
Fundamental Rights as Basic Structure of Constitution: Judicial Restraint of Pre-*Achakzai* Case

_____ Aman Ullah Malik

Abstract

The Islamic Republic of Pakistan, from its creation in 1947, has been governed by a number of Constitutions, Martial Laws and Emergencies. The first nine years, due to various reasons, were lost to frame its first constitution. Since the Government of India Act 1935 did not provide fundamental rights and new constitution could not be framed, therefore, the citizens of Pakistan were deprived of fundamental rights. Various Constitutions provided them, but constitutional amendments affected their availability, which were consistently challenged in the Constitutional Courts of Pakistan. However, the Courts refused to borrow the theory of basic structure of Pakistan and repeatedly denied to declare a constitutional amendment unconstitutional till the case of *Achakzai* in 1997, reviewing 8th Constitutional Amendment. The justifications had been that a constitutional amendment was not a law under Article 8; there were no implied powers of the Supreme Court to review the justifiability of a Constitutional Amendment and the Parliament had absolute authority to amend any provisions of the Constitution, rejecting any doctrine of implied limitations.

Introduction

Human rights in Pakistan have also been protected in the Constitution of Pakistan 1973 as well, like in the previous Constitutions of Pakistan 1956, 1962 and the Interim Constitution of 1972. In India, there has been a potential threat to human rights from the Parliament that it might abridge human rights by a constitutional amendment, and from the Government to promulgate an emergency. On the other hand, the threat has been three-pronged in Pakistan, namely, Martial Law, a constitutional amendment or a promulgation of emergency. The study would also

cover the taking away of human rights in Pakistan, particularly, when they were abridged or suspended during Martial Laws of 1958, 1969, 1977 and 1999.

In particular, it would be examined what was the judicial reaction when the validity of Martial Laws was challenged, which took away fundamental rights, along with abrogation or suspension of the various Constitutions and the impact of validation, granting the power to amend the Constitution, along with right to life, guaranteed under Article 4 and Article 9 of the Constitution of Pakistan.

While examining the relevant case law, the paper is specified to determine the status of human rights, including right to life as a permanent characteristic of the various Constitutions of Pakistan.

Distinguishing the amendments, it focuses on two types of constitutional amendments: one is the constitutional amendment, which indemnified Martial Laws, and the other is constitutional amendment, passed in different circumstances.

The focal point of the study has been the varying definition of 'law' and 'constitutional amendment' and 'Martial Law', in the light of Article 8, the power of the Parliament to amend the Constitution, under Articles 238 and 239, focusing on whether it is unfettered or contained, implied limitations, and how the Courts dealt with exclusionary clauses of the Constitution, which could not be called in question in any Court on any ground.

Lastly, it concludes that how the Courts maintained and protected actively their judicial rigidity, instead of judicial activism.

Post-Independence Developments, First Constitution of 1956 and Insertion of Bill of Rights

The Government of India Act 1935 was devoid of Bill of Rights, as a colonial enactment. However, after Independence, the incorporation of human rights was on the mind of the freedom-leaders, due to the colonial suppression, the lack of English traditions of democracy and the religious rights of a sizeable minority in Pakistan. Conscious of all these factors, the First Constituent Assembly constituted a

Committee, on the occasion of its first meeting in August 1947, to recommend a comprehensive package of human rights, needed to be protected in the new Constitution.¹

Eventually, the Constitution of Pakistan 1956 envisaged a comprehensive protection of human rights, almost like that of the Indian Constitution. Therefore, the liberties regarding economic rights, like right to property; political rights like freedom to make or to be a member of a political party; religious rights like to profess any religion or to get education of any religion or to establish any religious institution, and individual rights like right to life, right against preventive detention and right to equality before law, were satisfactorily guaranteed in the Constitution of Pakistan 1956.² Right to life was protected under Article 5(2) and all the existing laws were or the future laws would be declared void, which were or would be inconsistent with fundamental rights, guaranteed under Article 4 of the Constitution.

The approach of the constitutional Courts of Pakistan did not vary with their counterpart of India: textual and conservative approach of self-restraint. However, even in the era of self-restraint, the Federal Court of Pakistan, after the *Tamizuddin's case*, wherein the jurisdiction of the Chief Court of Karachi to entertain a writ on the issue of dissolution of the Constituent Assembly, under Section 223A of the Government of India Act 1935, was declared without authority of law, holding the Governor-General's Ordinance ultra vires to amend the Act, which gave retroactive effect to the unsigned enactments of the Constituent Assembly.³ In the case of *Zain Noorani*,⁴ while hearing an appeal against the impugned judgment of the High Court (W. P.) Karachi, the Supreme Court, speaking through Chief Justice Munir, held the rule framed under the Order, conferred by a legislature as a constitutional obligation, were equal in status to the rules that the framers of the Constitution intended to be part of the Constitution, during the interim period. It was a worst example of judicial rigidity.

In another case, the Supreme Court observed that "no right can be described as fundamental if the legislature can take it away by a law not involving an amendment of the Constitution."⁵ It denotes implicitly that fundamental rights were let to be taken away by a constitutional amendment.

The Supreme Court reiterated its view in the case of *Mehdi Ali Khan*,⁶ saying that a fundamental right “may be taken away or abridged by an amendment of the Constitution.”

It is clear that the Higher Courts of Pakistan did not face the direct question of a constitutional amendment taking away a fundamental right, unlike the First and the Fourth Constitutional Amendments of the Indian Constitution. However, they stuck to the conservative approach, whenever they handled such question indirectly.

First Martial Law, Abrogation of Fundamental Rights and *Dosso v State*

The Constitution of Pakistan 1956 could not survive due to political conspiracies, imposition of civil Martial Law, degrading law and order, political and religious movements against the government and particularly, the penetration of military in the affairs of the State, by induction of the Chief of Staff as a Defense Minister. All this culminated in the abrogation of Constitution of Pakistan 1956 and declaration of Martial Law on 7th October 1958.⁷ To avoid a legal vacuum, the Laws (Continuance in Force) Order was promulgated on 10th October, which replaced the late Constitution 1956 as a new legal order. The Order contained the words that “the Republic shall be governed as nearly as may be in accordance with the late Constitution.”⁸

The phraseology provided an ample opportunity to the Martial Law authorities to play with the Constitution as much as they wanted, especially with fundamental rights.⁹

Fundamental Rights were the first casualty of Martial Law. Inevitably, the question of validity of Martial Law arose before the Supreme Court of Pakistan in the famous case of *Dosso v State*,¹⁰ wherein the promulgation of Martial Law was legitimized and the enforcement of Laws (Continuance in Force) Order 1958 was held valid, adopting the Kelsen’s Pure Theory of Law that a successful revolution or *Coup d’etat*, as a new legal order, replacing the Constitution. Moreover, all the existing laws were to continue with that law-giver power and the new laws would depend on his will.¹¹

Referring to Article II of the Order, which provided that the Republic would be governed as nearly as might be, in accordance with the late Constitution., the Supreme Court did not move to utilize the potential benefit of “as nearly as may be” to favor fundamental rights. The phrase of ‘as nearly as may be’ was confined to the system of government only, not extended to fundamental rights, which had been expressly abrogated by Article IV of the Order. The phrase of ‘as nearly as may be’ was wrongly borrowed from the Government of India Act 1935, which was used in a different context.

While agreeing with the majority on the status of Martial Law, reluctantly, Justice A.R. Cornelius dissented with the majority of Chief Justice Munir, Shahabuddin and Amiruddin Ahmad JJ.

The judgment was delivered in haste, just to appease the military masters. Due to *Dosso*, the Constitutional Courts of Pakistan were deprived of the power of judicial review. Later, in his memoirs, the then Chief Justice Munir tried to justify his judgment on the ground, if the Court had decided otherwise; the writs could not have been enforced. The argument was vehemently repelled and lamented. If an order of a Court could not be enforced, that did not mean that a wrong order should be passed, detrimental to fundamental rights. It has rightly been suggested that “had he risen above these irrelevant considerations, the constitutional history of Pakistan might have been very different.”¹²

Even realizing the significance of fundamental rights, once again, the minority judgment of A. R. Cornelius in *Dosso* was not endorsed by the majority, in the case of *Mehdi Ali Khan*.¹³

Dosso was a dark chapter of the constitutional history of Pakistan and, in effect, the partisan judicial activism did not enable the future judiciary, to come out of its detrimental impact, for many decades. The first heavy fist of validation of Martial Law could not be responded, in a number of subsequent cases.¹⁴

However, the Courts contributed to soften Martial Law, turning it into an orderly Martial Law. Instead of leaving the Country in the hands of Military Dictator, the

Courts treated Martial Law Orders as much close to the late Constitution as was possible in that gloomy era.

Emboldened by these judgments, setting out the principle of the Laws (Continuance in Force) Order like a Constitution, the Courts courageously protected fundamental rights, even against the Martial Law Authorities. Since the Laws (Continuance in Force) Order had continued in force all the existing laws, therefore, a large number of Orders promulgated by a Zonal Martial Law Administrator were struck down on the ground of their inconsistency with several existing laws.¹⁵

Constitution of 1962 and Fundamental Rights

After the recognition of Martial Law as a law-creator, it was not only the demise of the Constitution, but the politicians were also its target. All political parties and activities with their name were banned. Later, through a referendum, the Basic Democracies network was turned into an electoral college for the President, along with the authority to frame a new Constitution for the Country.¹⁶

The President constituted a Law Commission, which was assigned to recommend a draft of the future Constitution to replace the Laws (Continuance in Force) Order 1958. Overlooking the valuable suggestions made by the Commission,¹⁷ an autocratic Constitution was promulgated in 1962. Apart from other ironical blunders, the new Constitution was destitute of fundamental rights and the power of judicial review to protect fundamental rights of the citizens. Fundamental rights were left to be enforced by the Courts in the name of 'Principles of Law Making'.¹⁸

However, the omission to incorporate fundamental rights, in the new Constitution, raised a hue and cry all over the Country. The Government gave up to the people's wish and introduced the First Constitutional Amendment Act in the Assembly. Although the procedure to amend the Constitution was very rigid, impracticable, impossible and extremely difficult,¹⁹ but the Government could not sustain the public demand; therefore, the Constitution was amended, human rights were incorporated and, in that way, the 'principles of law making' were made subject to judicial review. The incorporation of these rights was almost identical with that of human rights protected under the Constitution of Islamic Republic of Pakistan 1956. Article 6 of the Constitution was amended to declare that the existing laws, which

were inconsistent with fundamental rights, would be void and no law should be made contravening fundamental rights. Moreover, Article 98 restored the right of judicial review of the laws, in the case of inconsistency or contravention with fundamental rights.²⁰

The Second Amendment Act truncated right of the powerful President to dissolve the Assembly, making it conditional that he would also be re-elected by the new Assembly.²¹

In the well known case of *FazlulQuader Ch.*²² the Court dealt with the power of the President to make adaptations for the removal of difficulties. When he amended the Constitution to allow the Parliamentarians to join the Cabinet, under the difficulties' removal powers, the Court categorically observed that the Order, which fundamentally changed the Presidential form of government into a Parliamentary form of government, was ultra vires; hence, of no legal effect.

Thereafter, four more constitutional amendments were passed, but none was challenged on the ground that it was inconsistent with the basic structure, feature, characteristic or identity of the Constitution, except the procedure to amend the Constitution.²³

No question was raised, with reference to conflict of any of the six Constitutional Amendments with basic identity of the Constitution, due to the reason that the First Constitutional Amendment Act inserted fundamental rights and added 'Islamic' to the title of the 'Constitution of Republic of Pakistan 1962, owing to the extreme public demand.

Second Martial Law, Fundamental Rights and Asma Gilani case

Due to number of reasons, the creator of the Constitution of Pakistan 1962 and the first Chief Martial Law Administrator, General Muhammad Ayub Khan, agreed to step-down as the President and a new Martial Law was imposed, abrogating the Constitution of 1962.

However, after the new Martial Law, the existing laws and the Courts were preserved with the proviso that no writ or other order would be issued against the

Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator. After nine days, a Provisional Constitutional Order was promulgated by the CMLA.

Above all, all fundamental rights, except security of person, prohibition against slavery and forced labor, freedom of religion, access to public places and abolition of untouchability, were abrogated; all pending proceedings, relating to them, were also abated. However, all the other laws and the people in public office were allowed to continue, but subject to the discretion of the Chief Martial Law Administrator.

Further, the President was authorized to amend the Constitution by an Order, expedient to bring the Constitution into effective form by making omissions, additions to and modification of difficulties.

Like abrogation of the Constitution of Pakistan 1956, by imposition of Military Government, which raised the issue of validity of the Laws (Continuance in Force) Order 1958, the validity of the second Martial Government also came across, during the landmark case of *AsmaJilani v Government of the Punjab*.²⁴ In this case too, a Division Bench of the High Court of Sind and Baluchistan dismissed the application, holding that the Court had no jurisdiction to grant relief against the Martial Law Orders and subsequently the same reasons were advanced in the Lahore High Court in the case of *Malik GhulamJilani*.²⁵

However, a five members Bench of the Supreme Court unanimously rejected the Kelsen's Pure Theory of Law, overruling *Dosso* as *stare decisis*. Deviating from its earlier view, it held that the "Martial Law imposed by General Yahya Khan was illegal"; he was a 'usurper'; he "illegally proclaiming Martial Law. The Martial Law Regulation No.78, issued in pursuance of the aforesaid proclamation of Martial Law, was of no legal effect. As a result of the judgment, all punitive and repressive actions taken during the Martial Law period, if its effects were still continuing, came to an end and ceased to have effect". The main judgment was written by Chief Justice HammodurRehman, along with a separate note of all judges except Waheeduddin J, who simply agreed with the Chief Justice. The Court tried to deter future Army Chiefs to proclaim "Martial Laws on the assumption that they could escape the consequences of abrogating the Constitution on the plea that the success of the Coup

had its own legality and would make them the new law-givers. Under the ruling in *AsmaJilani's* case, they were to be treated not as law-givers, but as *usurpers*.²⁶ Apart from the overruling of *Dosso* and its rejection as *stare decisis*, declaring the CMLA as usurper, the other major contribution of the ruling was that it bestowed the Objective Resolution the status of 'grund norm' of the Constitution.²⁷

Besides defining the status of the Objective Resolution and the word 'law', the Supreme Court defined its limits to review the Constitutional amendments. While citing the pervious case law, developed on the same issue, the Court held that it would give full effect to the Constitution as an only source of validity and enforcement of law.²⁸

Regarding the provisions of the Constitution, including fundamental rights, the Court held that the judiciary could not claim to declare any of its provisions *ultra vires* or void. In its opinion, it would be not part of its function to interpret. The Court left no room to give a free hand to the Legislature to take away or abridge them, amending the Constitution.

Since the apparent and sever enemy of fundamental rights was Martial Law, therefore, the Parliament was perceived as a savior of fundamental rights, instead of a potential threat. The other cogent reason of such judicial behavior was that the Judiciary did not want to be an impediment between fundamental rights and the government's agenda of a socialist economy.

Asma Jilani was a new chapter in the constitutional history of Pakistan. It was hailed all over the country, but was criticized too that the CMLA could be declared as a usurper, in the period of General Yahya Khan.²⁹ However, it was also widely believed that Martial Law was buried forever, due to the *AsmaJilani's* judgment.

Interim Constitution of 1972 and Constitutional Amendments

The military intervention, due to political stalemate on the issues of new Constitution and transfer of power promised by the CMLA, resulted in the fall of East Pakistan in 1971 and its secession from West Pakistan. Gen. Yahya Khan, Army Chief, who had imposed Martial Law, could not sustain as a CMLA, after the debacle of East Pakistan and handed over the Government to Mr. Zulfikar Ali

Bhutto, the leader of the majority party in West Pakistan, who became the country's first Civilian Martial Law Administrator. He remained as a civilian CMLA, unique in the history of governments, till promulgation of the Interim Constitution of 1972.³⁰ The Interim Constitution 1972, was, *mutatusmatundus*, replica of the Constitution of Pakistan 1962, except the Supreme Court and the High Courts, were incorporated together under one part of the Constitution. Moreover, all the Martial Law Orders, Regulations and Ordinance were protected in the Interim Constitution. Notwithstanding, any decision of the Court and the power of judicial review of those laws and acts were taken away.³¹

After taking over as a civilian CMLA, Bhutto's government fell hard on the opposition.

Particularly, the journalists, who had been severely criticizing his policies, were arrested under lame and fake allegations. They challenged their detention, on grounds that, in light of *AsmaJilani*, Martial Law was illegal; the Interim Constitution was passed by an Assembly which lacked the mandate to constitute a new Constitution; the Constitution of 1962 was still in force and constitutional amendments were unconstitutional. All the petitions were joined and decided in the landmark case of *State v Zia-ur-Rehman*

In the case of *State v Zia-ur-Rehman*, for the first time, a number of constitutional amendments were challenged as contravening 'grund norm', set out in *AsmaJilani*. For Pakistan, the challenge was almost like that of *Sankari Prasad*³² and *Sajjan Singh*.³³ The word 'law' was attempted to be defined, but it was only explained in the sense of a contra-distinction, between a legislative law and a constituent law. However, in *Zia urRehman*, all aspect were covered to be answered, raised due to *AsmaJilani*, whether the Constitution of 1962 was restored or not; the constitutional amendments in the Interim Constitution of 1972 and the constitutional amendments under Martial Law Regulations, after the sunset date fixed in the Constitution, were valid or not.

In the instant case, it was held that a "Constitutional provision could not be challenged on the ground of being repugnant to 'national aspirations' or an abstract concept so long as the provision was passed by the competent Legislature, in

accordance with the procedure laid down by the Constitution or a supra-constitutional instrument.”

While citing the Indian case law, it was further held “that so long as the provision was passed by the competent Legislature, in accordance with the procedure laid down by the Constitution or a supra-constitutional instrument, the amendments in the Constitution could not be questioned for want of competence or any other formal defect.”

On question of the Objective Resolution as a ‘grund norm’, developed in *AsmaJilani*, the same learned Chief Justice, here as well, made it clear that his use of the term ‘grund norm’ was never meant to be perceived as a supra constitutional part of the Constitution. He repelled the misconception and categorically refused to agree that, in *AsmaJilani*, the Objectives Resolution had “been declared 'to be a transcendental part of the Constitution' or to be a 'supra-Constitutional instrument which was unalterable and immutable.”

The Court was most conservative when it declared that all the Constitutional questions were political questions, and it was for the Parliament to handle them. It was also observed that “with political decisions on questions of policy, the judiciary is not concerned. Its function is to enforce the Constitution and to see that the other organs of the State confine themselves within the limitation prescribed therein.”

The argument of the Court is still an enigma, because a constitution is always a legal political document and the judiciary is obliged to address the constitutional political issues, otherwise, the evasive attitude is bound to scar its legitimacy.³⁴

The contention that *AsmaJilani*, in consequential terms, had restored the Constitution of 1962 and the Interim Constitution was defiance to the Court was not welcomed by it. On the other hand, the Court held that once the representatives of the people had “been validly elected, it must follow that they had been validly elected for the purpose of framing of a Constitution in accordance with the provisions of the Legal Framework Order and then the abrogation of the Constitution of 1962 had also to be impliedly accepted.”

Regarding the protection and repeal of Martial Laws, under Articles 280 and 281, the Court provided them indemnity “as sub-constitutional legislative measures and not as supra-Constitutional measures”, but subject to mala fide or without jurisdiction laws.

Later, in another case,³⁵ the Supreme Court, while re-examining the case of *Zia urRehman*, reiterated its reticent approach, when a Bench, consisting of four members, facing the question of judicial power to declare the constitutional amendment made in clause (2) of Article 281 of the Interim Constitution, with reference to the power of President contained in Article 279 of the Interim Constitution. In this context, the Court took the protected Martial law Regulations as ‘Law’ at par with the Constitutional provisions and refused to review the protection on any ground. The Court remained stuck to the conservative approach of *Zia urRehman*.³⁶It again emphasized its view of limited jurisdiction, regarding a constitutional amendment.³⁷

Constitution of Pakistan, 1973 and Judicial Approach towards Constitutional Amendments: Reiteration of Self-restraint

A ‘permanent’ Constitution, replacing the Interim Constitution of 1972, on 14th August 1973, was unanimously passed by the Assembly. Like the earlier Constitutions of 1956, 1962 and the Interim Constitution of 1972, the new Constitution also incorporated fundamental rights, with a significant assertion on the prohibition to make any law, which would contravene fundamental rights; any existing law, which would be inconsistent with fundamental rights, would be declared null and void. Article 4 and Article 8 of the Constitution assured the supremacy of fundamental rights over all laws, existing or future, and the executive actions of the public institutions or functionaries. Right to life and liberty of every person was guaranteed under Article 9 of the Constitution. The bicameral Legislature was enabled to amend the Constitution and such amendment was saved from the judicial review, in any Court on any ground.

The Constitution (First Amendment) Act 1974 was passed on the 8th May 1974, wherein Clause (2) was deleted and substituted with two new clauses, empowering the Federal Government to ban a political party, on various grounds and make them

accountable financially. While Article 17 guaranteed, for every citizen, right to form a political party or be member of a political party.

The Second Constitutional Amendment Act 1974, wherein Clause (3) was added to Article 260, which obliged to believe in the Prophet Mohammad (Peace and Blessing of Allah upon him) as a last Prophet to be a Muslim. Similarly, Article 106 was amended to define Ahmedi or Qadiani group. However, it was later challenged as inconsistent with 'grund norm' of the Constitution.³⁸ The Third Constitutional Amendment Act 1975 was focused on the political detenus, amending Article 10 and the rights of the people detained preventively were cut down tremendously. The Fourth Constitutional Amendment Act 1975 was passed to curtail the jurisdiction of the High Courts, amending Article 199 of the Constitution. Since it directly affected the power of judicial review and the Independence of the Judiciary, therefore, it was also challenged.

The Fifth Constitutional Amendment Act 1976 heavily changed the structure of the Judiciary, to prevent favoritism and nepotism in the Higher Judiciary. It was also against the Independence of the Judiciary and later it was challenged. However, the conduct of the Judges themselves prompted it.

In the Constitution (Sixth Amendment) Act, the tenure of the Chief Justice of the Supreme Court and the High Courts was extended, just before the dissolution of the Assembly and new election.

All above challenges were dismissed following *Zia ur Rehman v State*.

After the rigged election of 1977, the resultant anti- government movement, the ruling party and the united opposition under the umbrella of PNA agreed to amend the Constitution that would have paved the way of referendum for the Prime Minister to get confidence from the public. Therefore, owing to a successful dialogue between the parties, the Seventh Constitutional Amendment Act was passed in 1977.

During this constitutional democratic era, few constitutional amendments caused to raise the question of the validity, on the touch stone of 'basic structure' of the Constitution, a theory well entrenched in the constitutional jurisprudence of India.

What is important to advert is that the "Court in the cases of *Zia urRahman*, *Saeed Ahmed Khan* and *F.B. Ali* ignored the Indian case-law, on the question of the jurisdiction of the superior judiciary to strike down a constitutional amendment. However, the Indian case-law was subsequently taken into consideration by a six member full Bench of the Court in the well known case of *Abdul Wali Khan*,³⁹ in which the vires of the amendment to Article 17 made by the Constitution (First Amendment) Act, 1974 came into question". Moreover, "specifically, the Court noted the majority judgment in the case of *Kesavanda Bharati v State of Kerala*⁴⁰ and observed that it was committed not to declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people; the validity of a Constitutional amendment could only be challenged if it was adopted in a manner different to that prescribed by the Constitution."

A challenge to the Fourth Amendment to the Constitution, on the ground of the doctrine of basic structure, was also rejected by the High Court of Sindh in *Dewan Textile*.⁴¹

Similarly, the challenge to the Seventh Amendment to the Constitution before the High Court of Sindh also failed in the case of *Niaz A. Khan*.⁴²

Soon, thereafter, the Supreme Court "once again faced the issue of validity of a Constitutional amendment in the case of *United Sugar Mills*."⁴³ In the view of a five member full Bench of the Supreme Court in the case of *Zia urRahman*, it was "firmly laid down that a Constitutional provision could not be challenged on the ground of being repugnant to what were sometimes stated as "national inspirations" or an 'abstract concept'."⁴⁴

In *JehangirIqbal Khan*,⁴⁵ the Peshawar High Court rejected a challenge to the Fifth Amendment to the Constitution and held that no organ of the State was empowered to challenge such amendment, *inter alia*, on the ground of its entailing abridgement

of any fundamental right or such amendment resulting in ouster of jurisdiction of the Courts.

While, in the case of *Darwesh M. Arbey*,⁴⁶ the learned Judge Shameem Hussain Kadri, held, with respect to the Constitutional Seventh Amendment Act, 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”, observing that power of the Parliament to amend the Constitution did not extend to alteration, repeal, modification, or replacement of Constitution.

During this era, the message of self-restraint is obvious, re-asserting *Zia urRehman*, with an exception of *Darwesh M. Arbey* as a maverick, rather than a case of main stream. Nonetheless, it was overruled in *Fauji Foundation*⁴⁷.

Third Martial Law and its Judicial Validation, with Suspension of Fundamental Rights

Due to the political agitation, deteriorating law and order, and imposition of Civil Martial Law, third Martial Law was imposed on 5th July 1977. All elected Assemblies were dissolved, federal and provincial Governments were dismissed, and the ‘permanent’ Constitution was held in abeyance along with fundamental rights, but not abrogated like the Constitution of 1956 in 1958 and the Constitution of 1962 in 1969, respectively, under the Laws (Continuance in Force) Order 1977. Article 6 of the Constitution of Pakistan 1973 was particularly inserted, in the light of *AsmaJilani*, which declared the imposition of Martial Law and abrogation of the Constitution as usurpation, to prevent potential martial law and it was enshrined that the abrogation of the Constitution would be a High Treason, hence, liable to death penalty.

When Nusrat Bhutto, wife of the former Prime Minister, who was detained under Martial Law, challenged her husband’s detention in the Supreme Court, then, once again, the validity of Martial Law was questioned. It was argued that the “orders of detention had resulted in a flagrant violation of the detenu’s Fundamental Rights, as contained in Chapter I, Part II of the Constitution, particularly Articles 9, 10, 17 and 25, which related to the security of person, safeguards as to arrest and detention, freedom of association and equality of all citizen before law”.⁴⁸

A nine member Bench of the Supreme Court, discarding the Kelsen's Theory of Law embraced in the *Dossocase* and the other extreme of usurpation, adopted in the case of *AsmaJilani*, reverted to the 'Doctrine of State Necessity', validating third Martial Law in Pakistan,⁴⁹ empowering the Chief Martial Law Administrator, to perform all such acts and promulgate all legislative measures, including the power to amend the Constitution. Above all, it was also held that the suspension of Fundamental Rights was not open to challenge.⁵⁰ Since very existence of the country was threatened; chaos and bloodshed was apprehended; there was complete erosion of the constitutional authority of the government; therefore, on the analogy of Emergency provisions of the Constitution, under Article 232 with the Laws in Force Order, the suspension was justified and the Courts' jurisdiction was barred.

Emboldened by the constitutional amendment power, the CMLA drastically brought about fundamental changes in the Basic Features of the Constitution, which were protected under Eighth Amendment Act 1985. Later, the Judges who were on the Bench, in *Nusrat Bhutto*, repented that they committed blunder to authorize the CMLA to amend the Constitution, along with fundamental rights. The authority was "exercised, *inter alia*, to oust the jurisdiction of the Courts to review the Orders of the Martial Law Authorities, to extend the period of Martial Law and to make other amendments in the Constitution. These amendments later caused manifold problems for the Courts, to establish rule of law." However, disfigured basic features of the Constitution took decades to be revived. Justice Dorab Patel once said that the power to amend the Constitution was later added to the judgment as he could not remember to see that in the draft. However, in his interview in a newspaper, he admitted that "they [Judges] enabled the CMLA to amend the Constitution, but it was not meant to alter its basic features".⁵¹

Soon after the *Begum Nusrat Bhutto's* case, the legislative measures were challenged before the Supreme Court, in the case of *ZA.Bhutto*, on the ground that the appointments and legislative measures were violative of the provisions of the Constitution and the rule laid down by the Supreme Court in *Begum Nusrat Bhutto's* case. The Supreme Court refuted all the contentions of the petitioner.

The Martial Law Regulation No. 48, which was challenged in the Supreme Court, along with other Orders that fundamentally changed the basic features of the Constitution, was challenged in the case of *Hamid Sarfaraz*.⁵² However, due to the partisan attitude of the Chief Justice, the petitions were withdrawn. On the other hand, the petitions in the Lahore High Court, on the same issue of fundamental changes, affecting the Constitutional structure, continued to be heard. However, with promulgation of the Provisional Constitutional Order in 1980, the powers of judicial review were usurped and the jurisdiction of the Higher Courts was debarred to review any Martial Laws orders, acts or proceedings, inconsistent with fundamental rights.

In *Fauji Foundation*, a four member Bench of the Supreme Court examined the concept of implied limitations on the legislative power and reaffirmed the conclusions drawn from the cases of *Zia urRahman* and *United Sugar Mills*. Referring to the Indian cases, the Supreme Court reiterated the ratio of *Zia-ur-Rahman's* case. It was also observed that in *Darwesh M. Arbey*, the Indian cases were misconceived by the Lahore High Court and “the learned Judge failed to notice that the amending power, unless it was restricted, could amend, vary, modify or repeal any provision of the Constitution.” Therefore, the *Darwesh M. Arbey's* case was overruled by the Supreme Court, and fundamental rights, along with right to life, were left to be abridged by a constitutional amendment.

Conclusion

The constitutional scenario of Pakistan presents a different picture, with reference to basic structure of the Constitution, including right to life. The Courts happily embraced the conservative approach of the Indian Courts, adopted in *SanakariParasad* and *Sajjan Singh*, with reference to a constitutional amendment. When the Indian Courts moved to *GolakNath*, incapacitating the Parliament to amend fundamental rights in any form and then in *Kesavananda*, finding implied limitations on the power of the Parliament to amend fundamental rights, violating basic structure of the Constitution, the Judiciary in Pakistan was more assertive to confine itself within vires of the Constitution, being its creature. Although the jurisprudence of basic structure, developed in India, did not remain unknown to the Higher Courts of Pakistan; even then, they remained averse to the idea of basic structure of the

Constitution, whenever the constitutional amendments were challenged on that ground,⁵³ except the maverick case of *Darwesh M. Arbey*.

Notes and References

¹ Hamid Khan, (OUP, Karachi 2001) 103

² Ibid.

³ Yousaf Patel v Crown PLD 1955 FC 387

⁴ Zain Noorani v Secretary PLD 1957 SC 48

⁵ Jibendra Kishore Acharyya Chowdhury v Province of East Pakistan PLD 1957 SC 9

⁶ The Secretary v Mehdi Ali Khan PLD 1959 SC 387

⁷ Hamid Khan (2001)

⁸ Ibid.

⁹ Ibid.

¹⁰ PLD 1958 SC 533

¹¹ Ibid.

¹² Hamid Khan (2001)

¹³ *Mehdi Ali Khan* (n 9). The Chief Justice reiterated that he was convinced more than before that *Dosso* was rightly decided.

¹⁴ Dr. Nasim Hassan Shah, 'Role of the Judiciary in Maintaining Rule of Law in Pakistan' PLD 1997 J 30

¹⁵ Dr. Nasim Hassan Shah (n 19).

¹⁶ Presidential (Election and Constitution) Order 1960

¹⁷ Report of the Constitution Commission 1961

¹⁸ Constitution of Pakistan 1962 art 6

¹⁹ Munir, *The Constitution of Islamic Republic of Pakistan* (Rev. edi. PLD, Lahore 1999)

520

²⁰ The Constitution of Pakistan 1962 art 98

²¹ The Constitution of Pakistan 1962 art 23(5)

²² Fazlul Quader Ch. v Muhammad Abdul Haq PLD 1963 SC 486

²³ A. M. Leghari v Government of Pakistan PLD 1967 Lahore 227

²⁴ AsmaJilani v The Government of the Punjab PLD 1972 SC139.

²⁵ Ibid.

²⁶ Ibid

²⁷ Ibid.

²⁸ Ibid

²⁹ Hamid Khan (2001) 255

³⁰ Habib-ur-Rehman, 'Judicial Reforms' PLD 2000 J 30

³¹ The Interim Constitution 1972 art 281

³² Sankari Prasad Singh Deo v. Union of India AIR 1951 SC 458

³³ Sajjan Singh v State of Rajasthan AIR 1965 SC 845

³⁴ P. N. Bhagwati, 'Judicial Activism and Public Interest Litigation' 23 Colum.578
1984-1985

³⁵ Federation of Pakistan v Saeed Ahmed Khan PLD 1974 SC 151

³⁶ Ibid.166

³⁷ F.B. Ali's case PLD 1975 SC 528.

³⁸ Zaheeruddin v the State 1993 SCMR 1718

³⁹ Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57

⁴⁰ KesavanandaBharathi v State of Kerala AIR 1973 SC 1461.

⁴¹ Dewan Textile Mills v. Federation PLD 1976 Kar. 1368.

⁴² Niaz A. Khan v Federation PLD 1977 Kar. 604

⁴³ Federation of Pakistan v United Sugar Mills PLD 1977 SC 397.

⁴⁴ Ibid. 410

⁴⁵ JehangirIqbal Khan V Federation PLD 1979 Pesh. 67

⁴⁶ Darwesh M. Arbey v Federation of Pakistan PLD 1980 Lah. 684.

⁴⁷ Fauji Foundation v Shamim-ur-Rehman PLD 1983 SC 457

⁴⁸ Begum NusratBhuto v Chief of Army Staff P L D 1977 S C 657

⁴⁹ Ibid

⁵⁰ CMLA's Order 1, 1977 order 2 (3)

⁵¹ Dawn dated 21-1-1997 Karachi edition

⁵² Hamid Sarfaraz v Federation of Pakistan PLD 1979 SC 991

⁵³ *Abdul Wali Khan* (n 64) 57, *F B Ali* (n 56), *Fauji Foundation* (n 84)