federal Court in the *"Molvi Tameezuddin"* Case, provided an opportunity for raising fingers of the legal fraternity over the validity of the exercise of its own Jurisdiction as well, because, it was the defunct Constituent Assembly's legislative instrument which upon enactment of the Privy Council (Abolition of Jurisdiction) Act, 1950, invested jurisdiction to the Federal Court of Pakistan.

Hence practically the later judgment if on the one hand had escalated future constitutional complications/crises *(as will be discussed in detail in the very next judgment herein below)* within the country, contrary to the specific warning pointed through separate findings of Justice Muhammad Bakhsh in *"Molvi Tameezuddin"* Case, being a member of the bench of Chief Court of Sindh, while stating in the following words that:

> *"...any law, passed by the Constituent Assembly as a constitution-making body, if held invalid for want of assent by the Governor General, would be disastrous in effect...."*

on the other it had also laid foundation of suppressing the will of the people *(i.e., Constituent Assembly)* by preferring the individual in office *(i.e., Governor General)* to be the sovereign entity, the ultimate result of which rests in creating obstacles in the framing of the Social Binding Contract (i.e., the Constitution) for a newly born country, till the year 1956.

2. Usif Patel's Case[587]

As discussed herein above that the judgment rendered under the leadership of Justice Muhammad Munir the then Chief Justice to an appeal from *"Molvi Tameezuddin"* Case (PLD 1955 SC 240), had created further legal complications for time to comes, as a matter of fact since the year 1950, huge numbers of the enactment promulgated by the then Constituent Assembly had also not received assent of the Governor-General. This situation gives rise to legal anomaly through out of the country casting thereby serious doubts about it legal sanctity & status of such legal instruments, thereof.

During the course of time Criminal Appeals on behalf of Usif Patel and 02 others, came for adjudication before the Federal Court challenging thereby their respective detention in prison under the Sindh Control of Goondas (Governor's) Act, 1952, while placing reliance on the *"Molvi Tameezuddin"* later findings of the Federal Court. The Governor General while taking note of the seriousness of the constitutional issue, step forwarded for covering up of the above cited lacuna, by finally promulgating the Emergency Powers Ordinance, 1955 (Ordinance No: IX of 1955), according thereby assent thereto to the all the legislative instruments passed by dissolved Constituent Assembly including the said Ordinance, retrospectively. Later on the vires of this Ordinance when came for consideration before the Federal Court the learned Federal Court under the leadership of Political Jurist[588] i.e., Justice Muhammad Munir the then Chief Justice, held that as the Constituent Assembly alone was competent to legislate on constitutional matters and by its dissolution, the powers held by it were not transferred to the Governor-General nor it could be vested in Governor-General's office through promulgation of the Ordinance under question, so the promulgation

[587] *Usif Patel and others vs. The Crown*: (PLD 1955 FC 387)

[588] For details please read Chapters 1, 2,3, 5 & 6 of Syed Sami Ahmad Senior Advocate Supreme Court on *The Judiciary of Pakistan and it's role in Political Crises*, (First published in 2012) Royal Book Company Karachi

of Ordinance No: IX of 1955, validating the laws since 1950 retrospectively, amounts to legislating which is invalid for the reasons that at that very time the Constituent Assembly was not in field which could alone legislate on the constitutional matters, while with respect of which the President could only accord or refuse his assent on such enactments only. It is sad to point out here that here once again the Political Jurist [589] i.e., Justice Muhammad Munir deviated from the principles set down by in his own earlier judgment rendered in *"Molvi Tameezuddin"* Case (PLD 1955 FC 240) where he himself knock down the Constitution Petition of the then Constituent Assembly, for want of the assent of the Governor General.

This decision again give rise to further complications as after the said decision there was no competent legislature left in the field to validate the laws under question. This situation compels the Governor-General to move a reference[590] in this respect by invoking his powers under Section 213 to the Government of India Act, seeking thereby the opinion of the Federal Court in this regard. Thereafter the Federal Court under the leadership of Political Jurist [591] i.e., Justice Muhammad Munir (the then Chief Justice), while taking in to account the legal maxim *"id quod allas lictum nonesset necessitas faciat licitum salus populi suprema lex"* and *"salus reipublicae est supreme lex"*, and referring the opinion of Lord Mansfield in George Strattion and others *(in 1979-21 Howells State trial 1045)* in addition to equating the powers of the Head of the State with that of the powers of the Army Commander during the Martial Law Regime, validated the impugned legislation (i.e., Ordinance No: IX of 1955)

[589] For details please read Chapters 1, 2,3, 5 & 6 of Syed Sami Ahmad Senior Advocate Supreme Court on *The Judiciary of Pakistan and it's role in Political Crises*, (First published in 2012) Royal Book Company Karachi

[590] Reference No: 1 of 1955: (PLD 1955 FC 435)

[591] For details please read Chapters 1, 2,3, 5 & 6 of Syed Sami Ahmad Senior Advocate Supreme Court on *The Judiciary of Pakistan and it's role in Political Crises*, (First published in 2012) Royal Book Company Karachi

during the interim period *(i.e., until the validity of such laws are decided upon by the new Constituent Assembly)*, unfortunately while applying the doctrine of *"State necessity"*, in this regard. Hence, after perusal of the judgments discussed herein above its reveals that actually it was the Justice Munir's led Federal Court which led first brick of the Legal & Constitutional Crises within the country, while rendering consisting conflicting views one after another, the aftershocks of which are still born by future generations even uptill to date.

3. Dosso Case[592]

Dosso Case primarily relates to the murder committed in District Lora Lai of the Province of Balochistan, wherein the accused (Dosso) was convicted under tribal system of Justice by Loya Jirga *(Council of Elders)* via FCR *(Frontier Crime Regulation)*. The relatives of the accused/convict agitated the matter through a writ petition before the Lahore High Court, challenging thereby the vires of the FCR as being unconstitutional to the Constitution of 1956; the Lahore High Court ruled in favour of the accused/convict while declaring the FCR 1901 as ultra vires to the Constitution of 1956. However, in the times to come, this judgment ignited anxiety among the previous convicts particularly the convicts under the FCR laws, to question their respective convictions in FCR, since the date of the promulgation of the then Constitution of 1956.

Feeling aggrieved the Federal Government went in appeal before the Supreme Court of Pakistan, wherein the appeal was set for hearing on 13th October, 1958, when prior to the date of hearing all of a sudden on 07th October, 1958 the then President Iskandar Mirza declared Martial Law through out of the country, while making Mr. Ayub Khan the then Army Chief to act as Chief Martial Law Administrator (CMLA), by dissolution of the National and Provincial Assemblies and abrogation of the Constitution of 1956, thereof. By

[592] *The State vs. Dosso and another*: [PLD 1958 SC (Pak) 533]

this brutal act, the affairs of the country were governed through the Laws (Continuance in Force), Order, 1958, which restored the jurisdiction of all the Courts besides validating all other laws except that of the Constitution of 1956.

This situation give rise to legal & technical issues, such as if the Supreme Court upheld the decision of the Lahore High Court, it would amount to implied validation of the Constitution of 1956 and if that being so in that eventuality what would be the role of Martial Law Regulations thereof. The afore said legal prepositions indirectly called in question the validity of Laws (Continuance in Force) Order, 1958 and legitimacy of the imposition of martial law, whereby finally the Supreme Court again under the leadership of its Political Jurist [593] i.e., Justice Muhammad Munir, the then Chief Justice, took Suo Motu action even without giving opportunity of hearing to the counsels for the parties and while relying upon the Hans Kelsen's *"Legal Positivism"* (i.e., *General Theory of Law and State that a successful revolution by itself was a law-creating organ),* upheld the martial law. Thus this judgment misfortunately laid foundations of the adventurism for the military dictators, in toppling the elected Government and to take legal shelter of the apex Courts in the succeeding periods.

4. Fazlul Quader Chowdhry Case[594]

Fazul Quader Chowdhry Case calls in question vires of the Removal of Difficulties (Appointment of Ministers) President's Order No: 34 of 1962, issued by virtue of the powers vests in his office under clause (3) of Article 224 (removal of difficulties etc.,) initially through filling a writ of quo warranto before the High Court of East Pakistan against the

[593] For details please read Chapters 1, 2,3, 5 & 6 of Syed Sami Ahmad Senior Advocate Supreme Court on *The Judiciary of Pakistan and it's role in Political Crises*, (First published in 2012) Royal Book Company Karachi

[594] *Fazlul Quader Chowdhry and others vs. Muhammad Abdul Haque* : (PLD 1963 SC 486)

election of three appellants as members of the Central Legislature, whereby amendments have been effected in Articles 25, 75, 103, 104, 242, 224 by giving right of speaking in and otherwise participate in the proceedings of National Assembly but not voting therein to a member of the President's Council of Ministers *"who is not a member of the Assembly"* and similar provision with regard to members of the Governor's Council of Ministers; Prescribing grounds of disqualification of persons from being member of an Assembly was also removed with respect to the office of Minsters; similar omission of the word *"Minister"* from definition of *"service of Pakistan"* as prescribed under Article 104; besides above addition by of the membership of Assembly in the definition of *"public office"* in addition of clause (4) to Article 224 to the Constitution of 1962, barring thereby the Courts from calling in question the validity of such orders, respectively.

The Supreme Court under the leadership of Justice A. R. Cornelius the then Chief Justice, through its unanimous decision upheld the judgment of the High Court by finally dismissing the petition, while holding all amendments made through the impugned Presidential Orders as being ultra vires to the Constitution, advancing thereby its reasons in this regard, that as the President after promulgation of the Constitution of 1962 become sub-servant to Constitution so under the garb of clause (3) to Article 224, he does not enjoy absolute discretionary powers *(for removing any difficulty)* in respect to making any amendment that he might chooses into the Constitution or similarly ousts the jurisdiction of the apex Courts from its scrutiny as the case may be, rather the same is limited.

This judgment has laid foundations for the judicial review of the Constitutional Amendments by our apex Courts, besides declaring the Constitutional Amendments incorporated into the Constitution through the impugned Presidential Order as being ultra vires, thereof.

5. Miss Asma Jillani Case[595]

Miss Asma Jillani Case, challenging the arrest and detention of the father of petitioner and another person under the Martial Law Regulations No. 78 of 1971, wherein precise questions before the Court was whether the High Court had jurisdiction under Article 98 of the Constitution of Pakistan 1962 to enquire into the validity of detention under Martial Law Regulations No: 78 of 1971 and also to examine the correctness or otherwise of the doctrine laid down in the case of State vs. Dosso (PLD 1958 SC 533). The Supreme Court under the leadership of Justice Hamoodur Rehman the then Chief Justice, without compromising over its powers of the Judicial Review even at inch, declare the martial law as illegal and the Chief Martial Law Administrator as a usurper, revisited its earlier finding by rejecting the *"Kelson's Theory of Legal Positivism"* of the State recognition of International Law, while holding that the theory cannot be applied on National Law, as no change occurs within the State if admittedly the territory and the people remains substantially the same. He went on to state that the Kelson's Theory has also no universal acceptance as such, nor it had become basic doctrine of the science of modern jurisprudence, nor likewise, Kelsen had ever attempt to formulate any theory of which "favours totalitarianism", the Judgment further held that the principle enunciated in earlier controversial judgment, famously known as *"Dosso Case"* is wholly unsustainable, which cannot be treated as good law either on the principle of stare decisis or even otherwise, which requires revisition accordingly.

Even, one of the sitting member of the same bench i.e., Justice Muhammad Yaqub Ali Khan also held the same opinion with respect to the *"Dosso's"* Case in addition to holding that the findings in Dosso Case coupled with the *"Molvi Tameezuddin"* Case and the Governor's General Reference No: 1 of 1955, had actually caused great hurdles in

[595] *Miss Asma Jillani vs. The Government of Punjab and other*: (PLD 1972 SC 139)

Constitutional Development of Pakistan, besides making the country a laughing stock internationally. Finally the Supreme Court unanimously accepted the appeals and orders the release of detenues forthwith.

It is also worth to point out here that the Constituent Assembly which was having the task of framing Constitution of 1973, under the leadership of its President Zulfiqar Ali Bhutto, surprisingly, inspite of having the knowledge of the verdict of the apex Court in *"Asma Jilani's"* Case, declaring thereby the military dictator as an usurper in the year 1972, surprisingly incorporated two dubious Articles i.e., Article 270 (*i.e., protecting the Military Martial Law Administrator's acts etc.,*) & Article 269 (*i.e., protecting the civilian martial Law Administrator's act etc.,*) into the newly framed Constitution of 1973, the former of which extending protection to the Military's Martial Law Administrator's misdeeds, while the later gives similar shelters to the Civilian Martial Law Administrator's misdeeds respectively, which is still a mystery, as amazingly both of these Articles (i.e., Articles 269 & 270), still hold its field, even till todate, as well.

6. <u>Begum Nusrat Bhutto Case</u>[596]

Begum Nusrat Bhutto Case questioned the validity and imposition of Martial Law *[impugning the Martial Law Order No: 12 of 1977& the Laws (Continuance in Force) Order, 1977]* dated 05th July of 1977, in the country and arrest/detention of her husband *(Mr. Zulfiqar Ali Bhutto then then Prime Minister)* and his 10 other colleagues on plea of political victimization at the hands of military dictator, which was sought to be declared as illegal and without lawful authority, by placing reliance on *"Miss Asma Jillani"* case *(PLD 1972 SC 139)*. After conclusion of the arguments advanced from both the sides, finally, the learned Supreme Court under the leadership of Justice Anwarul Haq, the then Chief Justice,

[596] *Begum Nusrat Bhutto vs. Chief of Army Staff and Federation of Pakistan*: (PLD 1977 SC 657)

while ignoring the full Court judgment in *"Asma Jilani Case"* supra and while retaining the power of judicial review unto to it, reached to final conclusion, that the military coup was justified, in view of the draconian doctrine of *"state necessity"*, however, the ugly face of the Court's verdict reveals that the learned Court while over stepping from its legal/constitutional limits, unauthorizedly allowed the military dictator to carry out Constitutional amendments as well. It was in pursuance to license given by the Supreme Court that the military dictator incorporated various amendments into the Constitution of 1973 which suits to his long term agendas including changing the Original Constitutional Scheme of the Parliamentary Form of Government with that of the autocracy in shape of the Presidential Form of Government unfortunately under the cover of Parliament's own seal by way of the Constitution (Eighth Amendment), Act of 1985, accordingly. Needless to state here that unfortunately the amendments incorporated during the tenure of the then military dictator *(i.e., General Zia-ul-Haq)* had still hold field in our Constitution, even today as well.

7. Malik Ghulam Mustafa Khar's Case[597]

Malik Ghulam Mustafa Khar Case called in question before the learned Lahore High Court, the constitution of Military Courts by the Martial Law Authorities whereby the petitioners were convicted through the said Courts besides above challenge were also cast to the authority of the Chief Martial Law Administrator/President to amend the Constitution, the powers of Parliament to incorporate Article 270-A into the Constitution validating the legal measures issued and acts done by the Martial Law Regime; the ouster of jurisdiction of the Superior Courts and the constitutionality of the assent given by the President to the Constitution (Eight Amendment) Act, 1985, were also under judicial scrutiny, respectively.

[597] *Malik Ghulam Mustafa Khar and others vs. Pakistan and others* : (PLD 1988 [Lahore] 49 (kk))
Federation of Pakistan and another vs. Malik Ghulam Mustafa Kha : (PLD 1989 SC 26)

The learned Court after analyzing argument from both the sides, came to conclusion that it cannot declare any provision of the Constitutional Amendments incorporated through the Presidential Order, 1985 to be invalid as the same had been ratified by the elected representatives of people and the same had now become constituent part of the Constitution *(i.e., 8th Amendment)*, moreover, Article 239(5) of the Constitution specifically bars the Courts from calling in question the constitutional amendments, likewise clause (6) to article ibid, so puts no limitation whatsoever on the powers of the Parliament to amend any provision of the Constitution. It is admitted by the Court that it derives its powers from the Constitution and function under it. Therefore, it cannot strike down any provision of the Constitution, rather it has to enforce and interpret them in such a manner so that all provisions may co-exist harmoniously in the constitutional framework.

Similarly, with regard to the exercise of the judicial powers of the apex Court to examine the legislative measures the Court held that exclusive judicial power to examine the validity of the legislative measures vests in the Superior Court which is limited to *coram non judice*, without jurisdiction, malice in law and violation of the Constitutional provisions, as the case may be. However, the final conclusion render by majority opinion of the learned High Court held that all legal measures mentioned in clause (1) of Article 270-A of the Constitution of having been validly made which cannot be subjected to judicial review, accordingly.

The above cited finding reveals that the learned High Court had indirectly endorsed the Constitutional Amendments introduced through the controversial Presidential Order 14 of 1985 on ground that peoples representatives have validated the same, which seems to be deviation from the judgments of Supreme Court of Pakistan on the following subjects which were in field, such as *"judges must wear all the laws of the country on the sleeves of the*

robe"[598], *"when basic order if without lawful authority, superstructure build on it falls to ground"*[599] & *"when law requires a thing to be done in a particular manner, it must be done in that very manner and not otherwise"*[600], respectively.

Feeling aggrieved the Federal Government agitated the matter before the Supreme Court on the sole ground that Article 270-A to the Constitution and Martial Law Order No: 107 gave blanket protection to all orders made, proceedings taken and acts done during the period of Martial Law in the country, which is not open to the High Courts to review them on any ground whatsoever. Similarly one of the counsel for private appellant raised question that the Constitution (Eighth Amendment) Act, 1985, which introduced Article 270-A into the Constitution was still a Bill and not became Act of the Parliament, as such on the date when the bill was passed, the Provisional Constitution Order was still in force under which no assent of the President was required, hence, it did not form part of the Constitution, hence practically the affairs of the country were governed simultaneously through two Constitutions.

But the Supreme Court repels all the arguments referred hereinabove, by holding firstly that they are not agree to the arguments that act, orders or proceedings which are done, taken or made without jurisdiction, mala fide or coram non judice have been saved from the scrutiny of the Courts by the ouster clause; secondly that that the sanction behind the Revival

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[598] *Muhammad Sarwar vs. The State*: (PLD 1969 SC 278)

[599] *Yousaf Ali vs. Muhammad Aslam Zia and 2 others*: (PLD 1958 SC 104)

[600] *Mst. Kaneez Fatima vs. Wali Muhammad and another*: (PLD 1993 SC 901);
Hakim Khan and 3 others vs. Government of Pakistan through Secretary Interior and others: [PLD 1992 SC 595 (e) & (f)];
Ghulam Hadi Baloch vs. Collector of Customs: (1987 SCMR 602);
Zarar Khan vs. Government of Sind: (PLD 1980 SC 310);
Collector Sahiwal vs. Muhammad Akhtar: (1971 SCMR 681)&
Muhammad Iqbal vs. Amir Bux: (1971 SCMR 61)

of the Constitution Order was the Provisional Constitution Order itself. Moreover, Article 238 which was revived as such provides mode of the amendment of the Constitution and assent of the President thereto. So, the President while giving assent to the Bill was acting in the manner as envisaged by the Revival of the Constitution Order having backing of the Provisional Constitution Order. Finally Supreme Court has upheld the military laws by remanding most of the petitions to the High Courts for decision afresh, accordingly.

Here too the learned apex Courts, did not shown its bravery to give verdict against the Constitution Amendments introduced by the military dictator.

8. Haji Muhammad Saifullah's Case[601]

Haji Muhammad Saifullah Case cast challenge before the Lahore High Court by way of a writ petition challenging thereby the orders dated: 29.05.1988 of dissolution of the National Assembly and dismissal of Government of the then Prime Minister Muhammad Khan Junejo and his Cabinet, by General Zia-ul-Haq, the then Military dictator/President, while invoking his controversial powers under Article 58(2)(b) to the Constitution of the Islamic Republic of Pakistan, 1973. It was pleaded that no grounds for exercise of the discretionary powers for dissolution were ever exists, so on the basis of above, the Court was asked to declared the act of dissolution of the Assemblies as illegal, unconstitutional and ultra vires. The learned High Court after hearing both parties reached to final conclusion by holding that the grounds mentioned in the impugned Presidential Order dated: 29.05.1988, had no nexus with the preconditions prescribed under Article 58(2)(b) to the Constitution warranting dismissal of the then elected Governments. However, in struggle of legal battle the petitioner do partially make out his case before the Lahore High Court by succeeding in

[601] *Haji Muhammad Saifullah vs. Federation of Pakistan and others*: [PLD 1988(Lahore) 505] ,
Haji Muhammad Saifullah vs. Federation of Pakistan and others: [PLD 1989 SC 166]

getting partial relief to the extent of declaring the orders of the dissolution and dismissal of the National and Provincial Assemblies as unsustainable in the eyes of law but failed in restoration of the respective assemblies thereof.

Later on the matter agitated in appeal before the learned Supreme Court belatedly *(when the military dictator had already perished in an Air Crash of C-130 plane)*, wherein main attacks were made to the two constitutional provisions i.e., Article 58(2)(b) and Article 48(5), respectively, on the ground that while drafting the impugned notification under former constitutional provision *(dissolution of National & Provincial Assemblies)* the constitutional mandate of the later constitutional provision *(the process of the appointment of general election within ninety days and care-taker government)* were never kept in mind, thereof. Finally the Supreme Court while thrashing out the Parliamentary Debates with respect to both of the above referred constitutional provision, particularly the belated agitation of the matter that too after the death of General Zia-ul-Haq and at the verge of the preparation of new General Election, endorse the findings of the learned High Court as it is.

Here again although the learned apex Court did show its bravery to give verdict against the unconstitutional act of the military dictator but in response to belated *lis* and at belated stage, which once again pave way to the indirect acceptance of the doctrine of necessity.

9 Khawaja Ahmad Tariq Rahim's Case[602]

Khawaja Ahmad Tariq Rahim Case determine the issue as to whether order dated: 06.08.1990 passed by the President under Article 58(2)(b) to the Constitution of the Islamic

[602] *Khawaja Ahmad Tariq Rahim vs. Federation of Pakistan and others*: (PLD 1990 Lahore 505=PLD 191 Lahore 78)

Republic of Pakistan, dissolving the National Assembly of Pakistan with immediate effect and directing that the Prime Minister and Cabinet led by the Pakistan People Party Government shall cease to hold office forthwith, can be judicially reviewed in exercise of the powers vested in the High Court under Article 199 of the Constitution 1973, besides above challenge was also put to the validity of the Constitution (Eighth Amendment) as well.

The learned High Court under the leadership of Muhammad Rafiq Tarar the then Chief Justice, after having considered the arguments of the learned counsel for the parties and thrashing out the material placed before it as well as while placing reliance on Federation of Pakistan and others vs. Haji Muhammad Saifullah Khan and others (PLD 1989 SC 166), held that it do have powers of the judicial review, while holding so it also justified the dissolution of National Assembly on the opinion formed by the President that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate in this regard, was necessary.

However, with regard to the validity of Constitution (Eighth Amendment) Act, 1985, the learned High Court adopted the policy of judicial restraint, by advancing the reason that the matter with respect to instant issue was already subjudice before the Supreme Court. Similarly, the learned Court also repel the challenge thrown to the appointment of respondent No: 2 as the Prime Minister to head the Caretaker Cabinet appointed by the President in his discretion, while placing reliance on clause (2) to article 48 ibid, which put specific bar over questioning the authority of President before any Court of law; by finally dismissing all the petitions, accordingly.

Similarly, in *Khalid Malik Case*[603] along with 03 other petitions *(one of them transferred from High Court of Balochistan on Supreme Court's order)* calls in question the same order dated: 06.08.1990 passed by the President under Article 58(2)(b) while similar order passed by the Governor Sindh under Article 112 to the Constitution of the Islamic Republic of Pakistan 1973, dissolving the National Assembly as well as the Provincial Assembly of the Province of Sindh as the case may be, mainly on the ground that the respective actions of the President as well as that of the Governor of Sindh does not fall within the preconditions laid down in Article 58(2)(b) & 112(2)(b), respectively. The dissolution order of the President was also attacked on the ground of its being based on malafide of the President as the subsequent Caretaker Cabinet, consists on most of the Ministers of the dissolved assembly on the charges of being corrupt, inefficient and responsible for the failure of constitutional machinery thereof. Similarly, it was also argued that even if one of the grounds mentioned by the President in his dissolution order is found by the Court to be irrelevant, vague or having no nexus with the preconditions prescribed in Article 58(2)(b) to the Constitution, then the Court will strike down the whole order of the President as unconstitutional and restored it to its original position.

The learned Sindh High Court under the leadership of Justice Saiduzzaman Siddiqui the then Chief Justice, after having considered arguments of the learned counsel for the parties and thrashing out the material placed before it as well as while applying the test of objectivity determined by the Supreme Court in Muhammad Saifullah Khan's Case (PLD 1989 SC 166) and distinguishing it from the facts & circumstance of the case titled as Muhammad Sharif vs. Federation of Pakistan (PLD 1988 Lahore 725), repel all the arguments by holding that the President was justified in the dissolution of National Assembly

[603] *Khalid Malik and others vs. Federation of Pakistan*: (PLD 1991 Karachi 1)

while similarly the Governor of Sindh with respect to the dissolution of the Provincial Assembly of the Sindh, on the opinion formed by the both of them that the Government of the Federation as well as of the Province of Sindh cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate in this regard was necessary. Likewise, the argument seeking striking down the order of the President if it be found that some of the grounds are non-existent or irrelevant, it is further held by the Court that it is the satisfaction of the Court concern which examining the issue came to conclusion that such irrelevant or non-existent grounds could not affect the ultimate opinion or decision thereof. Similarly the Court also advanced its reasons by holding that the Courts while examining the order of the President under the power of judicial review cannot substitute its own opinion as a Court of appeal. The plea of the private petitioners with respect to the restoration of the Assemblies to their 05th October, 1990 position was refused by holding firstly that they were not the members of the Federal Cabinet of the dissolved assemblies, secondly the Election Commission of Pakistan is in full swing in arrangement of the elections schedule for 24th to 27th October, 1990, through out of the country. Finally the Court dismissed the petitions unanimously, but by recording separate reasons thereof.

Later on when the same matter again came under discussion before the Supreme Court by way of a Civil Petition for Leave to Appeal through the case titled as *Khawaja Ahmad Tariq Rahim Case*[604]*(it is worth to point out here that no such appeal was preferred by Khalid Malik which attained finality)* determine the narrow downed issues whereby the appellants wanted to apply the principle as envisaged in Haji Muhammad Saifullah Khan's Case (PLD 1989 SC 166) to the present case, on two folded principle held therein i.e., justifiability of such order on the yardstick of an objective criteria and the exact objective

[604] *Khawaja Ahmad Tariq Rahim vs. Federation of Pakistan and others*: (PLD 1992 SC 646)

criteria required for sustaining such an order of dissolution, respectively. Finally the majority of the Judges under the leadership of Justice Shafiur-Rahman, while discussing the historical back ground of the failure of the past constitutional machinery in the light of circumstances necessitating and justifying the steps leading to the dismissal of Government held that in view of all those material facts, the President was justified in ordering the dissolution of the National Assembly under Article 58(2)(b).

Here too, the learned Lahore High Court & Sindh High Courts along with the learned Supreme Court had once again validated the act of civilian coup imposed through the office of President of the Country against the then elected Government while basing on one of the constitutional amendment introduced in Article 58(2)(b) by the then military dictator.

10. <u>Mian Muhammad Nawaz Shairf's Case</u>[605]

Mian Muhammad Nawaz Shairf Case, puts challenge to the order dated 18th April, 1993 of the dissolution of the National Assembly passed by the then President while invoking his constitutional powers under Article 58(2)(b), in reaction to National address of the petitioner of dated: 17th April, 1993, thereof; a weeks later the petitioner invoked the original jurisdiction of the Supreme Court under Article 184(3) to the Constitution of 1973 praying thereby to declare the said order of dissolution dated: 18.04.1993 as malafide, without lawful authority, null and void and of no legal effect, besides seeking similar prayers with respect to the steps taken in implementation including the formation of care-taker Cabinet. It was also prayed that the President of Pakistan and others be restrained from interfering with the functions and duties of the elected Government headed by the petitioner likewise no impediments be placed in the functioning of the National Assembly. Although initially the petition was objected to by the opponents on the ground of its being non-maintainable

[605] *Mian Muhammad Nawaz Sharif vs. President of Pakistan and others*: (PLD 1993 SC 473)

directly under Article 184(3) to the Constitution of Pakistan, however, the Supreme Court kept the preliminary objection alive till its decision on other legal issues on merit.

The Supreme Court under the leadership of Justice Nasim Hassan Shah the then Chief Justice, after having considered the arguments of the learned counsel for the parties and thrashing out the material placed before it as well as while placing reliance on *Federation of Pakistan and others vs. Haji Muhammad Saifullah Khan and others* (PLD 1989 SC 166), held that it do have powers of the judicial review, trashed out two primary questions, i.e., Is this petition under Article 184(3) of the Constitution Maintainable? And If so, has the President exceeded the powers conferred on him under clause (b) of Article 58(2) of the Constitution in ordering the dissolution of the National Assembly?

While attending to the preliminary objection of the non-maintainability of the petition under Article 184(3), the Supreme Court*(by majority of 10 to 01)* while interpreting the term *"operating"* as used in Article 17(2) held that the term includes both healthy and unhealthy operation of a political party therefore, if the lawful functioning of a Government of Political party was frustrated by its dismissal by an unlawful order, such an order being an impediment in the healthy functioning of the political party would constitute an infringement of Fundamental Right conferred by Article 17(2).

While on merits too, by examining the entire constitutional & legislative history with respect to Presidential powers & role assigned to his office under Article 58(2)(b) to the Constitution of Pakistan 1973 coupled with the scope of Presidential powers as enumerated in other article under the whole constitutional scheme, in addition to examining the grounds of mal-administration, corruption and nepotism etc., finally by its similar majority (i.e.,10 to 01) held that the order dated: 18th April, 1993 passed by the President of Pakistan was not within

the ambit of the powers conferred on the President under Article 58(2)(b), which is without lawful authority and of no legal effect; as a consequence of which the National Assembly along with the Prime Minister and his entire Cabinet was restored accordingly.

It is worth to mention here that although for the first time in the legal history of our country the Supreme Court took bold step towards rescuing the elected Civilian Government toppled by the then President on vague allegations, but inspite of the restoration of the Civilian Government the rifts inter se the offices of President and the Prime Minister were still continued unabatedly, which finally culminated in the resignation of both the incumbents from their respect offices, accordingly.

11. Pir Sabir Shah's Case[606]

Sabir Shah's Case call in question the imposition Proclamation of Emergency issued against the Provincial Government laid by the petitioner as a Chief Minister of NWFP, by the then President of Pakistan while invoking his powers under Article 234 to the Constitution of Pakistan. Here too, the petitioner invoked the original jurisdiction of the Supreme Court under Article 184(3) to the Constitution of 1973 praying inter alia thereby to declare the orders of Proclamation of Emergency dated: 25.02.1994, dissolving thereby the Petitioner's Government on the advice of the then Governor, to be declared as malafide, without lawful authority, null and void and of no legal effect, besides seeking declaration to the effect that the Federal Government and/or the President from interfering with or meddling in the affairs of the Government of NWFP; along with similar prayers that the respondents be restrained from interfering with the functions and duties of the elected Government headed by the petitioner likewise no impediments be placed in the functioning of his Provincial Government. It is important to note here that the direct filing of petition under Article 184(3)

[606] *Pir Sabir Shah vs. Federation of Pakistan and others*: (PLD 1994 SC 738)

was also objected to, by the opponents while alleging the existence of the specific bar as contained under Article 236(2) to the Constitution of Pakistan, similar objections were also raised with respect to the Proclamation of Emergency based on the report of the Governor, having defective appointment vis a vis further to the impleadment of the President as respondent contrary to the provisions of Article 248 to the Constitution into the present petition, respectively.

The Supreme Court while attending to the arguments advance by learned counsels for the parties with a split of 7 to 2 judges held that clause (2) to Article 236 will not cover a proclamation which is without jurisdiction, coram non judice or mala fide and the Superior Courts has the jurisdiction to examine a proclamation from the above three jurisdictional legal aspects. With respect to the appointment of the Acting Governor it was held that no challenge could be thrown on the appointment of Acting Governor, in collateral proceedings. The Judgment also justified the temporary measures taken by the President under Article 234 to the Constitution, but its applicability beyond the statutory period was declared to be in excess of powers & constitutional mandate, accordingly.

12. Mehmood Khan Achakzai's Case[607]

Mehmood Khan Achakzai Case & other connected cases[608] called in question the dissolution order of dated: 05.11.1996, passed by the President of Pakistan in exercise of Article 58(2)(b), whereby the Government of Miss Benazir Bhutto and her entire Cabinet were held so to be ceased forthwith, consequence of which the new elections were scheduled for 3rd February 1997, thereof. It is worth to point out here that the instant case had particularly revolves around the most controversial power given to the office of President of

[607] *Mehmood Khan Achakzai vs. Federation of Pakistan*: (PLD 1997 SC 426)

[608] *Mohtarma Benzir Bhutto and another vs. President of Pakistan and others*: [PLD 1998 SC 388 (Detailed Order)= 1997 SCMR 353 (Short Order]

Pakistan [i.e., Article 58(2)(b)] through the Constitution (Eighth Amendment) Act, 1985 by the then Military Dictator, whereby he (i.e., the President) could dissolve the National Assembly and dismiss the Federal Government, in his discretion. Needless to state here that this amendment has created Constitutional Crises for future coming Parliaments, whereof 04 successive Civilian Governments have to pay prices thereof. Apart from above challenge was also cast by the parties to the dictatorial amendments carried out in violation to the basic structure of Constitution with a request to declare the same as ultra vires.

After hearing the learned counsels for the parties as well as the amicus curiae the learned Supreme Court under the leadership of Justice Sajjad Ali Shah the then Chief Justice, while dismissing all the petitions held that the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality, but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now part of the Constitution as Article 2A inserted by the Constitution's Eighth Amendment. The learned Court also indirectly validated the Eighth Amendment, while holding that after the incorporation of 8th Amendment into the Constitution in the year 1985; three successive elected governments had never touched upon these amendments, so they are deemed to be ratified by implication unless amended in the manner as prescribed in Article 239 to the Constitution. It was further held that Article 58(2)(b) maintains Parliamentary Form of Government which provided checks and balances between the powers of the President and the Prime Minister to let the system work without let or hindrance to forestall a situation in which martial law could be imposed. This amendment to a great extent changes the originality of the Constitution of 1973, thereof.

13. Wukala Mahaz Barai Tahafaz Dastoor's Case[609]

Wukala Mahaz Barai Tahafaz Dastoor Case along with other connect case, puts challenge to Article 63A prescribing disqualification of the member of Parliament on the ground of defection, which was incorporated through the Constitution (Fourteenth Amendment) Act, 1997, which was sought to be declared as void and invalid on account of its inconsistency with and repugnancy to the fundamental rights/basic structure and other provisions of the Constitution. The crux of the arguments of the petitioners relating to Article 63A to the Constitution was that it is not anti-defection law, rather in essence it is anti-dissent and violative of Article 2A, 19, 55, 63, 66, 68 and 95 of the Constitution which curtail the right of free speak of a Parliamentarian if one express his candid opinion according to his conscience as result he has to face penal action from his party head which includes even the loss of his seat as well.

The learned Supreme Court under the leadership of Justice Ajmal Mian the then Chief Justice while trashing out the legislative history of the law pertaining to the defection and floor crossing, finally held that in our country the basic structure theory consistently had not been accepted by our apex Courts. Moreover, while elaborating the words *"any law"* used in Article 8 to the Constitution and likewise while drawing distinction between *"Ordinary Legislative Powers"* vis a vis the *"Constituent Powers"* of the Parliament, it held that the former is subject to the constraints mentioned in Article 8 of the Constitution while the latter is at a higher pedestal and as such is not subject to such constraint, hence the constitutional amendment falling in latter category; that's why the validity of which or such like newly introduced provision into the Constitution as such, cannot be tested on the touchstone of

[609] *Wukala Mahaz Barai Tahafaz Dastoor and another vs. Federation of Pakistan and others*: (PLD 1998 SC 1263)

Fundamental Rights contained in Part II, Chapter 1 of the Constitution, hence abridgement or curtailment of the Fundamental Rights through amendment of Constitution short of abrogating or taking away the Fundamental Rights cannot be declared invalid, accordingly.

Similarly, in order to avoid future litigation and to provide guideline, the Supreme Court clarified that paragraph (a) is to be read in conjunction with paragraphs (b) & (c) to Explanation to Clause (1) of Article 63A of the Constitution, according to which a member could only be disqualified in respect to the breach committed by him, occurred within the House. Besides above it was also held, that Article 63A to the Constitution as a valid constitutional provision which is not ultra vires to the Constitution, accordingly.

14. <u>Zafar Ali Shah's Case</u>[610]

Zafar Ali Shah Case challenged the imposition of Martial of 12th October, 1999, in the country; the validity of Provisional Constitution Order No. 1 of 2000 and the Oath of Office (Judges) Order, 2000; by dismissing the Government of Mian Muhammad Nawaz Sharif, the then Prime Minister after leveling charges against him which includes but not limited to his interference in the affairs of the Armed Forces, politicizing the army, destabilizing it and trying to create dissension within its ranks in addition to above the command of diverting the PIA plane schedule from Sri Lanka carrying the Army Chief Chief, respectively, but the learned Supreme Court under the leadership of Mr. Irshad Hassan Khan the then Chief Justice of Pakistan while relying upon its earlier judgment rendered in *Nursat Bhutto's Case* (i.e., PLD 1977 SC 657), validated the military coup on the ground of *"State necessity"* and on the Principle of *"Salus popli suprema lex" (i.e., Necessity makes prohibited things permissible).* Surprisingly, while giving its findings on those issues too, which had neither been taken nor raised as the point in issues before it; besides authorizing the military dictator

[610] *Zafar Ali Shah vs. General Pervez Musharaf*: (PLD 2000 SC 869)

to remain in office, initially for a period of 3 years, in order to carry out his 07 point agenda as disclosed by him at the time of his military coup. However, the ugliest part of the judgment of the Superior Court was the delegation of the powers to amend the Constitution into the hands of a usurper, while ignoring the Constitutional mandate and its own earlier views[611], where through it had itself categorically held that the apex Courts do not have any such powers at all. It is however worth to point out here that although this case do sets certain limits *(i.e., not to touch the basic feature of the Constitution)* for effecting Constitution Amendments, but these restrictions were meant not for the Parliament but for a single person i.e., General Pervez Musharraf.

15. <u>Pakistan Lawyers Forum Case</u>[612]

"Pakistan Lawyers Forum Case, precisely question the vires of the Legal Framework Order, 2002; the Referendum Order, 2002; the Constitution (Seventeenth Amendment) Act, 2003 being violative to basic structure of the Constitution; and the President to Hold another Office Act, 2004, respectively. Besides above the pleas of the Petitioner were that, the President of Pakistan is liable to be proceeded against under Article 6 of the Constitution for having violated the judgment of Supreme Court rendered in *"Syed Zafar Ali Shah's Case (PLD 2000 SC 869)"*; it was also contended that General Pervez Musharraf failed to hand over power to the civilians; the Parliament was not properly constituted; the Chief of Army Staff (COAS) cannot be the President of Pakistan for the reason that post of COAS is not

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[611] *The State vs. Zia-ur-Rahman and others*: (PLD 1973 SC 49)
Mrs Habiba Jilani vs. The Federation of Pakistan: (PLD 1974 [Lahore] 153)
Muhammad Suleman vs. Islamic Republic of Pakistan: (PLD 1976 [Lahore] 1250)
Dewan Textile Mills Ltd. vs. Pakistan and others: (PLD 1976 [Karachi] 1368)
Ch. Zahur Ilahi MNA vs. The State: (PLD 1977 SC 273)
Jehangir Iqbal Khan vs. Federation of Pakistan: (PLD 1979 [Peshawar] 67)
Muhammad Bachal Memon vs. Government of Sindh: (PLD 1987 [Karachi] 296)
Malik Ghulam Mustafa Khar and others vs. Pakistan and others : (PLD 1988 [Lahore] 49 (kk))

[612] *Pakistan Lawyers Forum vs. Federation of Pakistan*: (PLD 2005 SC 719)

excluded from the definition of *"Service of Pakistan"* under Article 260, moreover he can neither be elected as member of Parliament nor as President of Pakistan while still having been in uniform, even the oath of office as a member of the Armed Forces barred him to engage in political activities.

The learned Supreme Court under the leadership of Mr. Justice Nazim Hussain Siddiqui the then Chief Justice, dismissed all the petitions by holding that in fact the petitioner want to reappraisal of all the events, which took place on 12th October, 1999 and thereafter, which had already been decided in the *Syed Zafar Ali Shah's Case*, so as its review as well in the *Wasim Sajjad's Case*, consequent upon of which the Supreme Court finally held the Seventeenth Constitution Amendment, as a valid piece of legislation, by advance reasons to this effect that the petitioner's arguments are misconceived for the reason, that it ignores all the Constitutional Developments which took place in Pakistan over the past two years, which includes but not limited to the holding of elections to the National, Provincial Assemblies and of the Senate, the sworn in of the Prime Minister with full Cabinet of elected members, fully restored Constitution, in view of the schedule given by the Court in *Syed Zafar Ali Shah's Case*, respectively.

Similarly it was further held that the validity and competence of the election to Parliament cannot be challenged on the basis that the person conducting the election was not qualified or authorized to hold that election. Moreover the Court also refuse to dilate upon the issue of the applicability of the theory of basic structure or salient features in Pakistan, by advancing reasons that as per past practice it has only been used only as a doctrine to identify such features, and never press into service for striking down any Constitutional Amendment thereof, so according to it the matter relating to Constitutional Amendment falls within the

domain of the Political Questions, the proper forum of the addressal of which, is the Parliament and not the Court.

Although the ground advance for the refusal of the exercise of the Jurisdiction by Supreme Court on the confusing doctrine of the Political Question does not seems to be plausible as such in routine the apex Courts does had interfered in Political Issues during the course of its routine business as well, but additionally by the Politicians too, both of which were later on through a subsequent amendment (i.e., 18th Constitutional Amendment) were got annulled, accordingly.

16. <u>Tikka Iqbal Muhammad Khan Case</u>[613]

Tikka Iqbal Muhammad Khan Case questioned the vires of imposition of emergency of 03rd November, 2007 via Provisional Constitutional Order, 2007, to the extent of apex Courts as well as also the status of the PCO Judges who took oath under the Oath of Office (Judges) Order, 2007, respectively. The learned Supreme Court under leadership of Justice Abdul Hameed Dogar the then Chief Justice, while analyzing the material placed before it and appreciating those facts & figure relating to extremism, terrorism and suicide attacks on civilian as well as the armed forces and law enforcing agencies, incidents of abduction of the foreigners, the derogating situation of the law and order in Islamabad, NWFP, Balochistan and the Tribal Area, as depicted in detail through the letter of Prime Minister, the over stepping and interference in the domain of executive & legislative by the institution of judiciary under the garb of its Suo Motu powers or the power under Article 184(3) with respect to the issues of determining prices of edibles items, posting and transfer of the government officials, directions for enactment of laws, stoppage of development projects etc., paralyzing thereby the functioning of the branches of government (i.e., executive &

[613] *Tika Iqbal Muhammad Khan vs. General Pervaiz Musharraf* : (PLD 2008 SC 6)

legislative), making ineffective the institution of the Supreme Judicial Council meant for the accountability of the Judges of apex Courts besides creating hurdles in the smooth running of the day to day affairs of government in accordance with the constitutional mandates, respectively, the Supreme Court finally upheld the both the impugned legislative instruments under the principle of *"Salus populi suprema"* besides granting the powers to the military usurper of amending the Constitution, while over stepping its constitutional limits, but retaining with itself the powers of judicial review of all those acts or actions of the military dictator in the capacity of Chief of Army Staff or the President as the case may be.

It is worth to mention here that later on through a separate Constitution petition the same petitioner again called in question the validity of the Proclamation of Emergency of 3rd November, 2007; the Provisional Constitution Order No: 1 of 2007 and the Oath of Office (Judges) Order 2007, in addition to seeking directions that the deposed Judges of the Superior Courts and the Fundamental Rights be restored, the general elections to the Assemblies (i.e., National and Provincial) be held within the period as provided by the Constitution, the detenues held under preventive detention laws, be released forthwith and restrictions on the media be withdrawn[614]. The learned Supreme Court once again under the leadership of Justice Abdul Hameed Dogar the then Chief Justice, repel all the arguments advanced by counsels for parties and taking into account the law and order situation through out of the country and the erosion of trichotomy of powers in consequence of increased interference in the Government polices by some former Judges of the Superior Courts, particularly the former Chief Justice of Pakistan *(i.e., Justice Iftikhar Muhammad Chaudhry)*, while justifying the taking of the extra constitutional measures by the Chief of Army Staff and the President after holding all the Ordinances promulgated and legislative measures taken by the

[614] *Tika Iqbal Muhammad Khan and others vs. General Pervez Musharraf and others* : (PLD 2008 SC 178)

President or as the case may be by the Governor enforced during the period of the Proclamation of emergency of 03rd November, 2007 and protected through Article 270AAA (3) to the constitution of Pakistan 1973, as valid pieces of legislation unless and until the same is altered, repealed or amended by the appropriate legislature. Again while applying the principle of *"Salus populi suprema"* beside granting the powers to the military usurper of amending the Constitution, while over stepping its constitutional limits, but retaining with itself the powers of judicial review of all those act or actions of the military dictator in the capacity of Chief of Army Staff or the President as the case may be.

It is also worth to point out here that later on in response to a belated review[615] filed by similar petitioner sought thereby reversal of the short & detail Judgment reported in PLD 2008 SC 178, but once again the learned Supreme Court under the leadership of Justice Abdul Hameed Dogar the then Chief Justice, came forwarded in rescuing the misdeeds of the military dictator including the Constitutional Amendments as well, while dismissing the petitions subjudice before it.

17. Sindh High Court Bar Association Case[616]

Sindh High Court Bar Association Case, questions the validity of the actions taken by the military dictator, such as the Proclamation of Emergency of 03.11.2007 imposed by General Pervez Musharraf the then military dictator, thereby suspending and amending the Constitution of Pakistan 1973, through several instruments[617] including the removal of the

[615] *Tika Iqbal Muhammad Khan vs. General Pervaiz Musharraf, Chief of Army Staff, Rawalpindi and 02 others* : (PLD 2008 SC 615)

[616] *Sindh High Court Bar Association and others vs. Federation of Pakistan and others*: (PLD 2009 SC 879)

[617] Such as , Provisional Constitutional Order [1 of 2007], Provisional Constitution (Amendment) Order, 2007, Constitution (Amendment) Order [5 of 2007], Constitution (Second Amendment) Order [6 of 2007], Islamabad High Court (Establishment) Order, 2007, High Court Judges (Pensionary Benefits) Order [8 of 2007], Supreme

Judges of the apex Courts in addition to making appointment of the Judges of superior judiciary on or after 03.11.2007 uptill 23.03.2009 without consultation of de jure Chief Justice of Pakistan but on the opinion of Justice Abdul Hameed Dogar the then Chief Justice on the touch stone of principles determined under Tika Iqbal Muhammad Khan Cases *[i.e., (PLD 2008 SC 6), (PLD 2008 SC 178) & (PLD 2008 SC 615)]*, respectively.

The learned Supreme Court under the leadership of Justice Iftikhar Muhammad Chaudhry the then Chief Justice held that the contents of the impugned letter issued from the office of Prime Minister and addressed to the President/Chief of Army Staff calling for imposition of the restricted emergency through out of the country, that too to the effect of the Judges of the apex Judiciary (Supreme Court and High Courts) only, as unconstitutional, unauthorized without any legal basis. It was also declared that Justice Abdul Hameed Dogar's taking over oath of the office as Chief Justice of Pakistan while all other judges of Supreme Court and of High Courts who took similar oaths through out of the country, in violation of the earlier order of dated: 03.11.2007 passed by a 07 member bench headed by de jure Chief Justice of Pakistan, similarly, the judges affected by the orders of PCO were also restored to the date of their pre-imposition of the emergency position (i.e., 02.11.2007) respectively. The Supreme Court also declared the Judgments rendered in Tika Iqbal Muhammad Khan Cases *[i.e., (PLD 2008 SC 6), (PLD 2008 SC 178) & (PLD 2008 SC 615)]*, respectively, granting validity to the actions of General Pervez Musharraf as per incuriam, coram non judice, mala fide and void ab initio. Likewise the amendments introduced in the Supreme Court (Number of Judges) Act, 1997 by increasing it original strength from 17(1+16) to 30(1+29) number of Judges through the Finance Act, 2008 were also declared unconstitutional. Similarly, while examining the imposition of martial law against the Judicial Institution from the angle of the

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Court Judges (Pensionary Benefits) Order [9 of 2007], Supreme Court (Number of Judges) Act, (XXXIII of 1997), Articles 176, 177, 89, 128, 209(8), 245, 48, 50, 260 & 184(3) to Constitution of Pakistan 1973.

challenge cast to the eligibility of the General Pervez Musharraf to contest the office of President in uniform, the Supreme Court also equated the imposition of Proclamation of Emergency of 2007 in response to the expected outcome of the disqualification of the then Army Chief through pursuance to the subjudice matter of *Wajihuddin Ahmad Case* (PLD 2008 SC 25), respectively.

It is also going without mentioning here that through the instant Judgment the Supreme Court also admitted the bitter role of the apex Courts as remained in the past, whereby it had extend favours in empowering the military dictators to amend the Constitution in order to achieve overt and overt agenda besides holding that in the present case too, the powers acquired by General Pervez Musharraf through the Provisional Constitution Order and under the garb of same incorporation of the constitutional amendments were also declared to have been effected for his own benefits only. The Supreme Court also rejected the applicability of the Principle of Civil and State necessity to the instant case. It was also declared that the Judges of the Supreme Court including the High Courts who were declared to have ceased due to dictatorial laws, shall also be deemed to never have ceased to be such Chief Justices or such Judges irrespective of any notification issued regarding their reappointment or restoration as the case may be. However, protection has been extended to the orders passed and proceedings taken in respect of public litigation, administrative or financial matters as the case may be during the period of the imposition of emergency.

Similar protection was also extended to the elections of the members of the Parliament and the Provincial Assemblies including that of the constitutional appointments to the offices of President & Prime Minister etc., thereof. Likewise all legislative instruments as introduced during the period of proclamation including the establishment of Islamabad High

Court and the constitution amendments were also declared to be unconstitutional, ultra vires of the Constitution and of being illegal and no legal effect, accordingly.

It is also going without saying here that later on few of the affectees Judges of the High Court(s) who were appointed in between 04th November, 2007 and 23rd March, 2009, on the recommendation of and in consultation of Justice Abdul Hameed Dogar the then Chief Justice also sought reversal[618] of the afore referred Judgment but the Supreme Court while basing its reasoning on the findings already recorded in the judgment under review, dismiss the same.

18. <u>Dr. Mobashir Hassan Case</u>[619]

Dr. Mobahir Hassan Case challenged the constitutionality of the National Reconciliation Ordinance, 2007 (i.e., NRO of 2007), issued under the seal of President of Pakistan by exercising his legislative powers as envisage under Article 89 to the Constitution, the practical benefits of which were either given to few individual while the others were declined there so, by the Review Board/Executive Bodies as specified therein. It is worth to mention here that due to the Proclamation of Emergency imposed by the then military dictator General Pervez Musharraf, various legislative instruments including the NRO, 2007 promulgated during said era were given due protection by means of Article 5(1) to the Provisional Constitution Order, 2007 dated: 03rd November, 2007 and later on through insertion of Article 270AAA in to the Constitution vide the Constitution (Amendment) Order, 2007 as well as the Judicial seal affixed by the Supreme Court headed by Justice Abdul Hameed Dogar's Court in the case of Tika Iqbal Muhammad Khan vs. General Pervez Musharraf *[i.e., (PLD 2008 SC 6), (PLD 2008 SC 178) & (PLD 2008 SC 615)]*. However,

[618] *Justice Khurshid Anwar Bhindar and others vs. Federation of Pakistan and others*: (PLD 2010 SC 483)

[619] *Dr. Mobashir Hassan and others vs. Federation of Pakistan and others*: (PLD 2010 SC 265)

subsequently upon the restoration of Judiciary to its pre-emergency position, the Supreme Court vide its judgment dated: 31st July 2009, rendered in *Sindh High Court Bar Association vs. Federation of Pakistan* (PLD 2009 SC 879), declared the Proclamation of Emergency, 2007, Provisional Constitutional Order, 2007, Oath of Office (Judges) Order, 2007, Provisional Constitution (Amendment) Order, 2007 and the Constitution (Amendment) Order, 2007 to be unconstitutional, illegal and void ab initio. Consequent of which all the laws promulgated during the martial law regime including that of the NRO 2007 were referred by the Court to the Parliament for reconsideration. Where upon the NRO 2007 although considered before the Standing Committee of National Assembly on Law & Justice but when the matter brought to the floor of National Assembly it was later on withdrawn, vide its letter dated: 07th December, 2009.

In nut shell the crux of the arguments advanced by the petitioner's counsel was that the NRO 2007 be declared ultra vires to the Constitution, void ab initio and non-est, likewise, the learned Attorney General for Pakistan representing the Federation as well as Advocates Generals of the four Provinces including the Counsel for the National Accountability Bureau also did not oppose the petitions with their unanimous stand that they are not supporting the NRO 2007. While considering the arguments advance at the bar, the Supreme Court under the leadership of Justice Iftikhar Muhammad Chaudhry the then Chief Justice, finally held that NRO 2007 was promulgated as a result of a deal effected inter se two individuals for their personal objectives and was designed to benefit certain class of individuals against whom cases were registered in between 01.01.1986 to 12.10.1999, extending thereby benefits not only to the criminals involved in minor or heinous crimes but also to the holders of public offices as well, who were involved in corruption and corrupt practices, hence the same was declared as void ab initio, ultra vires and violative to various provisions of the Constitution,

accordingly. As a result of which the accused discharged or acquitted under Section 2 of the NRO 2007 or similarly the proceedings pending against the holders of public office which were got terminated in view of Section 7 thereof, were revived to its pre date of enforcement (05th October, 2007), position, which were directed to be proceeded in accordance with law accordingly. Action was also ordered to be initiated against the then Attorney General for Pakistan Mr. Malik Muhammad Qayyum besides setting up of a Monitoring Cell of Supreme Court and respective High Courts for compliance of the Judgment in its letter and spirit.

The unfortunate part of the matter is that practically this judgment had never reached to its logical conclusion, in view of the directions & observations made therein by the learned Supreme Court thereof, which were admittedly never complied with in its letter and spirit, even till to date.

19. <u>Nadeem Ahmed Advocate Case</u>[620]

Nadeem Ahmed Advocate Case challenged the vires of 18th Constitution Amendment, particularly with respect to the Article 175A, laying down new criteria for the appointment of the Judges of apex Courts, through recommendation process of the Judicial Commission and thereafter its final scrutiny by the Parliamentary Committee possessing veto power, thereof. It is worth to point out here that the attack on above cited changes were made on the touch stone of salient features of the Constitution i.e., Independence of Judiciary etc.,. The petitioner also sought the re-visitation of the Judgments of the Supreme Court, recognizing and acknowledging the principle of the basic structure of the Constitution in judgments reported as *Mahmood Khan Achakzai's Case* (PLD 1997 SC 426), *Wukala Mahaz Barai Tahafaz Dastoor Case* (PLD 1998 SC 1263) and in *Syed Zafar Ali Shah's Case* (PLD 2000 SC 869), as the case may be, but the Supreme Court had never deem it proper to strike down

[620] *Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others* : (PLD 2010 SC 1165)

a constitutional provision which were under challenge in all such cases. On the other hand the Attorney General for Pakistan along with the other counsels representing the Federation has dully supported the impugned amendments, besides submitting that the concept of the basic structure as advanced by the learned petitioner for striking down a constitutional provision is alien to our jurisprudence.

The learned Supreme Court under the leadership of Justice Iftikhar Muhammad Chaudhry the then Chief Justice, without expressing its opinion on merits through its interim order remanded the matter back to the Parliament for its reconsiderations of the issue in terms of Article 267A, to the extent of Article 175A only, as it affects its own jurisdiction. Later on, it was in pursuance to afore cited judgment that the Parliament finally passed the Court's Recommended Amendment which is commonly known as the 19th Constitution Amendment.

20. District Bar Association Rawalpindi Case[621]

District Bar Association, Rawalpindi Case questioned the 18th and 21st Constitutional Amendments respectively. Needless to state here that the main attack from the Bar Associations revolves around the new mechanism of the appointment of the Judges for Constitutional Courts incorporated through Article 175A into the Constitution through the Constitution (Eighteenth Amendment) Act, 2010, in addition to calling in question the trial of Civilians through the military Courts established by the Constitution (Twenty-First Amendment) Act, 2012, respectively. Other ancillary issues relates to the question as to what extent the Parliament has power to amend the Constitution; whereby the learned Court by a majority of 14 to 03, dismissed the Constitution Petitions challenging the Constitution (Eighteenth Amendment) Act, 2010. Similarly, by a majority of 11 to 06 the Constitution

[621] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc.,*: (PLD 2015 SC 401)

Petitions challenging the Constitution (Twenty-First Amendment) Act, 2015 and the Pakistan Army (Amendment) Act, 2015 were also dismissed; in the following manner that is with a split of 13 out of total 17 Judges[622], the Supreme Court also held that it can strike down a Constitutional Amendment if it repeals, alters or abrogates the *"salient features"* of the Constitution while four of the remaining Judges[623] opined that the Court has no power to examine the validity of constitutional amendments for dismissing the petitions. Eight other Justices[624] who also supported the opinion of dismissal of the petitions by ruling that it do has power to strike down the constitutional amendments but it is not being exercised in the current cases. Whereas the remaining five judges[625] were of the opinion that not only it had power to examine the substance of Constitutional Amendments but also that certain portion of the amendments impugned to be struck down as well.

It is also worth to point out here that this Judgment although travelled from its initial trend of Procedural Juridical Review of the Constitutional amendments to the Substantive Judicial Review, by once again reviving the draconian Doctrine of the State Necessity while legitimizing the act of the Federal Government taken in respect of the creation and the establishment of Military Courts parallel to the already existing normal Judicial System throughout of the country, which is indirectly an admission of the failure of the existing administration of Justice as well.

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[622] Justice Anwar Zaheer Jamali, Justice Amir Hani Muslim, Justice Sh. Azmat Saeed, Justice Umar Ata Bandial, Justice Sarmad Jalal Osmany, Justice Gulzar Ahmed, Justice Mushir Alam, Justice Maqbool Baqar, Justice Jawwad S. Khwaja, Justice Dost Muhammad Khan, Justice Qazi Faez Isa, Justice Ejaz Afzal Khan and and Justice Ijaz Ahmed Chaudhry

[623] Justice Nasir-ul-Mulk-CJ, Justice Mian Saqib Nisar-J, Justice Asif Saeed Khan Khosa and Justice Iqbal Hameedur Rahman

[624] Justice Anwar Zaheer Jamali, Justice Amir Hani Muslim, Justice Sh. Azmat Saeed, Justice Umar Ata Bandial, Justice Sarmad Jalal Osmany, Justice Gulzar Ahmed, Justice Mushir Alam and Justice Maqbool Baqar

[625] Justice Jawwad S. Khwaja, Justice Dost Muhammad Khan, Justice Qazi Faez Isa, Justice Ejaz Afzal Khan and Justice Ijaz Ahmed Chaudhry

Hence, the case study referred above reveals that the judicial institution (i.e., the apex Courts) which built up its case for the legitimate interference into the domain of other pillar of the State by advancing the Constitutional Scheme of the Separation/Trichotomy of Powers, Doctrine of State Necessity, and the Final Arbitrator respectively, while ignoring the ultimate effects of all of them, thereof. So let us examine each of them one by one :-

4.1. Separation/Trichotomy of Powers

As we known that the doctrine of separation of powers rests upon the universal truth that the concentration of absolute power in one man/one body inevitably leads to exploitation and tyranny, as rightly points out by Lord Acton's when he states that: *"power tends to corrupt and absolute power corrupts absolutely"*. Thus democratic states distribute powers of the state to different organs namely the executive, the legislature and the judiciary. On the same pattern the framers of the Constitution of Pakistan, inspired by the concept of the Separation of Powers also provided the constitutional scheme of the distribution of powers among our three organs as well, such as to the executive through Article 90, to the legislature through Articles 141 to 143 and to the Judiciary through Articles 175(2), 184 to 188, 199, 203D to 203G, respectively. It is also worth to mention here that these powers are "Constitutionally Settled Areas" which is prescribed by the Constitution itself. Meaning thereby that each organ of the State must has to work within its specified area as classified by the constitutional limits, thereof.

If we go little deeper into the other Constitutional Provisions it reveals that Article 97 talks about the extent of executive authority of the Federation which is coextensive with the legislative authority of the federation but of course it is subject to the other provisions of the Constitution, likewise restrictions were also place on the Majlis-e-Shoora (Parliament) that it authority also does not extend to the areas falling within the domain of Provincial Assembly

too. Similarly through Article 142, limitation has been placed on Parliament's legislative power *(i.e., both Majlis-e-Shoora & Provincial Assembly)*, which is again subject to the limits prescribed in the other Provisions of the Constitution. Again, there also exists restrictions over the Legislative Powers of the executive Head of the Federal and Provincial Government(s), i.e., the President of the Country and the Governor of a Province, respectively, both have the powers to promulgate Ordinances under Article 89 & 128 of the Constitution, in case only, when either the Senate or National Assembly in case of the Federation while in the Province the Provincial Assembly is not in session, and the circumstances rendered it necessary to take immediate action thereof. That too, such legislative instrument *(i.e., Ordinance)* which having short span of life of the one hundred and twenty days, had to be ultimately laid before the Maljis-e-Shoora (Parliament) or the Provincial Assembly, as the case may be, thereof.

Similarly, limitation has also been placed on the exercise of the judicial power of the constitutional Courts under Article 175(2) there too, such as the powers relating to the Supreme Court with respect of the exercising its Original (Article 184 (1) &(3)), Appellate (Article 185), Advisory (Article 186), Transfer of Cases to Supreme Court (Article 186A) & the Review (Article 188) Jurisdictions, including that of the exercise of its powers of doing Complete Justice (Article 187), likewise is the limitations were also placed even on the exercise of the Jurisdictions by the High Courts (Article 199) & the Federal Shariat Court (Articles 203D & 203DD), respectively. So, it is crystal clear that our Constitution does prescribe clear demarcation for each and every organ of the state, within which each of them have to carry on their respective businesses, i.e., the Legislator has the right to legislate, the Judiciary to interpret and the Executive has to implement, respectively.

But the judicial precedent referred above sketching political history of our country, paints an ugly picture of our society, wherein in reality the concept of Separation/Trichotomy of Powers has never been observed in stricto senso, rather the decision making and center of power most of the times, remained in the hands of one person, whether it be under military or civilian or in the present day the judicial rule as the case may be, as is evident from the Judgment of the then Federal Court passed in *"Molvi Tameezuddin Ahmed's"* Case, wherein for the first time such foundations were laid by the apex Court by giving preference to an individual (i.e., the Governor General) over the People Representative Body (i.e., the Constituent Assembly). Thus no matter what the Constitution says Separation of Powers has never been practically existed in our country nor the proper checks and balances system prevails here, in accordance with law, thereof.

4.2. Doctrine of State Necessity

Again as matter of fact the Judiciary being the third pillar of the government which by its nature of job had to play an important role in determining the country's political fate, has seems to be failed in discharge of its such constitutional function. Above all, irony of the fate is that in our country its rulings on the constitutional issues *(while placing reliance on the Hans Kelsen's "General Theory of Law and State")* had not only undermined the Sovereignty of the Parliament but also badly mutilated the Will of the People (Constitution), while validating the coups d'etat both of the Military or Civilian rulers in the name of the *"Doctrine of State Necessity"* which not only weakened the democratic institutions but also diminished and undermined its own authority and independence there too. As is self-evident from the perusal of the judicial pronouncements made in *"Yousuf Patel's"* Case, *"Dosso's"* Case, *Begum Nusrat Bhutto's"* Case, *"Malik Ghulam Mustafa Khar's"* Case, *"Haji Muhammad Saifullah's" Case "Khwaja Ahmad Tariq Rahim's"* Case, *"Khalid Malik's"*

Case, *"Pir Sabir Shah's"* Case, *"Mehmood Khan Achakzai's"* Case, *"Zafar Ali Shah's"* Case, *"Pakistan Lawyers Forum's"* Case, *"Tika Iqbal Muhammad Khan's"* Case and the Constitution's Amendments which were carried out, under the license given by the Supreme Court in shape of the Constitution's 08th and 17th amendments, respectively.

Needless to state here that there are also few exceptions to this effect in the field as well, wherein our apex Court deliberately deviated from applying the doctrine of State Necessity, initially in *"Fazul Quader Chowdhry"* Case by holding amendments made into the Constitution through the impugned Presidential Orders as being ultra vires to the Constitution then in *"Asma Jillani's"* Case by holding General Yahya's extra-constitutional steps through its judgment of 1972, as unsustainable besides declaring him a usurper *(albeit when Yahya had already left the power)*, while later on, on another occasion when a mini Martial Law was imposed by General Pervez Musharraf in 2007 against the institution of apex judiciary only, which was challenged in the *"Sindh High Court Bar Association's"* Case, wherein again vide its judgment delivered in the year 2009, the Supreme Court has once again refused to apply doctrine of State Necessity, this move seems to be the result of the counter blast to the dictatorial brutal act, as later on we see an abrupt reversal in the said thinking of the Court, whereby it has once again indirectly invoked the doctrine of State Necessity, in deviation to its own earlier judgment rendered in *"Sh. Liaquat Hussain's"* Case (i.e., PLD 1999 SC 504) while validating the establishment of the Military Courts which was even empowered to try civilian as well, through its latest pronouncement rendered in the famous *"District Bar Association Rawalpindi's"* Case, as well.

Thus it is proved that the use of so-called *"Doctrine of State Necessity"* by the Judiciary, had actually laid foundations for the adventurism of the Military dictator(s) and Civilian Head of the State(s), who had used it respectively in encouraging repeated toppling

of the elected Government(s) from time to time; besides above also by taking legal shelter under those judicial verdicts as well, while illegally effecting Constitution Amendments into the Constitution, that too against the Constitutional mandate accordingly. The ultimate effect of the case law referred above depicts the admitted position in clear terms as to that neither the Doctrine of State Necessity is buried so far nor the long proclaimed slogans of the politicians to the effect that after the passage of 18th Constitution Amendment, they had restored the Constitution to its 1973's original position, has any force thereof, for the simple reason that the Constitution unfortunately still holds the dictatorial amendments therein even till todate.

4.3. Final Arbitrator

At the very outset, there is no cavil to this fact that as per the Constitution's general scheme of the Trichotomy of Powers, the basic functions of the pillars of the State can be classified into three main categories i.e., the Parliament has the power is to legislate, the Executive has the power to implements it and the Judiciary has the power to interpret the law, respectively. When we further narrow down the scope of the legislative functions among these pillars of the States we find that primarily the legislative function vests within the domain of two pillars of the State i.e., the Parliament and the Judiciary, respectively. Since both are connected with the realm of legislation within their respective constitutional domains therefore, that's why both of them claim supremacy with respect to the final say, in this regard. So, the crucial question among both of these competing State Institutions, is that who has actually had the right of final say, thereof?

The Parliament claim rests on the simple analogy that being people representative National Body it vests with prime job of the creating the law, so it is supreme to the Supreme Court, on the other hand the Supreme Court claims that it interprets the provisions of the laws

on the touch stone of the Constitution where undisputedly during the course of its such deliberations it do give its findings on the legislative instruments of the Parliament as well. So, the Supreme Court positions its supremacy on the touch stone of the Preamble to the Constitution and on the test of the judicial scrutiny.

So, let us analyze the above referred controversy in view of our Constitution of 1973, which admittedly prescribed the concept of the Separation of Powers among its three pillars of the State, by distributing powers among them, such as to the executive through Article 90, to the legislature through Articles 141 to 143 and to the Judiciary through Articles 175(2), 184 to 188, 199, 203D to 203G, respectively, which means that each of the organ is independent to serve its respective functions within these constitutionally settled areas. Strength of this argument could be legitimately derived from reading the text of Constitutional Provisions as contained in Article 68 & 69 respectively, wherein if on the one hand the former puts specific restrictions over the Parliament from carrying out discussion on the conduct of any Judge of the Supreme Court or a High Court in the discharge of his duties in their domain, on the other the later also bars the Courts, from examining the validity of any proceedings of the Parliament, even on the ground of any irregularity of the procedure, thereto.

Likewise, it is also admitted fact that there also exists no division in "legislative powers" and "constituent powers" of the Parliament in our Constitution, as such the Constitutional Scheme entrust to the Parliament of carrying out its legislative functions in dual capacity that's vis a vis its Ordinary Power of the Legislation, it also without placing any restrictions/limitation etc., expressly allows it to amend the Constitution there too. Although it do vest the apex Courts with the powers to examine the vires of the Ordinary Legislation (i.e., Statute Law) by invoking its jurisdiction under Article 8 to the

Constitution that too if it clashes with the fundamental rights guaranteed under the Constitution or likewise under Article 227 if it clashes with the injunctions of Islam; but when we specifically talk with respect to effecting of the Constitutional Amendments, it is crystal clear that it does not give any mandate to the judges or Courts qua judicial review of the constitutional amendments as is self-evident from the perusal of clause (2) of Article 175 and clause (5) of Article 239 to the Constitution, respectively. Likewise the Constitution also expressly ousts the jurisdiction of the judiciary from entertaining any challenge made to an amendment of the Constitution if the same is brought about by the Parliament in accordance with the prescribed procedure.

From the above cited discussion it is clear that in essence the Constitution which defines and regulates the powers among pillars of the States, is the Supreme Law of the land, the fundamental law from which all public authorities derived their powers, all laws their validity and all subjects their rights respectively, while none of the pillars of the States does have any such privilege at all, if that being so and also when the interpretation of the Doctrine of "**Casus Omissus**" by our own apex Court's[626] explains in unequivocal terms that *"no read in is allowed in the statute"*, likewise how true may be the opinion of the apex Judiciary in *"Brown vs. Allen"* 344 US 443 (1953)

[626] *The Collector of Sales Tax Gujranwala and others vs. Messrs Super Asia Mohammad Din and Sons and others* :[2017 SCMR 1427 (c)]= [2017 PTD SC 1756];
Abdul Haq Khan and others vs. Haji Ameerzada and others: [PLD 2017 SC 105];
Fareed Ahmed A. Dayo vs. Chief Minister Sindh: [PLD 2017 Sindh 214];
Khushi Muhammad through LR's and others vs. Mst. Fazal Bibi and others: [PLD 2016 SC 872 (c)],
Dr. Zahid Javed vs. Dr. Tahir Riaz Chaudhry and others: [PLD 2016 SC 637 (k)];
Nadeem Ahmed Advocate vs. Federation of Pakistan: [2013 SCMR 1062(c)];
Reference No 1 of 2012 :[PLD 2013 SC 279 (z)];
Messrs State Cement Corporation of Pakistan vs. Collector of Customs Karachi: [1998 PTD [SC] 2999 (d)];
Zain Yar Khan vs. The Chief Engineer:[1998 PLC (CS) 1484 (b)]= (1998 SCMR 2419);
Amanullah Khan vs. Chief Secretary Government of NWFP: (1996 PLC (CS) 81=1995 SCMR 1856)

"we are not final because we are infallible, but we are infallible only because we are final".

Irrespective of what has been stated above, one wonders as to how a single pillar of the State (i.e., Judiciary) could claim the right to final say with respect to the *"Political Question"* (i.e., the interpretation of Constitution Amendment)[627], which as a matter of fact exclusively falls within the legislative domain of the People's Representative Body (i.e., the Parliament) only. More interestingly, when we deeply analyze the Constitutional Scheme of the Oath of offices prescribed into the Third Schedule, which also negates the supremacy of either of the three pillars of States, i.e., the Executive i.e., the President, the Legislature, i.e., (Majlis-e-Shoora) Parliament and the Judiciary (i.e., the Judges of the Constitutional Courts) as well, because it binds all the said institutions to take oath with respect to the preserving, protecting and defending the Constitution of Islamic Republic of Pakistan as individually as well as collectively, being the Guardian of the will of the people only.

Conclusion

After analysis of case to case study referred above it reveals that while interpreting the scope, powers and limitations of the Parliament to amend the Constitution, our Supreme Court do held that the Constitutional Scheme did not envisage that Parliament enjoy supremacy over the Constitution, rather on converse it is the Constitution which has supremacy over all the State organs, while the Parliament was a subordinate instrumentality of the people, created by them to subserve and implement their will only.[628]

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[627] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc.,*: [PLD 2015 SC 401 (f)];
Pakistan Lawyers Forum vs. Federation of Pakistan : (PLD 2005 SC 719)
The State vs. Zia-ur-Rahman and others: (PLD 1973 SC 49);

[628] *District Bar Association, Rawalpindi etc., vs. Federation of Pakistan etc.,*: (PLD 2015 SC 401)

Likewise, when similar were the views of the Supreme Court with respect to the scope and jurisdiction under Article 199 & 175(2) of the apex Court of the Provinces including that the Islamabad High Court that they had only that jurisdiction which has been conferred by the Constitution or by or under any law on them[629]. Similarly, the Supreme Court in its verdict has time and again held that the Provision of the Constitution cannot be amended by reference in a statute; the only procedure of its amendments is envisaged under Article 238 & 239 to the Constitution of 1973 only.[630]

Again, on another occasion while interpreting the question of *"Ouster Clause"* in a legislative instrument(s) which places specific bar on the exercise of the Constitutional Jurisdiction of the apex Courts and when the learned Lahore High Court do comes forward in defence to its own Constitutional Jurisdiction, by holding that the Legislature being the creature of the Constitution could not take away the jurisdiction of a Constitutional Court conferred by the Constitution.[631]

Meaning thereby that our own Constitution too follows suit of European Model of the Judicial Review[632], which confers powers of the Judicial Review only on the specialized Courts (i.e., Constitutional Courts) which does not have general jurisdiction rather have limited and special jurisdiction, if the true picture of the whole scenario is so, than one wonders as to how our apex Courts, whose members are admittedly not the chosen

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[629] *Dossani Travels Pvt Ltd and others vs. Messrs Travels Shop (Pvt) Ltd and others*: (PLD 2014 SC 1)

[630] *Baz Muhammad Kakar vs. Federation of Pakistan through Ministry of Law and Justice*: (PLD 2012 SC 923); *Sindh High Court Bar Association and others vs. Federation of Pakistan and others*: (PLD 2009 SC 879)

[631] *Arshad Mehmood vs. Commissioner/Delimitation Authority, Gujranwala and others*: [PLD 2014 (Lahore) 221]

[632] As our Constitution of 1973, do put limits on the exercise of the Jurisdiction of the apex Courts as envisaged under Articles 175(2), 184 to 188, 199, 203D to 203G, respectively

representative of the people; while being a component of the State and as the creature of the Constitution itself; how could it *(the apex Courts)* while validating the unconstitutional military coup(s) and as such usurping the powers of amendment vests exclusive within the domain of Parliament; further delegates the very powers of amending the Constitution into the hands of a non-State Actor *(i.e., military dictator)*, while ignoring the Constitutional mandate and its own earlier views[633]in this regard, where through it had itself categorically held that the apex Courts do not have any such powers at all. At the best what can it do is that after interpreting the relevant provision of law, it could only suggest certain improvements in the law under question but it does not have any power of either modifying it by itself or authorizing a non-state actor to distort/destroy the will of the people in contravention to what has been prescribed under Articles 238 & 239 to the Constitution of 1973, respectively.

If the admitted position being so, then deep reading of the Constitution reveals that admittedly the will of people *(i.e., Constitution)* has been badly mutilated for their respective interests by the trica of State components, which includes at the top the apex Court *(i.e., Supreme Court)*, then comes the Military Dictator and thereafter finally the Politicians, respectively. As is evident from appreciating the summary of case laws render by the apex Courts herein below, such as in *Molvi Tameezuddin's* Case, the Supreme Court reversed the finding of Chief Court of Sindh while suppressing the will of the people *(i.e., Constituent Assembly)* by preferring the individual in office *(i.e., Governor General)* to be sovereign entity, creating thereby obstacles in the framing of the Social Binding Contract (i.e., the

[633] *The State vs. Zia-ur-Rahman and others*: (PLD 1973 SC 49)
Mrs Habiba Jilani vs. The Federation of Pakistan: (PLD 1974 [Lahore] 153)
Muhammad Suleman vs. Islamic Republic of Pakistan: (PLD 1976 [Lahore] 1250)
Dewan Textile Mills Ltd. vs. Pakistan and others: (PLD 1976 [Karachi] 1368)
Ch. Zahur Ilahi MNA vs. The State: (PLD 1977 SC 273)
Jehangir Iqbal Khan vs. Federation of Pakistan: (PLD 1979 [Peshawar] 67)
Muhammad Bachal Memon vs. Government of Sindh: (PLD 1987 [Karachi] 296).
Malik Ghulam Mustafa Khar and others vs. Pakistan and others : (PLD 1988 [Lahore] 49 (kk));

Constitution) for the new born country. Similarly, in *Yousuf Patel's* Case, the Supreme Court while validating the Governor General's Proclamation of Emergency validated all his laws on the doctrine of state necessity. Likewise in *Dosso's* Case, the Supreme Court while relying upon the Hans Kelsen's *"General Theory of Law and State"* upheld the martial law, laying foundations for future adventurism for the military dictators and to take legal shelter of the apex Courts in succeeding periods. Again in *Asma Jillani's* Case the Supreme Court although declared General Yahya Khan a usurper but notwithstanding this declaration, Parliament inserted Article 270 into the Constitution of 1973, while validating all that was done during his tenure. Similarly while adopting same line of course the Supreme Court once again validated the Zia-ul-Haq's Martial Law in the *Nusrat Bhutto*'s Case, while the Parliament validated to his all laws including the Constitution amendments vide the 8th Amendment by inserting Article 270A. Likewise, on same pattern in *Malik Ghulam Mustafa Khar's* Case, the Supreme Court validated the Martial Law but remanded the petitions to the High Court for decision afresh. Then in *Khawaja Ahmad Tariq Rahim's* Case the learned Lahore High Court & Sindh High Courts along with the learned Supreme Court had once again validated the act of civilian coup by the civilian President while exercising his powers through controversial amendment incorporated by the then military dictator under Article 58(2)(b) to the Constitution, although, the Supreme Court in deviation to its past dictums referred above came to rescue via *Mian Muhammad Nawaz Shairf's* Case, the Civilian Government which was dismissed by the Presidency while invoking its powers under Article 58(2)(b). In *Pir Sabir Shah's* Case the Supreme Court justified the temporary measures taken by the President under Article 234 to the Constitution. In *Mehmood Khan Achakzai's* Case the Supreme Court adopting the mode of judicial restraint refused to examine the validity of the 8th Constitution Amendment while holding that after passage of the same, 03 successive Parliaments have not

revisited the same. Again in *Wukala Mahaz Barai Tahafaz Dastoor's* Case, the Supreme Court held Article 63A, prescribing method of de-seating a Parliamentarian on the ground of defection etc., to be a validate piece of legislation. The Supreme Court also validated Pervez Musharraf's First Military Coup of 1999 in *Zafar Ali Shah's* Case, while the Parliament validated his all laws through the 17th Amendment and insertion of Article 270AA to the Constitution. Again the 17th Amendment along with LFO & RO of 2002 were became under attack through *Pakistan Lawyers Forum* Case but the Supreme Court while adopting judicial restraint did not dilate upon it after holding that the question involved in instant case relates to Political Question. Similarly, the Supreme Court validated Pervez Musharraf's Second Military Coup of 2007 against the institution of Judiciary, in *Tika Iqbal's* Case, while the Parliament has once again validated all laws including the Constitution amendments while inserting Article 270AAA to the Constitution. But it was the *Sindh High Court Bar Association* Case, through which the Supreme Court reverses all the findings of *Tika Iqbal* Cases but after giving due protection has been extended to the administrative & financial matters of the PCO Courts. Similarly in *Nadeem Ahmed Advocate* Case, the Supreme Court in response to the challenge cast to the 18th Constitution Amendment only came forward against the amendment effected under Article 175A which affected its own Jurisdiction with respect to the appointment of apex Courts Judges only. Finally in *District Bar Association, Rawalpindi* Case, the Supreme Court affixed validation seal on the 21st Constitution Amendment, establishing military courts for the trials of civilian prisoners of war.

Hence it is proved that in fact it is the apex Court which in contravention to its Oath of Office and as a usurper of the amendment powers of the Parliament, illegally validated the unconstitutional measures of the military dictator besides illegally entrusting to him, the powers of effecting Constitutional Amendments into the Constitution, thereafter under the

garb of license given by the apex Court, the military dictator incorporated Constitutional Amendments which best suits to his personal interest and which results in enlargement of his dictatorial rule only, then comes the role of politicians who pursuance to lifting of Martial Laws compromises the sovereignty of the assemblies and mandate of the votes of the people of Pakistan by illegally affixing validation seal in contravention to Article 237 to the Constitution, over all his such misdeeds *(of the dictators)*, accordingly. So, the Constitution which as per the Original Constitutional Scheme represents the will of the people of Pakistan, pursuance to aforesaid mutilation now represents the mixture of the will of the Military Dictator, Judiciary and the Politicians respectively.

CHAPTER-VI

(F). CONCLUSION/RECOMMENDATIONS

From the above cited detailed discussion it is concluded that the Constitution of a country which being by its nature an "organic document" must have to live and change with the needs and requirements of the people to whom it seeks to govern with the common tradition of power sharing among the State institutions. This concept of power sharing/separation of powers has never really worked in our part of the country (i.e., in Pakistan). The reason being simple that soon after its inception, Pakistan inherited the Government of India Act of 1935 as its constitutional model, a framework designed by a colonial power to govern a colony that provided for a strong central government, a bureaucracy dominated by executives unanswerable to the legislature and limited representation with feudal domination over politics. In this set of affairs, the head of the state was the Governor-General having discretionary powers to appoint or remove ministers at his discretion and assuming emergency powers while the legislative functions were to be performed by the Constituent Assembly. These state of affairs as a result had far reaching bearings in our country on the principles of constitutional democracy, in which admittedly the powers of the government are divided, so that the legislature makes the laws, the executive implements them and runs the day-to-day administration, while the judiciary interprets the laws and operates independently.

But on the contrary, in our part of the country, it has been the executive which has always been remained the decision making authority, be it ruled under the Presidential or the Parliamentary Form of Government thereof. It is also a historical fact that during such rules, the decision making and the exercise of power, most of the time has been concentrated in the

hands of one person, whether it be under the military or a civilian rule, as the case may be. Thus no matter what the Constitution says, neither separation of powers has ever existed in Pakistan in practice nor have the checks and balances system prevailed in the country, thereof. As self-evident from appreciating the following facts that our country has experienced long stretches of military rule: from 1958-1969 led by Ayub Khan, from 1969-1971 under General Yahya Khan, from 1977-1988 headed by General Zia-ul-Haq and from 1999 October to August 2008 led by General Pervez Musharraf; inspite of the fact that Article 6 to the Constitution had been inserted into the new Constitution to serve as a safety valve against any military adventurisms *(keeping in view unpleasant events of the past)* while making any of such acts of any person, of abrogating or conspired to abrogate or subverting the Constitution or any attempt to do so, to be fall within the ambit of high treason and punishable in accordance with act of the Parliament accordingly.

But irony of the fate is that inspite of having such safety valves into the Constitution, we do had experienced the military expeditions from time to time, which had unfortunately received due protections from both pillars of the State i.e., of the legislature and the judiciary, who had served under the military regime while acting as a rubber stamps or acquiescent institutions for most of the times, while in the remaining years of the short lived periods of civilian rule in which the civilian governments have fumbled through their respective tenures, the civilian leaders have also shown marked authoritarian tendencies in contrast to proving their ability to govern in the interest of its masses firmly and honestly.

That is the reason that in our country the betrayal of the three pillars of the State had badly stripped of the fabric of our Social Binding Contract (The Constitution of 1973), which has unfortunately dis-figured by way of the self-serving constitutional changes (i.e., Amendments) including the one made on Courts command or that of the one made on

directions of an individual, which were directly incorporated into the Constitution, through the mode of Presidential Ordinances *(having four months life line or else reissued)* without receiving an approval of the Parliament, as per the Constitutional mandate, as the case may be. So such like amendments clearly demonstrates as to how true the fears of the possible abuse of the amending power exists in our polluted system, so that none of the power hungry player(s) of the State, could be relied upon especially in the matters of important constitutional amendments. If we go by the books (i.e., Constitutions) of the Sub-Continent countries under discussion, we find that the pace of the introduction of frequent/casual Constitution Amendments is much higher in Indian Constitution of 1950, wherein so far 120 Constitution Amendment Bills have been moved in the Parliament; as compared to the Constitution of Pakistan 1973, which has witnessed 31 Constitution Amendment Bills so far, while the Bangladesh's Constitution of 1972 is at a lowest ratio of having received 16 Constitution Amendment Bills respectively.[634]

Keeping in view the above statistics it is therefore humbly recommended that:-

RECOMMENDATIONS

(i). The present Article 239 to the Constitution of Islamic Republic of Pakistan, 1973 be sufficiently amended on the pattern similar that to the equivalent provisions as contained under Article 209(6)&(7) to the Constitution of Islamic Republic of Pakistan 1962, by introducing the mechanism of holding public referendum thereof. But let me clear here that the author does not support the kind of referendum which has to take place on the request of an executive authority only i.e., the President, rather it should be a mandatory Public

[634] https://www.thenews.com.pk/print/16934-constitutional-amendments-in-various-world-charters lastly visted on 05.06.2018.

Referendum[635] floated automatically upon adaptation of a Constitution Amendment Bill by the Majlis-e-Shoora (Parliament) with its further transmission directly to the electorates (Public) while amending the relevant provision of Article 239 to the Constitution of Pakistan 1973, in the following ways. i.e.,

> **239. <u>Constitution amendment Bill</u>**:-
>
> (1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.
>
> (2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.
>
> (3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had or originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions of clause (4), be presented to the President for assent.
>
> (4) A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.
>
> (5). No such Bill which is passed under clauses (2) to (4) ibid, shall be presented to the President for obtaining his final assent thereto, unless in addition to the procedure prescribed therein; within ten day of the passage of the same, it shall also be submitted by the Prime Minister through print and electronic media for having electorate's debates on constitutional issue(s) for the purpose of securing final public referendum in accordance with law, at the national and provincial levels, as the Bill in such circumstances may requires in this behalf.

[635] As is being held in the countries like Irland, Australia, Switzerland, Denmark etc,, for more details on *"Report of the Independent Commission on Referendums"* July, 2018 at page 25, available at https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/182_-_independent_ commission_on _referendums. pdf, lastly visited on 23.12.2019.

Provided that in case if the Prime Minister fails to discharge his said constitutional obligations within the period specified hereinabove, he shall be deemed to have been ceased from his office forthwith, notwithstanding anything contained in the Constitution, thereof.

Explanation:-
In this Article the term

(a). "public referendum" means a referendum conducted in view of the provisions as contained under Article 48(6)&(7) to the Constitution and
(b). "Bill" means a Constitution Amendment Bill.

(6). As a result of the public referendum so conducted, in relation to a Bill in clause (5) ibid, if the majority votes cast in its favour, the Bill in that eventuality, shall be presented to the President for his final assent thereto; and a Bill so assented to shall be deemed to be enforced from the date of declaring of the results, on the contrary if the Bill fails to secure majority votes, in that eventuality it shall be deemed to have been rejected, accordingly.

(7) No amendment of the Constitution carried out through public referendum shall be called in question in any Court on any ground whatsoever.

(8) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution, except as provided under this article.

(ii). As practically no debates has ever been seriously take place within the House (Parliament) over the constitutional amendment(s), which as a matter of fact does not represent will of the people, so the Houses should be bound to follow the code of conduct and its Rules of Business in letter and spirit, before it is floated for public referendum thereof.

(iii). For the purpose of securing refined draft of the Proposed Constitutional Amendment Bill, Print & Electronic Media be involved in gathering data of the Public Debates made on an intended Constitutional Amendments, thereof.

(iv). The process with respect to the Constitution Amendment be given effect to in accordance with procedural mandate as provided into the Constitution, hereinabove.

(v). Obstacles created in respect of even voting on a Constitution Amendment Bill, as per the directions/dictates of the Party's Head's as envisaged under Article 63A (b) (iii) be deleted, as similarly attempted earlier through LFO 2002 vide its item 8 thereof. So that the elected member may exercise his right of franchise according to his good conscience and not according to the Party's Head whims and wishes.

(vi). All three pillars of the states including that of the non-state actors (Military) be confined to their prescribed constitutional limits and in case of any deviation from any quarter concern, the perpetrator(s) should be brought to justice by invoking the provisions of Article 6 to the Constitution of Islamic Republic of Pakistan, 1973, accordingly.

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