IN THE SUPREME COURT OF PAKISTAN

(Original/Appellate Jurisdiction)

PRESENT:
MR. JUSTICE NASIR-UL-MULK, CJ
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE SARMAD JALAL OSMANY
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE GULZAR AHMED
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE MAQBOOL BAQAR

CONSTITUTION PETITION NOS.12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 OF 2010
(Petitions Under Article 184(3) Of The Constitution Of Islamic Republic Of Pakistan 1973)

AND

C.M.A. NO.1859 OF 2010 IN CONSTITUTION PETITION NO.40 OF 2010
(Application For Impleadment As Party)

AND

CIVIL PETITION NO.1901 OF 2010
(On appeal from the judgement of the Peshawar High Court, Peshawar, dated 16.6.2010 passed in W. P. No. 1581 of 2010)

AND

H.R.C.NO. 22753-K OF 2010
(Petition Under Article 184(3) Of The Constitution Of Islamic Republic Of Pakistan 1973)

AND

CONSTITUTION PETITION NOS. 99 & 100 OF 2014
(Petitions Under Article 184(3) Of The Constitution Of Islamic Republic Of Pakistan 1973)

AND

CONSTITUTION PETITION NOS. 2, 4 TO 13, 23-24 OF 2015

(Petitions Under Article 184(3) Of The Constitution Of Islamic Republic Of Pakistan 1973)

District Bar Association, Rawalpindi (in Const.P.12/10)
Watan Party thr. its Chairman Zafar Ullah Khan (in Const.P.13/10)
Lahore High Court Bar Association (in Const.P.18/10)
Pakistan Lawyers Forum through its
President Mr. A.K.Dogar (in Const.P.20/10)
Sardar Khan Niazi (in Const.P.21/10)
Shahid Orakzai (in Const.P.22/10)
Al Jehad Trust through Habibul Wahab-ul-Khairi (in Const.P.31/10)
District Bar Association, Sangarh through
its President Anwar Mehmood Nizamani (in Const.P.35/10)
District Bar Association, Gujrat (in Const.P.36/10)
Arshad Mehmood Bago etc (in Const.P.39/10)
Dr. Abdul Hafeez Pirzada, (in Const.P.40/10)
&
(in CMA 1859/10)
Shamshad Ahmad Mangat (in Const.P.42/10)
Julius Salak (in Const.P.43/10)
Concerned Citizens of Pakistan through its
President Hamid Zaman and others (in Const.P.44/10)
Shahid Orakzai (in CP.1901 /10)

...Petitioners

Application by Baba Sardar Haider Zaman (HRC 22753-K /10)

...Applicants

Watan Party through its President (in Const.P.99/14)
Altaf Shakoor (in Const.P.100 /14)
Lahore High Court Bar Association, Lahore
through its Secretary (in Const.P.2/15)
Moulvi Iqbal Haider (in Const.P.4/15)
Pakistan Justice Party through its Chairman (in Const.P.5/15)
Communist Party through its Chairman (in Const.P.6/15)
Taufiq Asif, ASC (in Const.P.7/15)
Sohail Hameed, Advocate (in Const.P.8/15)
Pakistan Bar Council through its Vice Chairman (in Const.P.9/15)
Supreme Court Bar Association
through its Secretary (in Const.P.10/15)
Lahore Bar Association, through its Secretary (in Const.P.11/15)
Sindh High Court Bar Association,
Karachi through its Secretary (in Const.P.12/15)
Allama Zuhair Abbas Abidi (in Const.P.13/15)
Peshawar High Court Bar Association, Peshawar
through its President (in Const.P.23/15)
Sh. Ahsan-ud-Din, ASC (in Const.P.24/15)

...Petitioners

VERSUS

Federation of Pakistan and others (in all cases)

...Respondents

For the Petitioners:

Mr. Muhammad Ikram Ch, Sr. ASC (in Const.P.12/10)
Mr. Arshad Ali Ch, AOR

Mr. Zafar Ullah Khan, ASC. (in Const.Ps.13/10)

Mr. Hamid Khan, Sr. ASC (in Const.Ps.18, 35,
Mr. Rashid, A. Rizvi, Sr.ASC 36, 39 & 44 /10)
Assisted by
Mr. Ajmal Ghaffar Toor, Advocate

Mr. A.K.Dogar, Sr.ASC (in Const.P.20 /10)

Mr. Sardar Khan Niazi, (Petitioner in person) (in Const.P.21/10)

Mr. Shahid Orakzai, (Petitioner in person) (in Const.P.22 /10
& CP 1901/10)

Mr. Habib-ul-Wahab-ul,Khairi, (in Const.P.31 /10)
(Petitioner in person)

Dr.Abdul Hafeez Pirzada, Sr.ASC (in Const.P.40/10)
Miangul Hassan Aurangzeb, ASC
Mr. M. S. Khattak, AOR

Mr. Hashmat Ali Habib, ASC (in Const.P.42/10)
Mr. M. S. Khattak, AOR.

Mr. Zulfiqar Ahmed Bhutta, ASC (in Const.P.43/10)

Qari Abdul Rasheed, ASC (in HRC.22753-K/10)

Mr. Zafar Ullah Khan, ASC (in Const.P.99/14)

Rasheed A.Rizvi, Sr.ASC (in Const.P.100/14)
Syed Rifaqat Hussian Shah,AOR

Mr. Hamid Khan, Sr. ASC. (in Const.P.2/15)
Mr. Shafqat Mehmood Chohan, ASC
Assisted by
Mr. Ajmal Ghaffar Toor, Advocate

Moulvi Iqbal Haider, Petitioner in Person (in Const.P.4/15)

Mr. Muhammad Ikram Ch, Sr.ASC (in Const.P.5/15)
Syed Rifaqat Hussian Shah, AOR

Nemo (in Const.P.6/15)

Mr. Taufiq Asif, ASC (in Const.P.7/15)
Syed Rifaqat Hussian Shah, AOR

Mr. Arshad Zaman Kiyani, ASC (in Const.P.8/15)
Chaudhry Akhtar Ali AOR

Mr. Abrar Hasan, ASC (in Const.P.9/15)
Mr. Abdul Latif Afridi ASC
Syed Rifaqat Hussian Shah, AOR

Ms. Asma Jahangir, ASC (in Const.P.10/15)
Mr. Kamran Murtaza ASC
Mr. Fazal-i-Haq Abbasi, ASC President (SCBA)
Ch. Muhammad Maqsood Ahmed, ASC Secretary (SCBA)
Chaudhry Akhtar Ali AOR
Assisted by
Br. Mansoor Usman Awan Advocate

Mr. Hamid Khan, Sr. ASC. (in Const.P.11/15)
Mr. Ahmed Awais ASC
Assisted by
Mr. Ajmal Ghaffar Toor, Advocate

Mr. Abid S Zuberi, ASC (in Const.P.12/15)
Mr. M. S. Khattak, AOR
Assisted by
Haseeb Jamali Advocate and
Shoaib Elahi Advocate

Nemo (in Const.P.13/15)

Mr. Fida Gul, ASC (in Const.P.23/15)

Sh. Ahsan-ud-Din ASC as Petitioner in Person (in Const.P.24/15)

Salman Akram Raja, ASC (in CMA No.1859/ 2010 in Const. P. 40/2010)

On Court's Notice:
Mr. Salman Aslam Butt, Attorney General
Mr. M. Waqar Rana, Addl. Attorney General
Assisted by Mr.Dilnawaz Ahmed Cheema Consultant to AGP.

Mian Abdul Rauf, A.G., Islamabad
Mr. Razzaq A. Mirza, Addl. A.G., Punjab
Abdul Latif Yousafzai A.G.,KPK
Mr. Ayaz Swati, Addl. A.G., Balochistan
Mr. Adnan Karim, Addl. A.G., Sindh

For the Federation:

Mr. Khalid Anwar Sr.ASC
Mr. Mehmood A. Sheikh, AOR
Assisted by
Muhammad Anas Makhdoom Advocate (in Const.P. 12, 13, 18,20, 21, 22, 31, 35, 36,39, 40, 42 & 43/10)

Mr. Khalid Anwar Sr.ASC
Qari Abdul Rasheed, AOR
Assisted by
Muhammad Anas Makhdoom Advocate (in Const.P.2 of 2015)

For Government of KPK:
Syed Iftikhar Hussain Gillani Sr.ASC (in Const.P.13, 20 & 21
Assisted by Mr. Saad Butter, Adv. of 2010:

For Government of Sindh:
Mr. Adnan Karim,
Addl. Advocate General, Sindh.
Raja Abdul Ghafoor,AOR (in Const.P.12,13,18,20,21, 22 &40 of 2010:

Dates of Hearing: 16, 22, 27 to 29th April, 04 to 07, 12, 13, 18 to 21, 25, 26, 28th of May, 01 to 04, 16 to 18, 22 to 26 June 2015

JUDGMENT

NASIR-UL-MULK, C.J.- By the Constitution (Eighteenth Amendment) Act (Act X of 2010) the Parliament brought about extensive amendments in the Constitution. A number of petitions under Article 184(3) of the Constitution were filed in this Court challenging some of the amendments, mainly, Articles 1(2)(a), 17(4), 51(6)(e), 63A, 226, 267A and 175A. Arguments were addressed in all these matters before the Full Court in the months of June, July, August and September, 2010. The primary focus of the arguments, particularly in the petitions filed on behalf of various Bar Associations was on the change introduced through Article 175A whereby an entirely

new procedure for the appointment of Judges of the Supreme Court, High Courts and Federal Shariat Court through Judicial Commission was introduced. The names for appointment of Judges and Chief Justices of the Supreme Court of Pakistan were to be first considered by the Judicial Commission comprising of the Chief Justice of Pakistan, two senior most judges of the Supreme Court, a retired Judge of the Supreme Court, Federal Minister for Law and Justice, Attorney General for Pakistan along with a senior Advocate of the Supreme Court to be nominated by the Pakistan Bar Council in case of appointment to the Supreme Court. In case of appointment of a judge of Federal Shariat Court, the Chief Justice along with a judge of the said court, in the aforementioned composition of the Commission was to be added. For appointment to the High Court the composition would include the Chief Justice along with a senior most judge of the concerned High Court, Provincial Law minister and a senior advocate nominated by the Provincial Bar Council. Similar procedure was also provided for the appointment of the Chief Justice of and the judges of Islamabad High Court and Chief Justice of Federal Shariat Court. The nomination by the Judicial Commission was to be placed before a Parliamentary Committee comprising of four members each from the two houses of the Parliament, with equal representation from the Treasury and Opposition Benches. Upon approval of the Parliamentary Committee the matter was to be placed before the President of Pakistan for appointment.

2. After the conclusion of arguments addressed at the bar an interim order was passed, now reported as **Nadeem**

Ahmed, Advocate v **Federation of Pakistan** (PLD 2010 SC 1165) whereby the matter of appointment of judges was referred to the Parliament for re-examination with proposals stated in Paragraph 10 read with Paragraph 13 of the Order which read:

> "10. Most of the petitioners who had challenged Article 175A of the Constitution raised serious issues regarding the composition of the Judicial Commission and Parliamentary Committee and veto power given to the latter. It was contended that there was a well-known practice, when the unamended provision was in vogue that Chief Justice would consult most senior Judges of the Supreme Court before finalizing the recommendations. Instead of bringing any drastic change, the said practice should have been formalized. It was, therefore, suggested during arguments that to ensure that the appointment process is in consonance with the concept of independence of judiciary, separation of powers and to make it workable, Article 175A may be amended in following terms:-
>
> (i) That instead of two most senior Judges of the Supreme Court being part of the Judicial Commission, the number should be increased to four most senior Judges.
>
> (ii) That when a recommendation has been made by the Judicial Commission for the appointment of a candidate as a Judge, and such recommendation is not agreed/agreeable by the Committee of the Parliamentarians as per the majority of 3/4th, the

> Committee shall give very sound reasons and shall refer the matter back to the Judicial Commission upon considering the reasons if again reiterates the recommendation, it shall be final and the President shall make the appointment accordingly.
>
> (iii) That the proceedings of the Parliamentary Committee shall be held in camera but a detailed record of its proceedings and deliberations shall be maintained.
>
> …
>
> 13. In view of the arguments addressed by the learned counsel, the criticism made with regard to the effect of Article 175A on the independence of judiciary and the observations made in paragraphs-8, 9 & 10 as also deferring to the parliamentary mandate, we would like to refer to the Parliament for re-consideration, the issue of appointment process of Judges to the superior courts introduced by Article 175A of the Constitution, *inter alia*, in the light of the concerns/reservations expressed and observations/suggestions made hereinabove. Making reference to the Parliament for reconsideration is in accord with the law and practice of this Court as held in Hakim Khan v. Government of Pakistan (PLD 1992 SC 595 at 621)."

After referring the matter to the Parliament and to enable it to re-examine it in terms of the above observations, the petitions were adjourned. Article 175A was re-considered by the Parliament in the light of the said interim order and changes

were made therein through Constitution (Nineteenth Amendment) Act, 2010.

3. Through the said Constitutional Amendment under Article 175A instead of two senior most judges of the Supreme Court four were made part of the Judicial Commission. The Parliamentary Committee is now required to record its reasons in case of not confirming the nomination by three-fourth majority and that the non-confirmation decision would be forwarded with reasons so recorded to the Commission through the Prime Minister. In such eventuality, the Commission shall send another nomination.

4. The above cases of the 18th Amendment were still pending when two other amendments were made on 7.01.2015, empowering military courts to try a certain class of civilians, by the Pakistan Army (Amendment) Act, 2015 (Act II of 2015) and the Constitution (Twenty First) Amendment Act, 2015 (Act 1 of 2015) added the following proviso to Article 175 of the Constitution:

> "**Provided** that the provisions of this Article shall have no application to the trial of the persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.
>
> **Explanation:** In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties order, 2002."

By the same Act First Schedule of the Constitution was amended to include in sub-part III of Part I after entry number 5, the following new entries namely:

"6. The Pakistan Army Act (XXXXIX of 1952)

7. The Pakistan Air Force Act, 1953 (VI of 1953)

8. The Pakistan Navy Ordinance, 1961 (XXXV of 1961)

9. The Protection of Pakistan Act, 2014 (X of 2014)."

5. The said amendments have also come under challenge in a number of petitions, mostly filed by Bar Associations. The petitions challenging the 18th and 21st Amendments to the Constitution were clubbed and heard together as the two sets of cases involved a common constitutional question as to whether there are any limitations on the powers of the Parliament to amend the Constitution and whether the Courts possess jurisdiction to strike down a constitutional amendment.

6. As regards Article 175A, notwithstanding the amendment made through the 19th Amendment, certain reservations were expressed on account of retention of the supervisory role assigned to the Parliamentary Committee over nominations made by the Judicial Commission. The arguments were also addressed on other constitutional amendments made in Article 1(2)(a), changing the name of NWFP to Khyber Pakhtunkhwa; Article 51(6)(e), introducing elections for non-Muslims through proportional representation system; Article 63A, empowering a party-head to take action against its

members for defection; Article 226, providing for elections of the Prime Minister and the Chief Minister not through secret ballot; Article 267A, empowering the Parliament to remove difficulties arising out of 18th Amendment by simple majority in a joint session; the changes made in Article 63 (1) (g) (h), reducing the lifetime ban to five years and the omission of Article 17 (4) which had made intra-party polls for every political party mandatory.

7. Apart from submissions made on each of the aforesaid amendments and the changes brought about by the Act 1 and Act II of 2015 extending the jurisdiction of the Military Courts to try certain class of civilians, the basic question addressed by the learned counsel appearing in both set of cases was the limitation, if any, on the power of the parliament to amend the Constitution.

8. Mr. Hamid Khan, leading the arguments on behalf of the petitioners in both set of cases argued that there are certain basic features of the Constitution which are unamendable and that notwithstanding ostensible conferment of unlimited power on the Parliament by clause (6) of Article 239 and ouster of jurisdiction of the Courts by clause (5) thereof, the Parliament is not empowered to bring about changes in the basic structure of the Constitution. The said provisions are reproduced below for ease of reference:

> "(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."

9. Mr. Hamid Khan Sr. ASC submitted that pursuant to the order of this Court dated 21.10.2010, Judicial Commission had been reconstituted and a number of changes had been made in Article 175A through the 19th Amendment to the Constitution. That notwithstanding the amendments made through the 19th Amendment the retention of Parliamentary Committee as oversight over the recommendations of the Judicial Commission violated Independence of the Judiciary as it was against the doctrine of separation of powers and thus, against the basic structure of the Constitution. Similarly, in the context of the 21st Amendment he argued that the said amendment had subverted the scheme of the Constitution by violating the doctrine of the separation of powers, excluding due process and all norms of fair trial.

10. In support of his argument concerning basic features of the Constitution, he contended that there was no absolute power granted to the Parliament to amend or change basic features of the original Constitution. That clauses (5) (concerning non-justiciability of any amendment made to the Constitution) and clause (6) (providing for no limitations upon the power of the Parliament to amend the Constitution) of Article 239 were brought about by a military dictator through P.O. No. 20 of 1985, which was later affirmed by the Parliament through the Constitution (Eighth Amendment) Act, 1985. He made a comparison of the said Amendment in Article 239 with the amendments made through the 42nd Amendment in Article 368 of the Indian Constitution and contended that the purpose

of the amendment was the same i.e. to oust the powers of the Supreme Court to call into question any amendments made in the Constitution; that the said 42nd Amendment of the Constitution of India was introduced to nullify the effects of annulment of constitutional amendments on the ground of them being violative of the basic structure in the cases of **Kesavananda Bharati** v. **State of Kerala** (AIR 1973 SC 1641) and **Indira Nehru Gandhi** v. **Shri Raj Narain** (AIR 1975 SC 2299). He referred to the Report by the Parliamentary Committee on Constitutional Reform, particularly paragraphs 1 to 3, to contend that even the Parliamentary Committee which drafted the 18th Amendment recognized that there are "Basic Features" of the Constitution. It was further contended that in paragraph number 3 of the same Report noted with regard to the 8th Amendment, introducing Article 239 of the Constitution that:

> "... The non-democratic regimes that took power sought to centralize all authority and introduce various provision which altered the basic structure of the Constitution from a parliamentary form to a quasi Presidential form of Government through the 8th and 17th Constitutional Amendments..."

Relying upon the said Report he argued that Independence of the Judiciary as a basic feature of the Constitution of Pakistan was provided in the Objectives Resolution, which has been stated to be the '*grundnorm*' of the Constitution of Pakistan in **Miss Asma Jilani** v. **Government of the Punjab** (PLD 1972 SC 139).

11. Learned Counsel contended that judiciary has always been embroiled in struggle with other arms of the state

for ensuring and protecting its independence; that the doctrine of Judicial Review, as developed in the US Supreme Court case of **Marbury** v. **Madison** [5 U.S. 137 (1803)], was an attempt by the US Judiciary to assert their independence; that the Judiciary of Pakistan in the case of **Al-Jehad Trust** v. **Federation of Pakistan** (PLD 1996 SC 324) as affirmed in **Sindh High Court Bar Association through its Secretary** v. **Federation Of Pakistan through Secretary, Ministry of Law And Justice, Islamabad** (PLD 2009 SC 879) and Indian Supreme Court in the cases of **Advocates-On-Record Association** v. **Union of India** (AIR 1994 SC 268) and later in the case of **In Re: Presidential Reference** (AIR 1999 SC 1) declared and affirmed the independence of Judiciary from Executive as necessary to ensure that the tendency of other organs of the state to overstep their Constitutional limitations remain under check.

12. Relying upon the basic structure theory, as developed and expounded upon by the Indian Supreme Court, learned Counsel argued that there is a basic structure to the Constitution of Pakistan as well, which has been affirmed by the Superior Judiciary of Pakistan in various cases. That the idea of basic structure prevents the power to amend from turning into power to destroy the Constitution. He submitted that the Doctrine of basic structure was an academic thesis introduced by Professor Dietrich Conrad, a German professor of Law, which was adopted by the Indian Supreme Court in Kesavananda Bharati (supra) and affirmed in later judgments. That the only basis grounding it are academic arguments and Indian case law. He referred to the following Indian Supreme

Court judgments in which Professor Conrad's theory of un-amendable basic structure of the Constitution was followed in India:

- **Sajjan Singh** v. **The State of Rajasthan** (AIR 1965 SC 845)
- **I. C. Golak Nath and others** v. **State the Punjab and other** (AIR 1967 SC 1643)
- Kesavananda Bharati (supra)
- **Indira Nehru Gandhi** (AIR 1975 SC 2299)
- **Minerva Mills Ltd.** v. **Union of India** (supra)
- **Waman Rao** v. **Union of India** (AIR 1981 SC 271)
- **I.R. Coelho** v. **State of Tamil Nadu** (AIR 2007 SC 861)

Learned Counsel further submitted that the basic structure doctrine has also now been recognized by the Supreme Court of Bangladesh in **Anwar Hussain Chawdhry** v. **Government of the People's Republic of Bangladesh** [1989 BLD (Supplement) 1]. Further by relying on comparative Constitutional analysis of Germany, Turkey, Austria, Romania and some other jurisdictions, he contended that power to amend the Constitution is limited across the globe. Applying the 'Basic Structure Doctrine' to the Constitution of Pakistan he argued that the first instance of basic structure in Pakistan can be found in the case of **Mr. Fazlul Quader Chowdhry and others** v. **Mr. Muhammad Abdul Haque** (PLD 1963 SC 486); that the said judgment was also quoted by the Indian Supreme Court in the case of **Sajjan Singh** v. **The State of Rajasthan** (supra) acknowledging the "fundamental features of the Constitution"; that in the case of **Mahmood Khan**

Achakzai v. **Federation of Pakistan** (PLD 1997 SC 426) the Court recognized three 'Salient Features' of the Constitution, including Islamic provisions, federalism and parliamentary form of Government and fully securing independence of judiciary. Referring to **Wukala Mahaz Barai Thafaz Dastoor** v. **Federation of Pakistan** (PLD 1998 SC 1263) it was contended that power to amend the Constitution is limited and that the Court cannot sit silently over the change of Pakistan from an "Islamic-Ideological state" to a secular state; that in **Zafar Ali Shah** v. **Pervez Musharraf Chief Executive of Pakistan** (PLD 2000 SC 869) the Court had 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 Provision cannot be altered even by the Parliament"; that in the case of **Pakistan Lawyers Forum** v. **Federation of Pakistan** (PLD 2005 SC 719) and also in the Order of this Court dated 21.10.2010 in Nadeem Ahmed, (supra) basic features of the Constitution have been recognized. By placing reliance upon the aforementioned case law, learned Counsel argued that Constitution can be amended provided that the basic features of it are not disturbed; that it is not correct to say that the Courts in Pakistan have rejected the basic structure doctrine as the question is still open.

13. Mr. Iftikhar Gillani, Sr. ASC, represented the Government of Khyber Pakhtunkhwa in Constitution Petition No. 13, 20 and 31 of 2010 relating to the 18th Constitutional Amendment. His basic formulation was that the Parliament's

power of amendment of the Constitution was in the nature of "Constituent Power", on which no limitations whatsoever could be placed; that had the framers of the Constitution intended it to be so, they would have placed such limitations themselves upon the powers of the parliament. In this context he also argued that when an Act of the Parliament amending the Constitution is passed, the Act becomes part of the Constitution; that all provisions of the Constitution are of equal importance and that Fundamental Rights have not been given any primacy over other provisions of the Constitution. While countering the contention that Parliament if left unchecked could go to any extreme in amending the Constitution, he argued that as the parliamentarians and political parties have to return to the people for seeking vote they will remain on guard not to make unpopular amendments. He further argued that there are about 32 Constitutions of the world where basic structure has been defined and laid down with precision and out of those 32 Constitutions only 6 have provisions limiting the power of parliament to amend the Constitution before the judgment in Kesavanda Bharati (supra); that limitations in rest of the Constitutions were introduced after the said judgment. Referring to Wukla Mahaz (supra) the learned Counsel contended that Parliament has both constituent and legislative powers; that the validity of a constitutional amendment cannot be made on the touchstone of fundamental rights; that constitutional amendment is not law within the meaning of Article 8 of the Constitution; that the discussion in the case of Wukla Mahaz was in the nature of *obiter dicta.* That Mahmood Khan Achakzai (supra) also ruled that the Fundamental Rights

could not be used as a touchstone for striking down Constitutional Amendments as all the provisions of the Constitution are equal. That in **Islamic Republic of Pakistan** v. **Abdul Wali Khan** (PLD 1976 SC 57), after discussing the judgment of Kevananda Bharati (supra), the Court followed the case of **State** v. **Ziaur Rahman** (PLD 1973 SC 49) in holding that the judiciary cannot declare any provision of the Constitution to be invalid.

14. In respect of the challenges raised to the change of the name of the "North-West-Frontier" province to "Khyber Pakhtunkhwa" (KPK), Mr. Gillani contended that the name of KPK manifests identity rather than any race or ethnicity. In this he read out "An Account of the Kingdom of Caubal" by Elphinston Monstuart, wherein it has been noted that the word "Pookhtauneh" is plural of the name by which people inhabiting the land refer to themselves; that Sir Olaf Caroe recorded in "The Pathans with an Epilogue on Russia" that there is a difference between Afghan and Pathan and that people inhabiting the said areas refer to themselves as Pathan. He also traced a genealogy of the name Pakhtun or Pashtun from medieval literature as recorded in the same book. He also referred to "The Way of the Pathans" by James W. Spain to draw upon history of the name Pakhtun. That the political party then forming the government in the Province had contested the election with an express desire mentioned in its manifesto to change the name of the Province; that the Provincial Legislature had also passed a resolution to that effect.

15. Mr. A.K. Dogar appearing in Constitution Petition No. 20 of 2010 (18th Amendment Case) raised objections over the amendment in and omission of Article 17 (4), Article 63 (1) (g) and (h), Article 91 and Article 175A. He argued that there is a difference between power to frame the Constitution which is the primary power and the power to amend which is power derived from the Constitution; that the Constitution making Assembly drafts the Constitution in accordance with the mandate given to it by the people, who are the real source of power; that amendments made to the Constitution being derivative powers cannot go against the original Constitution, the *grundnorm* of which has been declared to be the Objectives Resolution by the Asma Jillani's case (supra); that the Objectives Resolution as it existed prior to amendment declared Islamic Ideology to be the basic concept underlying the Constitution which was drafted in accordance with it. He submitted that there is a difference between "constituent powers" and "legislative powers" as has been held in Wukla Mahaz (supra); that power to amend the Constitution by the Parliament is in the nature of constituent power; that after the Constitution was made, all that was left with Parliament are legislative powers by which they cannot go on drafting a new Constitution through amendments. He further contended that the power to make the Constitution lies outside of the Constitution, while the power to amend or change the Constitution lies within it. He argued that there exists what he called "Structural Basis" of the Constitution which is not to be called the "Basic Structure" of it. In support of his argument in favor of the existence of structural basis of the Constitution he

argued that it has been stated in the case of **Begum Nusrat Bhutto** v. **Chief of Army Staff and Federation of Pakistan** (PLD 1977 SC 657) that "the ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on his behalf as a sacred trust by the chosen representatives of the people"; that this has also been reiterated in the case of **Zaheeruddin** v. **State** (1993 SCMR 1718) that "the chosen representatives of people, for the first time accepted the sovereignty of Allah, as the operative part of the Constitution, to be binding on them and vowed that they will exercise only the delegated powers, within the limits fixed by Allah". He questioned the procedure of appointment of Judges through nomination by the Judicial Commission and termed it as discriminatory as it does not grant every lawyer equal opportunity to be considered for appointment.

16. Dr. Abdul Hafeez Pirzada, Sr. ASC, appearing in Constitution Petition No. 40 of 2010 (Eighteenth Amendment) structured his arguments around the following two questions:

1. Does the Constitution of Pakistan have a basic structure?
2. Does the amending power of the Parliament extend over the basic structure?

He referred to the case of **Jhamandas** v. **Chief Land Commissioner** (1966 SC 229), wherein the Court had declared that there was a "constitutional conscience of Pakistan"; that there was a difference between 'the spirit of the Constitution' and 'the conscience of the Constitution'; that spirit is something which encouraged one to do something, while conscience is a

restricting force which bounds or limits. It was contended that constitutional conscience of Pakistan is much stronger than the theory of basic structure; that Courts can strike down a constitutional amendment if it is found to be against the constitutional conscience; that this Court has the jurisdiction of Judicial Review over constitutional amendments. He argued that the word 'law' as used in Article 8 clearly includes constitutional amendments. The learned Counsel then referred to the case of Mahmood Khan Achakzai (supra) and contended that while the Court had validated the 8th Amendment to the Constitution it also possessed the power not to validate any Constitutional amendment.

17. Learned Counsel referred to the case of **Justice Sajjad Ali Shah** v. **Malik Asad Ali** (1999 SCMR 640) to argue that it has been accepted in the said judgment that there is no difference between "constitutional law" and "established convention"; that if the Court was of opinion that convention of independence of judiciary was being encroached upon by the legislature through Constitutional amendments, it can interfere. In this context he argued that amendment by definition has to be progressive and the Courts can interfere in the constitutional amendments which are retrogressive; that if parliament wants to amend or change the basic structure of the Constitution, it should dissolve itself and return with a clear mandate from the people on the question of proposed amendments to the Constitution. He referred to the Objectives Resolution as providing the basic structure or the conscience of the Constitution.

18. Learned Counsel challenged the changes brought into the process of the appointment of judges by Article 175A as encroachment upon the independence of judiciary; that Article 63A has concentrated powers into the hands of the head of the party line. It was contended that on the one hand Concurrent Legislative List has been abolished to provide more autonomy to the federating units but electricity and other items, which were previously in the concurrent list, have now been included in the Federal Legislative List by the 18th Amendment. He prayed for these provisions of the Constitution to be struck down on the touchstone of the basic structure of the Constitution.

19. Sardar Khan Niazi appearing in Constitution Petition No. 21 of 2010 challenged the changes to the Constitution by the 18th amendment in Article 17(4), 63A, 226 and 267A. He contended that the end to secret balloting under Article 226 through the said Constitutional Amendment would lead to dictatorship; that there was no debate on the said amendment. By referring to clause (4) of Article 17, he submitted that it has been deleted, as a result of which the requirement of holding intra-party elections has been done away with, which is the base of any democratic system. He challenged Article 267A, inserted for removal of difficulties which may arise in giving effect to the 18th Amendment, as converting the requirement of two third majority for amendment of the Constitution into simple majority.

20. Habib-ul-Wahab-ul-Khairi appearing in Constitution Petition No. 31 of 2010 submitted that he had challenged almost all the amendments introduced by the 18th Amendment. He contended that amendments made in Article

91 were person specific to benefit certain political leaders by enabling them to become Prime Ministers for more than the previously stipulated terms.

21. M. Ikram Chaudhary Sr. ASC appearing in Constitution Petition No. 12 of 2010 for District Bar Association, Rawalpindi adopted the arguments of Mr. Hamid Khan, Sr. ASC and further argued that Judiciary has been kept out of the definition of Article 7 because it was to be granted supervisory role over other organs of the State. That the oath of the Office of the Parliamentarians enjoins upon them to "preserve, protect and defend the Constitution of the Islamic Republic of Pakistan"; that the duty of protecting and defending the Constitution means that the Parliamentarians cannot violate basic structure of the Constitution.

22. Qari Abdul Rasheed, ASC in HRC No. 22753-K of 2010 argued that the change of the name of North-West Frontier Province has hurt the feelings of the people of the Hazara Division and other non-Pashtun people of the Province. However, he conceded that it is almost a dead issue.

23. Mr. Zulfiqar Ahmed Bhutta, ASC appearing in Constitution Petition No. 43 of 2010 questioned the election of non-Muslims on reserved seats "through proportional representation system of political parties" introduced by the 18th Amendment; that Article 36 of the Constitution grants protection to the rights of the minorities including due representation in the Federal and Provincial legislature; that such system of election would grant power to the political parties to nominate people of their liking to the reserved seats.

24. Shahid Orakzai appearing in Constitution Petition No. 22 of 2010 and Civil Petition No. 1901 of 2010 submitted that the Constitution does not place any limit or bar on the powers of the Supreme Court to strike down any amendment to the Constitution; that the phrase "any court" as used in clause (5) of Article 239 does not include Supreme Court which under its original powers provided in Article 184 (3) can strike down Constitutional amendments. He further raised objections over the inclusion of senior judges of the Supreme Court in the Supreme Judicial Council under Article 209 and in Judicial Commission under Article 175A, as according to him the same judges who nominate other judges, also have power over their removal, which goes against the spirit of the Constitution. The petitioner was also aggrieved of the change of the name of NWFP by using the name of one of the tribal agencies i.e. Khyber Agency in the new name as it contravenes Article 33 wherein State has to discourage parochialism, racial biases and provincial prejudices among the citizens.

25. Mr. Khalid Anwar, Sr. ASC, represented the Federation of Pakistan in Constitution Petition No. 2 of 2015. He presented arguments on both the 18th and 21st constitutional amendments mainly on the basic structure doctrine. He began by dividing basic structure doctrine into two mutually exclusive and distinctive parts:

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

b) Basic Structure as a prescriptive doctrine: It grants power to the Judiciary to strike down

constitutional amendments which modify basic features of the Constitution. Basic structure as a prescriptive doctrine creates unamendable parts of the Constitution, which are to be protected from amendment by the Courts.

26. He argued that the basic structure prescriptive doctrine is at best an academic exercise; that theories cannot be equated with law as law has two distinct features i.e. clarity and its presence in the public domain as public knowledge; that basic structure of the Constitution has neither been clearly laid down by the Courts nor is it clearly present in the public domain. He further substantiated this point by first drawing a difference between Judicial Power and Jurisdiction, whereas the former cannot be taken away as it stems from the existence of the Courts and is inherent in the concept of a Court, the latter can be added, repealed or limited.

27. Dilating upon the case law from the Indian jurisdiction on the application of the basic structure doctrine to constitutional amendments, Mr. Khalid Anwar submitted that the case of Kesavananda Bharati (supra) introduced a new type of judicial power, whereby the Courts of India have assumed jurisdiction over constitution amending power of the Parliament. That this jurisdiction, as assumed in the said Indian case, does not exist in Constitution of India or of Pakistan and it is an instance of self conferred power by the judiciary. This self-conferred power in operation and theory destroys the separation of powers as has been ordained in the Constitution. He contended that the search for basic structure by the Courts is basically an exercise in metaphysics whereby

determination of the essence of the Constitution is attempted; that it is an indeterminate process and in this regard he referred to paragraph 668 of Indira Nehru Gandhi (supra) wherein the Court noted that "...The theory of Basic Structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem..." That even Indian judiciary could not identify basic structure of the Indian Constitution with clarity and it could only identify various aspects forming basic structure of the Indian Constitution in various succeeding judgments. In the light of various judgments by Indian Supreme Court learned Counsel formulated that the basic structure of any Constitution is neither fixed nor permanent and cannot be discerned with clarity or fully discovered; that in order to keep the Constitution relevant to the changing times and as a living document it ought to be allowed to change; that there is always an element of subjectivity involved in determining basic structure of any Constitution which differs when different readings are put on it by different judges; that society and institutions develop over time and constitution require changes to keep up with the changing social and economic conditions.

28. He referred to the case of **Dewan Textile Mills Ltd. v. Pakistan and others** (PLD 1976 Kar. 1368) at page number 155 to contend that Preamble of the Constitution cannot be read as placing implied limitations on the powers of the parliament to amend the Constitution. He then compared the original Constitution of 1973 to the Constitution after amendments as it exists today and contended that the original Constitution was substantively inferior to the Constitution as it

exists today. By the inclusion of Article 10A into the Constitution, a sea change has been brought into the Fundamental Rights; that the original Article 177 of the Constitution granted Executive the power of appointment of Judges which has been done away with over the course of time; that any attempt to take the Constitution back to its basic structure would be highly retrogressive as it would put appointment of judges back into the hands of the Executive. It was contended that there is no need to resort to the basic structure of the Constitution of Pakistan as what Supreme Court of India tried to achieve in the judgment of Kesavananda Bharati (supra), the Supreme Court of Pakistan has been able to achieve in a series of judgments over time such as Al-Jehad Trust case (supra).

29. The learned Counsel referred to the case of Zia-ur-Rahman (supra) to contend that the Supreme Court does not have the power to strike down any provision of the Constitution; that it was further stated in the said judgment that no part of the Constitution can be struck down on the touchstone of Objectives Resolution which cannot be granted supra-Constitutional status of a *grundnorm*. He contended that in **Hakim Khan** v. **Government of Pakistan** (PLD 1992 SC 595) and **Mst. Kaniz Fatima** v. **Wali Muhammad and another** (PLD 1993 SC 901) it had been clearly held that Article 2A cannot be made a touchstone for striking down provisions of the Constitution; that in Pakistan Lawyers Forum (supra) it has been clearly held by the Court that the theory of basic structure is only used to identify salient or the basic features of the Constitution, which cannot be struck down by the Courts; that

in Zafar Ali Shah (supra) the Court had not stated that the Courts can strike down amendments to the Constitution upon the touchstone of the basic features identified. The learned Counsel submitted that Courts do not have the jurisdiction to subject Amendments to the Constitution to Judicial Review.

30. With regards to the 21st Amendment he argued that there is a clear difference between "law of war" and "law of peace" as has been held by various writers including Hugo Grotius, the Dutch Jurist; that the "law of war" only applies when two nation states enter into declared conflict and war with each other; that Pakistan is in a state of undeclared war with belligerent non-state armed groups. It was in the context of undeclared war against such non-state actors operating as armies that 21st Amendment to the Constitution was enacted.

31. He pointed out that there is a sunset clause in the said Constitutional amendment providing that the provisions of the amendment act shall remain in force for a period of two years from the date of its commencement, after which they shall cease to form part of the Constitution and shall stand repealed. By reading Article 175 of the Constitution as it emerges after amendment, he contended that clause (1) of Article 175 provides for "such other courts as may be established by law"; that under clause (2) of Article 175 Courts do not have any jurisdiction except what has been conferred upon it by the Constitution or any other law; that the Military Tribunals have been established under the law and have been conferred jurisdiction by the Constitution through the 21st Amendment. He argued that this has been done as an act of balancing

between War Time Powers and Peace Time Powers, whereby balancing rights of the people with the need for security.

32. Mr. Abid S. Zuberi, ASC appearing for Sindh High Court Bar Association, Karachi through its Secretary in Constitution Petition No. 12 of 2015 prayed that the military courts are against the basic structure or salient features of the Constitution and should hence be struck down. Learned Counsel argued that under Article 239, Constitution may be amended by the 2/3 of the Parliament voting consciously; that under Article 63A (1) (b) (iii) the members of the Parliament are obligated to vote for the constitutional amendment in line with the directions of the political party leadership; that this forced and dictated political party discipline binds the parliamentarians to the decisions of their party leadership and does not allow them to exercise a conscious decision in voting for or against a proposed constitutional amendment; that this forced policy discipline was not envisaged under Article 239.

33. With respect to the military courts he argued that the extension of their powers over the civilians abridges the fundamental right of access to justice; that independent court, independent procedure and right to engage counsel of choice are the essential elements of a fair judicial system, which are denied to those to be tried by the military courts. With reference to the bar contained in Article 199 (3) over judicial review of proceedings under the military courts, the learned Counsel argued that this bar does not operate when actions of the military courts were mala-fide, lacked jurisdiction or were corum non judice. In this context he relied on the case of **Rana**

Muhammad Naveed v. **Federation of Pakistan through Secretary M/o Defence** (2013 SCMR 596). In the alternate he prayed that if laws in the current form were to be held as valid, then protection has to be extended to the accused for ensuring a fair trial.

34. Mr. Abrar Hasan, ASC, appearing for Pakistan Bar Council through its Vice Chairman in Constitution Petition No. 9 of 2015 argued that by the inclusion of the military laws in Part 1 to the First Schedule has granted blanket protection to the provisions of these laws. He further argued that classification given in the constitutional amendment conflicts with Article 4 and 25 as only terrorists "raising arms and insurgency using the name of religion or a sect" have been included and other terrorist organizations with other motives but still posing threat to the peace and security of Pakistan have been excluded. He was however against the use of the basic structure for striking down constitutional amendment. He instead prayed that the matter be referred back to the Parliament for reviewing the amendments.

35. Barrister Zafar ullah Khan, ASC appearing in Constitution Petition No. 99 of 2014 argued by comparing the frequency of amendments introduced in the Constitution of Pakistan to other Constitutions of the world that there is a culture of amendments in Pakistan as the process of amendment has become very easy. That the 21st Amendment would grant unrestricted powers to the executive.

36. Ms. Asma Jahangir, ASC representing Supreme Court Bar Association (SCBA) through Secretary in Constitution Petition No. 10 of 2015 submitted at the outset that SCBA does

not support the basic structure theory as a ground to strike down constitutional amendment. That she has the same instructions from the current President of the Lahore High Court Bar Association. Learned Counsel contended that the sun set clause in the 21st Constitutional Amendment indicates hesitation of the legislators in granting unchecked powers to the military; that the sun set clause was included in the constitutional amendment Act but not in the Constitution; that all the Bar Associations of the country were unanimous in opposing the said constitutional amendment as it denied access to justice. She argued that there were two ways of doing away with the said Amendment:

1. It could be struck down by the Courts on the touchstone of basic structure;
2. A middle ground could be taken to do away with the military courts set up through the constitutional amendment on grounds other than the basic structure doctrine.

37. The learned Counsel argued that the Courts of Pakistan have only identified basic features of the Constitution but have never struck down any constitutional amendment based upon such features or developed a theory of the basic structure of the Constitution. Learned Counsel cautioned that laying down a basic structure to the Constitution would open flood gates as all amendments to the Constitution after the 7th Amendment could be revisited. That Parliament should be held responsible for its actions in political forums and through political actions and not before the judiciary; that the theory of fear of what might happen should not be taken as a base for

restricting the powers of the Parliament through identification of the basic structure by the Courts, as the Parliament at the end of the day is politically responsible to the people. With reference to the Indian case law on the basic Structure, she argued that it should not be followed blindly in Pakistan because of the following reasons:

- Even in India, basic structure theory is on the decline;
- That as Indian Constitution was given by their founding fathers, discerning the ideas forming basic structure of their Republican Constitution is easy to some extent. However, as Pakistan's Constitution of 1973 was not given by the founding fathers, it will be difficult to discern with unanimity basic structure underlying it;
- Indian Constitution making process differed from that of Pakistan.

38. With reference to the argument that Objectives Resolution ought to be considered as providing basic structure of the Constitution, learned Counsel argued that considering it as a unanimously agreed document is a myth; that it was presented during the budget debates of the Constituent Assembly when attendance was thin and in this regard referred to the debate by Mr. Prem Hari Barma in the Constituent Assembly on 7.03.1949 when the Objectives Resolution was moved as a motion in the Assembly; that amendments were proposed to it but were never followed or incorporated; that no heed was paid to the opposition to it raised in the Assembly, which has been obliterated from history; that reliance upon

Objectives Resolution in search for basic structure of the Constitution would cause divisions in the society.

39. Learned Counsel then submitted that Article 8 (3) protected laws by placing them in the First Schedule; that this protection only applied to those laws existing at the time of inclusion and not to subsequent amendments or changes. With regards to the protection given to the Pakistan Army Act, 1952 under the Constitutional Amendment, learned Counsel argued that amendment to the Constitution was made under Act No. 1 of 2015, whereas amendment to the Army Act was made under Act II of 2015 and that Act II of 2015 did not exist at the time when the Army Act was sought to be protected by placing it in the First Schedule. Based upon this reasoning, the learned Counsel argued that since amendment in the Army Act through Act II was made subsequent to the passing of the Constitutional Amendment through Act I, the amendment in the Army Act extending the jurisdiction of the Military Court to civilians does remain without constitutional cover. In the alternative she made an argument that if military courts are accepted, the power of the Federal Government to transfer trial of certain cases, without any clear scheme or formula, to military courts should be subject to judicial review. She further argued that Article 8 (3) read with Article 199 (3) did not oust the jurisdiction of the Court of judicial review over the outcome of the trial by the military courts; that even otherwise, jurisdiction of the Courts has not been ousted under Article 8 (3).

40. Mr. Salman Aslam Butt, Attorney General for Pakistan, submitted that Mr. Khalid Anwar, appearing for the Federation has made extensive submissions on the basic

structure theory and he would confine his arguments to the formal and legal justifications for the amendments. The learned Attorney General by reference to Article 175 (2) argued that it is couched in negative language whereby the jurisdiction of the Courts has defined as only that conferred upon them by the Constitution and by or under any law; that there was no provision parallel to it in the Constitution of 1956, 1962 or the Interim Constitution of 1972; that in the case of **Additional Chief Secretary (FATA)** v. **Piayo Noor** (2014 SCMR 17) at paragraph 9 Court also noticed that foundation of the jurisdiction of Court is couched in negative term; that the same is also recorded in paragraph 6 of **S.M. Waseem Ashraf** v. **Federation of Pakistan through Secretary, M/O Housing and Works, Islamabad** (2013 SCMR 338). Reliance in this context was also placed on the case of Zia-ur-Rehman in which the Court had recorded that the Courts being a creature of the Constitution derive its power and jurisdiction from it and limits of such power are also set by the Constitution. That the Courts have recognized that it only has the jurisdiction as conferred upon it by the Constitution as in the case of **Federation of Pakistan** v. **United Sugar Mills Ltd. Karachi** (PLD 1977 SC 397), wherein the Court had held that the creation of Council of Common Interest (CCI) under the Constitution, "abridges the original jurisdiction of the Supreme Court under Article 184 and correspondingly new power essentially quasi-judicial in character has been conferred on the Parliament in joint sitting"; that there was no jurisdiction of Courts over CCI but the judicial power of the Courts remained. Referring to the ambiguity surrounding the status and role of

the Objectives Resolution, he read out from the speech of Mr. Abdul Hafeez Pirzada, the Federal Law Minister at the time of the framing of the 1973 Constitution, in Parliament and pointed out that the role intended for the Objectives Resolution at the time of passing of the Constitution was only that of a preamble.

41. With respect to the military courts learned Attorney General submitted that under Article 245 the armed forces are to act in aid of civil power in cases of "threat of war"; that the original Article 245 only contained the provision which now forms clause (1) of it and the other clauses were added through Seventh Amendment to the Constitution; that if war was feared or declared in Pakistan military forces could in aid of civil power, create and administer military courts which can try any person involved in raising the threat or actual war against the state; that Article 245 is an independent Article in the Constitution, under which the military courts can be created. It was further contended that Article 245 read with Entry 1 and Entry 55 of Federal Legislative List grants Federal Government the power to legislate for creating military courts for "the defence of Pakistan" during the times of war. In furtherance of his argument learned counsel relied upon case law for defining "threat of war" and "war"; that in the case of **Muhammad Umar Khan** v. **The Crown** (PLD 1953 Lah. 528) the Court had held that "where riots have assumed the form of armed insurrection or open rebellion amounting to war... On such occasions the Civil Courts may still function, though a delicate position may develop where, while the Courts are functioning, the military seek to oust their jurisdiction by setting up their parallel tribunals and claiming paramountcy for them"; that in the case

of **Aung Hla and Ors.** v. **Emperor** (AIR 1931 Rangoon 235) offence of "waging war" against the state did not presume trained or regular army as insurrection has different dynamics from regular war; that in the case of **Sarbananda Sonowal** v. **Union of India** (AIR 2005 SC 2920) it was stated that "modern war may involve not merely the armed forces of belligerent state but their entire population"; that in the case of Abdul Wali Khan (supra) the terms 'insurgency' and 'subversion' have been defined. It was contended by relying upon the stated case law that the contemporary definition of war has changed and includes the threat of war as well.

42. In relation to the Military Courts, learned Attorney General contended that the Court cannot confer any jurisdiction upon itself or any other Court to question a Constitutional Amendment on any touchstone whatsoever; that the Constitution of Pakistan envisages that a person acting against the defence of Pakistan or is a threat to the defence of Pakistan or any part thereof in the time of war, can be subjected to a law relating to the Armed Forces and can be Constitutionally tried under Article 245 read with Entry 1 and 55 of Federal legislative List; that the cases of **Sheikh Liaquat Hussain** v. **Federation of Pakistan** (PLD 1999 SC 504) and **Mehram Ali** v. **Federation of Pakistan** (PLD 1998 SC 1445) can be differentiated on facts, as at that time there was no organized insurgency or insurrection or war or threat of war. It was further argued that Article 245 was not interpreted in its true perspective in the two said cases in that Article 245 has the following three parts:

i. Defence against external aggression

ii. Defence against the threat of war

iii. Subject to law acting in aid of civil power

That the first two are defence powers of the state, exclusively falling within the domain of the executive and are not justiciable as provided under Article 199 (3) and Article 245 (2). In reference to the 21st Constitutional Amendment, it was contended that the Parliament has validly placed the Army Act in the First Schedule. That the word "specified" as used in Article 8 (3) (b) (i) is a present perfect tense which would mean that it would include both past and future laws included in the Schedule; that in the past First Schedule had also been amended in its entirety by the Fifth Constitutional Amendment. It was in this context that he submitted that jurisdiction of military courts called "Field General Court Martial" already existing under the structure of the Army Act have been vested with jurisdiction over certain sections of the accused; that the amendment in the Act had merely extended the jurisdiction of the military courts to certain persons; that the Constitutional Amendment has merely included Army Act in the first schedule and has not made any other amendment to the Constitution touching or affecting the basic structure.

43. In response to the argument raised by Ms. Asma Jahangir, learned ASC, that the Constitutional Amendment Bill was passed prior in time to the Bill amending the Army Act, learned Attorney General submitted that both the bills were introduced in the parliament at the same time and debate took place on them together; that they were passed by the National Assembly in the same Session and on the same date. That when

the bills were submitted to the Senate, the Army Act Amendment Bill was introduced earlier in time and the Constitutional Amendment was introduced thereafter. That when the bills were sent to the President his assent was granted to both the bills at the same time. It was also argued that according to the Rule of statutory interpretation the amendment in the Army Act being ordinary legislation had come into effect during mid-night of 6 and 7 June, 2015 in terms of General Clauses Act, 1897; that as General Clauses Act is not applicable to interpretation of the Constitution the 21st Amendment to the Constitution would come into effect when it was assented to by the President; that the Pakistan Army (Amendment) Act, 2015 had already come into effect when the assent to the 21st Constitutional Amendment was given by the President. It was also contended that matter of assent given to a bill falls within the proceedings of the Parliament in view of Article 66 ad 69 of the Constitution; that no Act of Parliament can be invalidated on the grounds of lack of previous sanction or consent required by the Constitution under Article 75 (4).

44. The fundamental issue in all these matters is the power of the Court to strike down a constitutional amendment and the grounds or the basis for the exercise of such power. This question has remained the subject matter of cases before our Courts as well as in India and amendments to the Constitution have been challenged on the touchstone of the basic structure theory. As mentioned above supporters of the theory have based their arguments mainly on the Indian case law. Of greater relevance for us however are the judgments of

this Court starting from Fazlul Quader Chowdhry (supra). This particular case deserves discussion in some detail as it was cited as the first judgment in Pakistan and India to have recognized the salient features of the Constitution. The Constitution of Pakistan, 1962 had introduced Presidential form of government where the President was to act on the advice of the Council of Ministers, who were not to be members of the Legislature. However, some of the members who were sought to be taken into the Council of Ministers were reluctant to accept their new responsibilities unless they were allowed to retain their membership of the Legislature. The President had been granted powers for a limited period under Article 224 (3) of the Constitution "for the purpose of removing any difficulties that may arise in bringing this Constitution or any provision of this Constitution, into operation" to direct "by Order, that the provisions of this Constitution shall, during such period as is specified in the Order, have effect subject to such **adaptations**, whether by way of *modification, addition or omission*, as he may deem to be necessary or expedient." (**Emphasis has been added**)

45. The President by using his powers under Article 224 (3) promulgated "Removal of Difficulties (Appointment of Ministers) President's Order No. 34 of 1962" (hereinafter referred to as the "Order"). By the Order, an amendment was also effected in Article 224 of the Constitution itself by the addition of a fourth clause ousting the jurisdiction of the Courts as under:

> "The validity of any order made or purporting to have been made under the Article shall not be called in question."

The said Order was impugned before the High Court of East Pakistan by the respondent, also a member of the National Assembly. He succeeded and a writ of qua warranto was issued against the appellants, who filed a certified appeal before this Court.

46. This case was cited by the Supreme Court of India in Sajjan Singh (supra) observing that the Supreme Court of Pakistan had "held that franchise and form of government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution." (**Emphasis has been added**) Reliance has now been placed on the case of Fazlul Quader Chowdhry (supra) on behalf of the petitioners to contend that the Supreme Court had then held that there were un-amendable "fundamental features" of the Constitution of Pakistan. This view is not correct. The said case, as emphasized above, only held that the President in exercise of his particular powers under Article 224 (3) could not change "fundamental features" of the Constitution and nothing was said to limit the power of the Parliament to change the "fundamental features" of the Constitution. The fundamental features of the Constitution were enumerated which could not be amended by the President through the exercise of Article 224 (3) but nothing was said about the power of the Parliament to change them. A Presidential Order passed under Article 224 (3) was restricted to

remove difficulties; it could not amend the Constitution. The Court thus held:

> "In exercise of the power contained in this Article the President has brought in fundamental changes by amending the Constitution. The question therefore is: Whether this Article empowers the President to make such amendments... It is clear from the above provisions that the amendment of the Constitution being a task of great responsibility the Constitution not only sets up a machinery for such amendments but also regulates the methods by which amendment should be made. The prima facie presumption, therefore, must be that the intention of the Constitution is that this duty is to be performed primarily by the legislative body itself. Except this there is no other provision under which the amendment of the Constitution is permissible."
>
> (**Emphasis has been added**)

Therefore, the Court only struck down the Presidential Order as it amounted to amendment of the Constitution, which was not within the scope of the powers granted to the President under the Constitution. The Court expressly held this in the following words (per Justice Fazl-e-Akbar):

> "The power under' this Article, therefore, can be exercised only for the limited purpose of bringing the Constitution in operation and it should accordingly be restricted to those purely machinery arrangements vitally requisite for that purpose. From the language of the Article it is abundantly

> clear that this Article was never meant to bestow power on the President to change the fundamentals of the Constitution. Our Constitution has provided for a Presidential form of Government and the President by the impugned Order has introduced a semi-Parliamentary form of Government. As already stated, this Article 224 (3) was never meant to bestow power on the President to change the fundamentals of the Constitution. However whole-some the intention and however noble the motive may be the extra-constitutional action could not be supported because the President was not entitled to go beyond the Constitution and touch any of the fundamentals of the Constitution." (**Emphasis has been added**)

Justice Hamood-ur-Rahman, as he then was, writing at another part of his judgment, noted that the "main fabric" or fundamental features of the Constitution could not be changed by the President by calling it adaptation:

> "The main feature of the Constitution, therefore, is that a Minister should not be a member of the House, he should have no right to vote therein, nor should his tenure of office be dependent upon the support of the majority of the members of the Assembly nor should he be responsible to the Assembly. This is an essential characteristic of a Presidential form of government and Mr. Brohi appearing on behalf of the respondent has called it the "main fabric" of the system of government

> sought to be set up by the present Constitution. An alteration of this "main fabric", therefore, so as to destroy it altogether cannot, in my view, be called an adaptation of the Constitution for the purpose of implementing it." (**Emphasis has been added**)

The Court first identified a distinction between "removal of difficulty" and "amendment" of the Constitution. It was only after that the Court identified "fundamental features" which could not be changed in the garb of removing difficulty by the President. Nothing was said at any part of the judgment to place limitations on the power of the Parliament as 'Amending Authority' to amend the Constitution.

47. Coming back to the Indian judgment of Sajjan Singh (supra) wherein it was observed that the Supreme Court of Pakistan had identified un-amendable features of the Constitution, even there it was noted that the Supreme Court of Pakistan had held that the President had no powers to amend the Constitution. The paragraph quoted in the Indian judgment was taken from the judgment of Chief Justice Cornelius, as he then was. If the said paragraph, in which "fundamental features" of the Constitution were identified is read in its proper context, it becomes clear that no limitations, either expressly or impliedly, were placed on the power of the Parliament as "Amending Authority" to amend such features. In the said paragraph, after declaring the true intent and purpose of Article 224 (3), the then Chief Justice had held the Presidential Order to be ultra-vires the Constitution as:

> "…the expediency and necessity were for producing an effect contrary to that clearly stated in the

> Constitution, and not for the purpose of bringing the Constitution as it was granted to the country, into operation... The impression is clear and unavoidable that the ground of expediency was based on a desire to accede to the wishes of certain persons, probably a fairly small number of persons, but the Constitution was not intended to be varied according to the wishes of any person or persons. Anything in the nature of "respecting of persons," unless provided by the Constitution itself, would be a violation of the Constitution, and if the Constitution were itself altered for some such reason, and that in a substantial, and not merely a machinery aspect, there would clearly be an erosion, a whittling away of its provisions, which it would be the duty of the superior Courts to resist in defence of the Constitution. The aspect of the franchise, and of the form of Government are fundamental features of a Constitution, and to alter them, in limine in order to placate or secure the support of a few persons, would appear to be equivalent not to bringing the given Constitution into force, but to bringing into effect an altered or different Constitution."

It is quite clear from this discussion that Chief Justice Cornelius, as he then was, only referred to the "fundamental features" which could not be amended by the President by exercising powers under Article 224 (3) to bring into "effect an altered or different Constitution" in order to favour "few

persons". This judgment did not at any point place or identify any limitations, whether implied or express, on the power of the Parliament to amend even the identified "fundamental features" of the Constitution.

Zia-ur-Rehman (supra) was the case in which this Court for the first time considered the power of the Courts to strike down a Constitutional Amendment. The petitioners therein had challenged the validity of the Interim Constitution of 1972 and the competence of the National Assembly to frame such a Constitution. It was argued that the Superior Courts were entitled to strike down such of the provisions of the Interim Constitution as were violative of the fundamental principles accepted by the Objectives Resolution of the 7.03.1949. Chief Justice Hamood ur Rehman, as he then was, writing for the Court held that:

> "So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will even confine itself within the limits set by the Constitution which it has taken oath to protect and preserve but it does claim and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a

> provision seeking to oust the jurisdiction of this Court" (**Emphasis has been provided**)

Rejecting the argument of the learned Counsel for the petitioners that higher laws of morality, political expediency, laws of nature etc should be employed to strike down the provisions of the Constitutional amendment, the Court held that:

> "It is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether the judiciary can, in the exercise of its judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of Government wish to be established. I for my part cannot conceive a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation." (**Emphasis has been provided**)

The Court however laid down that the judicial review over Constitutional Amendments was only limited to considering if the proper procedure for introducing such amendment was

followed and did not extend over the substantive parts of the amendment:

> "This does not, however, mean that the validity of no Constitutional measure can be tested in the Courts. If a Constitutional measure is adopted in a manner different to that prescribed in the Constitution itself or is passed by a lesser number of votes than those specified in the Constitution then the validity of such a measure may well be questioned and adjudicated upon. This, however, will be possible only in the case of a Constitutional amendment..."

Taking up the argument based on the Objectives Resolution, the Court held that:

> "Therefore, in my view, however solemn or sacrosanct & document, **if it is not incorporated in the Constitution or does not form a part thereof** it cannot control the Constitution. At any rate, the Courts created under the Constitution will not have the power to declare any Provision of the constitution itself as being in violation of such a document. If in fact that document contains the expression of the will of the vast majority of the people, then the remedy for correcting such a violation will lie with the people and not with the judiciary. It follows from this that under our own system too the Objectives Resolution of 1949, even though it is a document which has been generally accepted and has never been repealed or

> renounced, **will not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it**. If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof..." (**Emphasis has been added**)

The Objectives Resolution was later made substantive part of the Constitution through Article 2A yet in Hakim Khan (supra) and Kaneez Fatima (supra) it was held that even then the Courts cannot strike down any provision of the Constitution on the touch stone of Objectives Resolution.

48. In Abdul Wali Khan (supra) this Court did not follow the arguments based upon the Indian judgments of Golak Nath (supra) and Kesavananda Bharati (supra) but followed and affirmed the principle in Zia-ur-Rahma's case. In reference to the arguments based upon the Indian case law, it was held that:

> "We are told that the Supreme Court of a neighbouring country by a majority of six to five actually took such a view in the case of Golak Nath v. State of Punjab (A I R 1967 SC 1943), but this view was modified subsequently by a larger Bench by a majority of seven to six in the case of Kesavananda v. State of Kerala (AI R 1973 SC 1461), to the extent that "while fundamental rights

> cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest". The minority, of course, took the view that the power to amend is "wide and unlimited" and that the power to amend includes the power to repeal. The minority view in the last mentioned case is in line with the decisions of that Court prior to 1967 vide Shankari Prasad v. Union of India (AIR 1951 SC 458) and Sajjan Singh v. State of Rajasthan (AIR 1965 S C 845), but it is unnecessary for us to enter into this. controversy, as this Court is committed to the view that "the judiciary cannot declare any provision of the Constitution to be invalid or repugnant" to that national aspirations of the people and the validity of a Constitutional amendment can only be challenged if it is adopted in a manner different to the prescribed by the Constitution or is passed by a lesser number of votes than those specified in the Constitution, *vide* State v. Ziaur Rahman(P L D 1973 S C 49)…" (**Emphasis has been added**)

The basic structure argument was again raised in United Sugar Mills Ltd. Karachi (supra). While discussing the challenges raised to the Constitutional amendment in the said case, the Court held that:

> "Learned counsel however, did not assail the amendments on the larger ground as was done in Golaknath's case AIR 1967 SC 1943 decided in the Indian Jurisdiction. In that case a narrowly divided

> Supreme Court ruled that the Indian Parliament lacked the power to amend Part III of the Indian Constitution which provides for Fundamental Rights. However, the majority view in that case was modified later in the case of Kasavananda (AIR 1973 SC 1461) again by a narrow majority. In Pakistan, this Court in the case of Ziaur Rehman PLD 1973 S C 49 has however firmly laid down the principle 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 or a supra constitutional instrument. In the instant case, the two amendments are riot questioned for want of competency or any other formal defect." (**Emphasis has been added**)

This Court in **Fauji Foundation** v. **Shamimur Rehman** (PLD 1983 SC 457) after discussing series of Indian case law on the subject of basic structure in paragraphs 190 to 192, held that "no provision of the Constitution can be ultra vires, because there is no touchstone outside the Constitution by which the validity of a provision of the Constitution can be judged." (**Emphasis has been added**) In the case of **Sabir Shah** v. **Federation of Pakistan** (PLD 1994 SC 738) Presidential Proclamation issued under Article 234 of the Constitution directing the Governor of the province to assume

functions of the province of North-West Frontier province on behalf of the President was challenged before the Court. The Counsel for the government argued that the jurisdiction of the Court was ousted in undertaking judicial review of the Presidential Proclamation. Indian cases were again cited to contend that amendments to the Constitution changing the basic structure are justiciable before the Courts. This Court did not accept the said argument in the following words:

> "10. The distinction made by the Indian Supreme Court between a bar of the jurisdiction provided by the original Constitution of India and a bar of jurisdiction subsequently incorporated by amending the Constitution highlighted by Mr. Sharifuddin Pirzada has not been pressed into service by the Superior Courts in Pakistan**.** It is true that this Court has not declared any amendment in the Constitution as ultra vires on the ground that it was violative of the basic structure of the Constitution. In other words in Pakistan the above theory has not been accepted."
>
> (**Emphasis has been added**)

49. Two other cases require some discussion, namely, Mahmood Khan Achakzai (supra) and that of Wukala Mahaz (supra) as the counsel appearing for both the sides have interpreted the judgments differently regarding basic structure theory, in support of their respective stand point. In Mahmood Khan Achakzai (supra) the Eighth Amendment to the Constitution came under challenge, including Article 58 (2) (b) (which now stands repealed) on the touchstone of basic

structure of the Constitution. The seven Member Bench of this Court hearing the case dismissed the petition along with other connected petitions by a short order. Mr. Justice Sajjad Ali Shah, the then Chief Justice of Pakistan, in his judgment while holding that clause (6) of Article 239 of the Constitution imposed no limitation whatsoever on the power of the Parliament to amend any provision of the Constitution went on to add that amendments to the Constitution remain subject to limitation that the salient feature or basic characteristic of the Constitution providing for Federalism, Parliamentary Democracy and Islamic provisions as envisaged in the Objectives Resolution/Preamble to the Constitution of 1973 which have become substantive part of the Constitution remain untouched. The other main judgment was rendered by Mr. Justice Saleem Akhtar. Whereas the Chief Justice had without any discussion on the point or giving reasons had simply declared that there were limitations on the powers of the Parliament to deviate from the basic structure of the Constitution, Mr. Justice Saleem Akhtar had in paragraphs 29 to 43 of his judgment referred to the case law from the Indian jurisdiction, starting from Kesavanda Bharati case up to **Raghonathrao Ganpatrao** v. **Union of India** (AIR 1993 SC 1267) and taking into account the jurisprudence on the question developed in Pakistan since the case of Zia-ur-Rehman's held:

> "34. It 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 has 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 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." (**Emphasis has been added**)

Referring to clauses (5) and (6) of Article 239 of the Constitution the Hon'ble Judge noted that "However, there are factors which restrict the power of the Legislature to amend the Constitution. It is the moral or political sentiment, which binds the barriers of Legislature and forms Constitutional understanding. The pressure of public opinion is another factor which restricts and resists the unlimited power to amend the Constitution. In Pakistan although Article 239 confers unlimited power upon the Legislature, yet it cannot by sheer force of morality 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 can perish only with the Constitution." Another significant point to note in Mahmood Khan Achakzai's case is the short order which in fact

is the judgment. It recognizes that the question of basic structure of the Constitution cannot be answered authoritatively. Para 2 of the short order reads:

> "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 as Article 2A inserted by the Eighth Amendment."

Thus, it was never held in Mahmood Khan Achakzai that the basic features of the Constitution can be made a ground to test the validity of a Constitutional amendment.

50. By the fourteenth constitutional amendment Article 63A was introduced providing for disqualification of a Member of National Assembly or Provincial Assemblies upon his defection from the party on whose ticket he got elected. This amendment was challenged by Wukala Mahaz Barai Tahafuz Dastoor, on whose behalf again the basic structure theory was invoked for the purpose of striking down the amendment. Mr. Justice Ajmal Mian, the then Chief Justice of Pakistan, wrote the leading judgment wherein he discussed the case law of India and Pakistan on the subject and concluded that "from the above case law, it is evident that in Pakistan the basic structure theory consistently had not been accepted."

51. The case Zafar Ali Shah (supra) has been cited in support of the proposition that the Court can annul constitutional amendment on the touchstone of basic feature of

the Constitution. In that case while according legitimacy to military takeover by General Pervez Musharraf he was also granted the power to amend the Constitution. The Court was however mindful that such powers must not be unfettered. It was in that context that the Court observed that since the Parliament cannot alter basic feature of the Constitution as was held in Mahmood Khan Achakzai's case the military ruler could also not exercise such powers. The Court went on to state that the independence of the judiciary, federalism and parliamentary form of government blended with Islamic Provisions being the basic feature cannot be altered by the Parliament. With respect it was never held in Mahmood Khan Achakzai's case that the Parliament was not empowered to bring about amendment in violation of the basic structure of the Constitution. Furthermore, the above limitation in Zafar Ali Shah's case is to be considered in the context of the grant of amending powers to a military ruler and the limitations were imposed on the exercise of such power. In any case, since the question of striking down a constitutional amendment was not before the Court, the observation at best could be considered as obiter dicta.

52. Zafar Ali Shah was not followed in Pakistan Lawyers Forum where this Court unequivocally refused to accept the argument of setting aside constitutional amendments on the touchstone of basic structure. Referring to the cases of Mahmood Khan Achakzai and Zafar Ali Shah it was held that:

> "57. The conclusion which emerges from the above survey is that prior to Syed Zafar Ali

> Shah's case, there was almost three decades of settled law to the effect that even though there were certain salient features of the Constitution, no Constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the Courts. A Constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections."
>
> (**Emphasis has been added**)

Referring to Indian case law on the subject and also the views expressed in the judgments of this Court declared that:

> "58. It may finally be noted that the basic structure theory, particularly as applied by the Supreme Court of India, is not a new concept so far as Pakistani jurisprudence is concerned but has been already considered and rejected after considerable reflection as discussed in the cases noted hereinabove…
>
> 59. The position adopted by the Indian Supreme Court in Kesvavananda Bharati case is not necessarily a doctrine, which can be applied unthinkingly to Pakistan. Pakistan has its own unique political history and its own unique judicial history. It has been the consistent position of this Court ever since it first

> enunciated the point in Zia ur Rahman's case that the debate with respect to the substantive vires of an amendment to the Constitution is a political question to be determined by the appropriate political forum, not by the judiciary. That in the instant petitions this Court cannot abandon its well-settled jurisprudence." (**Emphasis has been added**)

53. The above discussion leave one in no doubt that this Court has right from the 1973 case of Zia-ur-Rahman to Wukla Muhaz and Pakistan Lawyers Forum (supra) consistently held that the basic structure theory has been recognized only to the extent of identifying salient or fundamental features of our Constitution. However, the theory has never been accepted or applied as a ground for striking down amendment in the Constitution. The Court has consistently refused to follow the position taken by the Supreme Court of India on the subject.

54. Even in India there is no unanimity on the application of this doctrine. A detailed analysis of case law from the Indian jurisdiction is not required as that has been extensively undertaken by this Court in the cases of Fauji Foundation, Mahmood Khan Achakzai, Pakistan Lawyers Forum and Wukla Muhaz (supra) before holding that the peculiar Constitutional history and politics of India cannot be emulated in Pakistan unscrupulously. A brief critical analysis will be made of the broad trends introduced by seminal Indian judgments on the matter to identify the particular history of the struggle and conflict between the judiciary and parliament in

India necessitating the development of the basic structure doctrine.

55. The doctrine of basic structure developed in India as a result of the struggle for supremacy between the judiciary and the parliament over *interpretative finality* over the Constitution. The Congress led Parliament of India during the times of Jawaharlal Nehru and Indira Gandhi believed strongly in the idea of state-led socialism in which a centralized, parliamentarian system of government would lead the nation in redistributing wealth through state led modernization through industrialization and land reform. A number of amendments were brought in the Constitution to further the socialist agenda of land reforms and the right to property in India suffered as a result of such schemes. These amendments were challenged before the Courts which committed to protecting the right to property of the people, after initial reluctance, finally struck down the amendments in the case of Golak Nath. Later, in the case of Kesavannada Bharati the Supreme Court of India borrowed the academic doctrine of basic structure, developed by Professor Dietrich Conrad, a German academic, to develop jurisprudential basis for the said doctrine. This created the basis for the struggle between the Parliament and the Courts over finality of say over the Constitution. This has been described by a historian as the "struggle over the *custody* of the Constitution", with the parliament's assertion of absolute power to amend being countered by the judiciary acting as custodian of the un-amendable *basic features* of the Constitution. (Reference can be made to following texts for a critical commentary and historiography of the struggle of supremacy

between the Parliament and the Courts leading to the development of the basic structure doctrine in India: "Working a Democratic Constitution" by Granville Austin; *The Supreme Court and the struggle for custody of the Constitution* by Granville Austin in "Supreme but not infallible: Essays in Honour of the Supreme Court of India"; "Courage, Craft and Contention: The Indian Supreme Court in the Eighties" by Professor Upendra Baxi). Supreme Court of India in Golak Nath (supra) reversed the earlier view in the cases of Shankari Prasad and Sajjan Singh (supra) that fundamental rights cannot be amended even by following the procedure laid down under Article 368. In Golak Nath's case, the doctrine of any implied limitations on Parliament's power to amend the Constitution was not accepted. The majority felt that "there is considerable force in this argument" but thought it unnecessary to pronounce on it. "This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in provisions other than in Part III of the Constitution."

56. It was eventually in the case of Kesavananda Bharati that this theory of implied limitations on the powers of amendment by the Parliament was accepted when amendments to the Constitution weakening the right to property were challenged before the Court. The later judgment in Indira Gandhi was pronounced during a period of emergency, when Constitutional amendment had been passed to help the then incumbent Prime Minister in her appeal, pending before the Supreme Court. These judgments have been criticized for introducing uncertainties as the Parliament while amending the

Constitution would not know as to whether the amendment would survive the test of *basic features* forming the basic structure of the Constitution. Kesavananda Bharati did not lay down with precision any of the *basic features* of the Constitution which were identified by the Court in the later cases of Indira Gandhi, Minerva Mills Ltd., Waman Rao, I.R. Coelho (supra) etc and have been listed by certain commentators on Indian Constitution to be 27 in number and growing in count. Even these identified *basic features* are very broad in nature and open to varied interpretation by the judiciary. The dissent in Kesavananda Bharati questions many of the assumptions forming the basis of laying down implied limitations on Parliament's powers to amend. One of the arguments forwarded was the 'fear' theory, expressing distrust in the Parliament's unbridled powers of amendment, as it was contended that it may lead to complete abrogation or even repeal of the Constitution by it. This 'fear' theory is based upon the appalling and sad history of the amendments introduced by the Nazi dictatorship of the Third Reich to the Constitution of the German Reich (Weimar Constitution) of 1919 through the Enabling Act of 1933 (Reference can be made to the following text for a theoretical account of the constitutional and legal history of Germany under the Nazi totalitarianship: "State of Exception" by Giorgio Agamben). Justice Chandrachud, who later became the Chief Justice of India, in his dissent argued against the fear theory in the following words:

> "Counsel painted a lurid picture of the consequences which will ensue if a wide and untrammelled power is conceded to the

> Parliament to amend the Constitution. These consequences do not scare me. It is true that our confidence in the men of our choice cannot completely silence our fears for the safety of our rights. But in a democratic policy, people have the right to decide what they want and they can only express their will through their elected representatives in the hope and belief that the trust will not be abused. Trustees are not unknown to have committed breaches of trust but no one for that reason has abolished the institution of Trusts... The true sanction against such political crimes lies in the hearts and minds of men. It is there that the liberty is insured... If and when they realise the disaster brought by them upon themselves, they will snatch the Crown and scatter its jewels to the winds."

57. The position in India also differed from Pakistan as there was no jurisdiction ousting clause in the Constitution of India restricting the powers of the Parliament to amend the Constitution under Article 368 before the judgment in Kesavananda Bharati. It was only later, that to grant protection to constitutional amendments, that clause (4) was added to Article 368 through the Forty Second Constitutional Amendment, to oust the jurisdiction of the Courts from calling into question any amendment to the Constitution. The said clause was later held to be unconstitutional and void in Minerva Mills Ltd. whereas similar provisions in the Constitution of

Pakistan i.e. clauses (5) and (6) of Article 239, introduced through the Eighth Amendment, remained unchallenged. Rather, the said Amendment as a whole has been held to be valid in the case of Mahmood Khan Achakzai (supra).

58. Basic structure theory, developed by Professor Conrad, in the wake of the harrowing experience of the Nazi Germany, was adopted by the Courts of India as a tool to create jurisprudence for ensuring their supremacy over the Parliament. This theory does not have any universal acceptance in comparative constitutional analysis and also has limitations as highlighted in dissenting notes of Kesavnanda Bharati. Ideas cannot be uncritically borrowed from foreign jurisdiction, without understanding the particular histories of their development or appreciating their consequences in the host jurisdiction, especially when our own jurisprudence on the said question has already been settled and for good reasons.

59. An argument was raised at the bar that the Objectives Resolution, adopted by the Constituent Assembly of Pakistan on 12.03.1949 (Constituent Assembly of Pakistan Debates, 1949 Volume-V at page 101) and incorporated in all the Constitutions, be considered as expressing and containing the basic structure of the Constitution of Pakistan; it was urged that it was a consensus document and that it expressed the desires of the founding fathers for all times on which the Republic of Pakistan is to be formed; that the Objectives Resolution is broad enough to be interpreted by each generation according to its time and specific enough to contain all the basic and essential features forming the framework of the Constitution of Pakistan; that after its inclusion into the

Constitution of Pakistan by Presidential Order No. 14 of 1985, it has become a “substantive” part of the Constitution which should be recognized as such by the Court. Reference was made to case law, where Objectives Resolution has been declared to contain the “grundnorm” of the Constitution of Pakistan.

60. Before referring to the case law regarding the status of Objectives Resolution incorporated as substantive part of the Constitution vide Article 2A, it will be worthwhile to refer to the historical role and status envisaged for the Objectives Resolution as preamble by the drafters of the Constitution.

61. Objectives Resolution was first moved as the motion titled re: Aims and Objects of the Constitution by the then Prime Minister of Pakistan Liaquat Ali Khan on 7.03.1949 as “embodying the main principles on which the Constitution of Pakistan is to be based”. It was further observed by Sardar Abdur Rab Nishtar, the Deputy Leader of the House, in his speech that “this Resolution itself is not a Constitution. It is a direction to the Committee that will have to prepare the draft keeping in view these main features.” Ch. Nazir Ahmad Khan, Minister of the Government, also expressed the nature and status of the Objectives Resolution in these words: "This Resolution is merely in the nature of a Preamble. It is, so to say, the terms of reference to this Assembly under which they have to frame their future Constitution. It is neither the official legislation nor even the Constitution itself...” (these excerpts have been borrowed from the history of the Objectives Resolution as given by Chief Justice Nasim Hassan Shah, as he then was, in the judgement of Hakim Khan (supra). It was neither intended to be a supra-Constitutional document by the

drafters of the Constitution of 1956 nor by the drafters of the Constitution of 1973. Mr. Abdul Hafeez Pirzada, as the Federal Minister for Law and Parliamentary Affairs, who presented the draft Bill of the Constitution before the parliament, explained the "position of the Preamble *vis-a-vis* the operative parts of the Constitution" in the following words:

> "Preamble essentially is not an operative part of the Constitution. Preamble is a preamble which makes manifestation of intention on the part of Legislature. In the past some people have claimed the preamble which reflects the Objectives Resolution of the first Constituent Assembly of Pakistan of 1949 as the grundnome (sic) making the crest of the Constitution subservient to the preamble. This is not the correct position. Preamble cannot be relied upon for the purposes of interpretation or enforcement of the Constitution where of the language of the Constitution is absolutely clear. This view was always the accepted view and only lately, in a case, the Supreme Court of Pakistan has reaffirmed this position that preamble is not a grundnome (sic). We have also got some cases in which judgement has been delivered by a superior court in Pakistan whereby it is said that by virtue of the preamble, Judges of the High Courts, without disrespect to them, derived some divine power under the preamble to supersede the

> Constitution. I would like to categorically state that nothing could be more wrong than this... Therefore, the preamble at best serves as what is supposed to be manifestation of intention, nothing beyond that. And only where the language is incapable of interpretation can the manifestation of intention be looked upon. Once that is done, that is the end. Preamble does not serve any purpose beyond this. It cannot be over-riding, it cannot be dominant, it cannot make Constitution subservient to the language and the preamble. It is not a supra-Constitutional document or instrument as has been stated in the past in a judgement which now we have reversed through a judgement of the Supreme Court. So Sir, this I would like to go on record that preamble although contained in a Constitutional document, is not part and parcel of the operative portion of the Constitution so as to govern the rules of interpretation with regard to the Constitution."

The will of the people, as is represented through their representatives in the Constituent Assembly was not to grant a supra-Constitutional status to the Objectives Resolution, dominating rest of the provisions and structure of the Constitution. It was to remain as the preamble to the Constitution. No objection to its status as preamble of the Constitution was raised from any side in the Constitution making process of 1973, as can be seen from the archive of the

Constitution Making Debates. The speech by Mr. Pirzada, while presenting the draft of the Bill of the Constitution before the parliament, shows that people through their representatives only wanted to retain the Objectives Resolution as preamble to the Constitution, as was also done in the previous two Constitutions.

62. It was only made a substantive part of the Constitution vide the Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985) through the insertion of Article 2A. It was through amendment of the Constitution by a military dictator, which however did receive approval from the parliament through the Eighth Amendment to the Constitution.

63. The issue regarding the role and status of Objectives Resolution as supra-Constitutional was first raised in the case of Miss Asma Jilani (supra) in that Chief Justice Hamood-ur-Rehman, as he then was, noted that:

> "In any event, if a grund-norm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grund-norm is enshrined in its own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent

> Assembly of Pakistan on the 7th of March 1949. "

This statement has been interpreted as a pronouncement by the Court of Objectives Resolution to be *grundnorm* of the Constitutional and legal structure of Pakistan and granting it a supra-Constitutional status. However, in the later case of Zia-ur-Rehman (supra), Chief Justice Hammod-ur-Rehman, as he then was, cleared the ambiguity surrounding the status of Objectives Resolution which had cropped up in his earlier pronouncement, in these words:

> "So far as the Objectives Resolution of 1949 is concerned, there is no dispute that it is an important document which proclaims the aims and objectives sought to be attained by the people of Pakistan; but it is not a supra-Constitutional document, nor is it enforceable as such, for, having been incorporated as a preamble it stands on the same footing as a preamble. It may be looked at to remove doubts if the language of any provision of the Constitution is not clear, but it cannot override or control the clear provisions of the Constitution itself. "

Even otherwise, the ambiguity can be cleared up if the excerpt referred to from Asma Jilani's case is read within the context in which it was written. Chief Justice Hamood-ur-Rehman in the said judgment was considering the jurisprudential errors the Court had earlier fallen into, in the case of **State** v. **Dosso** (PLD 1958 SC 533), by using the concept of *grundnorm* from the writings of Hans Kelsen. Chief Justice Hamood-ur-Rehman only referred to the Objectives Resolution to prove a point that there

was no need to have recourse to Western legal thought for importing ideas of *grundnorm*. Objectives Resolution was only referred to in this context as a possible *grundnorm* which could have been referred to by the Court in the case of Dosso instead of relying on the writings of Kelsen. It should also be noted that the said excerpt starts with a conditional statement "[i]n any event, if a grundnorm is necessary" clearly providing that it was only an argument stated to counter the use of Western legal theorist in the said case and not to state a binding opinion of the Court.

Chief Justice Hamood-ur-Rehman, in the case of **Zia-ur-Rehman** then went on to add that:

> "It follows from this that under our own system too the Objectives Resolution of 1949, even though it is a document which has been generally accepted and has never been repealed or renounced, will not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it. If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof... " (**Emphasis has been added**)

Chief Justice Hamood-ur-Rehman's opinion in the said excerpts could be read to imply that Objectives Resolution will not have the same status or authority as the Constitution or claim to control it, unless and until it is incorporated within the Constitution. This could be read as conditional legitimacy

for Objectives Resolution to control the Constitution subject to it being made a part of the Constitution instead of being retained merely as preamble of the Constitution. The confusion surrounding its status was exasperated after Objectives Resolution was made a “substantive” part of the Constitution through Article 2A, inserted through President's Order No.14 of 1985 which reads as under:

> "2A. The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly."

Justice Nasim Hassan Shah writing for the Court in the case of Hakim Khan (supra) also noticed ambiguity surrounding the status and role of the Objectives Resolution in the Constitution of Pakistan due to the observations of Justice Hamood-ur-Rehman and Article 2A being made substantive part of the Constitution in the following words:

> “These observations of the learned Chief Justice are open to differing interpretations: Thus, for some they mean that the Objectives Resolution was not a Supra-Constitutional document and that Courts being the creatures of the Constitution could not strike down any of its provisions and, therefore, it was not open to a Court to countenance any prayer to that effect. While others understood these observations to imply that in case the Objectives Resolution got incorporated into the Constitution and became its substantive part, it then could control the other provisions of the Constitution.”

It was urged in Hakim Khan's case that after the inclusion of Objectives Resolution as substantive part of the Constitution it "has clearly acquired the status of a supra-Constitutional document. Resultantly, any of the existing provisions of the Constitution which conflicts with its terms and is inconsistent or repugnant to its principles and provisions has become inoperative and of no legal effect and can be so declared by the Courts." The Court disagreed with this submission holding that since the word "substantive" means "an essential part or constituent or relating to what is essential", after the inclusion of Article 2A into the Constitution, Objectives Resolution possess the "same weight and status as other Articles of the Constitution which are already a substantive part thereof." Court then proceeded to consider the implications of the scenario when Article 2A would become in control of the Constitution. In such a situation, most of the Articles of the Constitution would become questionable on the touchstone of the Objectives Resolution, which in relation to the Constitution would "result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form." That this could not be allowed to happen as inconsistencies between provisions of the Constitution and Objectives Resolution were to be harmoniously interpreted instead of annulling existing provisions of the Constitution which cannot be undertaken by any Court. Further, the Court held that the role of the Objectives Resolution has not changed despite its insertion as Article 2A. The original role for the Objectives Resolution, in the words of the Court, was that "it should serve as beacon of light for the Constitution-makers and

guide them to formulate such provisions for the Constitution which reflect ideals and objectives set forth therein." After the framing of the Constitution the role of the Objectives Resolution still remained the same, despite its inclusion as 'substantive' part of the Constitution, through the insertion of Article 2A, in that any inconsistency between the existing provisions of the Constitution and Objectives Resolution must be resolved by the Parliament. It is only through the amending process provided in the Constitution that the alleged inconsistency between the Objectives Resolution and provisions of the Constitution can be resolved. The Court was further of the opinion that as the principles contained in the Objectives Resolution are capable of very wide and different interpretations for different times, any "interpretations placed on these concepts by Courts of law from time to time pursuant to controversies raised about them every now and then would render the Constitution unstable and make it uncertain." Therefore, if any question was raised regarding the validity of any Constitutional provision, it was held that:

> "... such question can only be resolved by the Majlis-e-Shoora (Parliament), which can, if the plea is well founded, take the necessary remedial action by making suitable amendments in the impugned provision in order to bring it within the limits prescribed by Allah Almighty."

Justice Shafi-ur-Rehman, also noted that the Court could not strike down Constitutional provisions on the touchstone of Objectives Resolution, in the following words:

> "The provisions of Article 2A were never intended at any stage to be self-executory or to

> be adopted as a test of repugnancy or of contrariety. It was beyond the power of the Court to have applied the test of repugnancy by invoking Article 2A of the Constitution for striking down any provision of the Constitution (Article 45)."

The question also came before the Court in the case of **Kaneez Fatima** v. **Wali Muhammad** (PLD 1993 SC 901), wherein Justice Saleem Akhtar, relying on the earlier case of **Hakim Khan**, held that:

> "As is obvious from the aforestated weighty observations, Article 2A cannot be pressed into service for striking down any provision of the Constitution on the grounds that it is not self-executory and also that another provision of the Constitution cannot be struck down being in conflict with any other provision of the Constitution."

In **Justice Khurshid Anwar Bhinder** v. **Federation of Pakistan** (PLD 2010 SC 483) the Court was again confronted with the question over the status and role of Objectives Resolution as substantive part of the Constitution. The Court held that:

> "The Objectives Resolution remained a subject of discussion in various judgments and the judicial consensus seems to be that "while interpreting the Constitution, the Objectives Resolution must be present to the mind of the Judge and where the language of the Constitutional provision permits exercise of choice, the Court must choose that interpretation which is guided by the principles embodied therein. But that does not mean, that Objectives Resolution is to be

> given a status higher than that of other provisions and used to defeat such provisions. One provision of the Constitution cannot be struck down on the basis of another provision." (**Emphasis has been added**)

64. Another aspect canvassed on behalf of the petitioners is that the Objectives Resolution represents the will of the people and that the Parliament is not empowered to go against it by making amendments in the Constitution that are in conflict with the declarations made in the Objectives Resolution. Undoubtedly the will of the people is expressed through their representatives in the Parliament. It may however be noted that it is in the preamble of the 1973 Constitution that the will of the people is declared in these words:

> "Now, therefore, we, the people of Pakistan…
> Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution."

This declaration of "we, the people of Pakistan" was neither a part of the Objectives Resolution as it was passed in 1949 nor as preamble to the Constitution of 1956 and 1962. However, the will of the people in enacting the Constitution of 1973 was that the Objectives Resolution was nothing more than a Preamble. The Objectives Resolution which was made substantive part of the Constitution through Article 2A was that annexed to the Constitution. The text of the annexure is different from the preamble of the Constitution in that the declaration made by "we, the people of Pakistan" has been omitted, for obvious reasons as the Annex was introduced by a military ruler. This goes to show that the original Constitution of 1973,

representing the will of the people through their chosen representatives, had declared the Objectives Resolution to be only a preamble to the Constitution and not its substantive part. This amendment was therefore, not expression of the will of the people. Though, Article 2A has since been acknowledged and accepted as substantive part of the Constitution, it does not however, represent the will of the people.

65. It follows from the above discussion that notwithstanding the inclusion of Article 2A whereby the Objectives Resolution has been made a substantive part of the Constitution, it neither controls other provisions of the Constitution nor can other provisions of the Constitution be struck down on the ground that they come into conflict with it. The Objectives Resolution as substantive part of the Constitution can be used in interpretation of other provisions of the Constitution in case of doubt.

66. Some petitioners before the Court argued that the Parliament did not have the political mandate to introduce amendments affecting basic or salient features of the Constitution as they have not received mandate for the same from the people. It was argued that the parliament should dissolve itself and approach the people with a clear political agenda regarding the amendments to the Constitution contemplated by them. In the alternate it was argued that referendum seeking people's opinion of the proposed amendments be sought before they are made by the Parliament. This argument is unfounded as the procedure for introduction of a bill to amend the Constitution under Article 239 does not lay down any such requirement or restriction upon the

Parliament. Further, there is no divide between 'legislative powers' and 'constituent powers' in the Constitution of Pakistan. Parliament under the Constitutional structure of Pakistan has both legislative and constitutive powers as has been held by Justice Saeed-uz-Zaman Siddiqui in Wukla Muhaz in the following words:

> "...Parliament in Pakistan exercises ordinary legislative as well as constituent power. The Parliament in exercise of its ordinary legislative power approves or passes Acts and Legislations in respect of items enumerated in the two legislative lists in the Fourth Schedule of the Constitution, while in exercise of its constituent power it can amend the Constitution."

The question also came before full bench of the Sindh High Court in Dewan Textile Mills Ltd (supra) which articulated the question in the following words:

> "...the Preamble declares that it was the 'people' who framed the Constitution, could it be said after the Constitution was framed that the 'people' still retain and can exercise their sovereign Constituent power to amend or modify that document by virtue of their legal sovereignty?"

After discussing the position from comparative Constitutional and political philosophies, the Court answered the above posed question in the following words:

> "It was in the exercise of the 'constituent power' that the 'people' framed the Constitution and invested the Amending Body with the power to amend the very instrument they created. The instrument, so created, by necessary implication, limits the further exercise of the power by them, though not the possession of it. The Constitution,

> when it exists, is supreme over the 'people', and as the 'people' have voluntarily excluded themselves from any direct or immediate participation in the process of making amendment to it and have directly placed that power in the representatives without reservation. It is difficult to understand how the 'people' can juridically resume the power to continue to exercise it. (see Dodge v. Woolsay ((1856) 18 How. 331). It would be absurd to think that there can be two bodies for doing the same thing under the Constitution. It would be most incongruous to incorporate in the Constitution a provision for its amendment, if the constituent power to amend can also be exercised at the same time by the mass of the people, apart from the machinery provided for the amendment. In other words, the people having delegated the power of amendment, that power cannot be exercised in any way other than that prescribed, nor by any instrumentality other than that designated for that purpose by the Constitution. There are many Constitutions which provide for active participation of the people in the mechanism for amendment either by way of initiative or referendum as in Switzerland, Australia and Eire. But in our Constitution there is no provision for any such popular devise and the power of amendment is vested only in the Amending Body." (**Emphasis has been added)**

The above quoted excerpt quite aptly captures and replies all the challenges raised over the political mandate exercised by the Parliament as Constitution Amending Body having absolute 'constituent powers' under clause (6) of Article 239 (It may however be kept in mind that the said ratio decidendi of the Court was borrowed from the dissenting note by Justice K. K.

Mathew in Kesavananda Bharati). It may further be observed that any determination of the existence or otherwise of the political mandate by the Parliament making amendments to the Constitution by the Courts would be entering the 'political thicket' which was proscribed by this Court in Zia-ur-Rehman in the following words:

> "This does not, however, mean that the body having the power of framing a Constitution is "omnipotent" or that it can disregard the mandate given to it by the people for framing a Constitution or can frame a Constitution which does not fulfil the aspirations of the people or achieve their cherished objectives political, social or economic. These limitations on its power, however, are political limitations and not justiciable by the judiciary. If a Constituent Assembly or National Assembly so acts in disregard of the wishes of the people, it is the people who have the right to correct it. The judiciary cannot declare any provision of the Constitution to be invalid or repugnant on the ground that it goes beyond the mandate given to the Assembly concerned or that it does not fulfil the aspirations or objectives of the people. To endeavour to do so would amount to entering into the political arena which should be scrupulously avoided by the judiciary. With political decisions or decisions on questions of policy, the judiciary is not concerned"

It would be wise for the Court to leave the determination of the question regarding political mandate to the 'people', rather than engaging in it as it is purely a political question. This Court in Pakistan Lawyers Forum (supra) held on similar lines that:

> "57... no Constitutional amendment could be struck down by the superior judiciary as being

> violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the Courts. A Constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections." (**Emphasis has been added**)

67. Having held that neither the basic structure theory nor the Objectives Resolution of the Constitution can be made a ground to annul any amendment in the Constitution, the primary question remains whether the Court has jurisdiction at all to strike down an amendment on any ground whatsoever. In this respect reference may be made to Constitutional provision embodied in clause (2) of Article 175 read in conjunction with clause (5) of Article 239 of the Constitution.

68. The Courts have only such powers that have been conferred upon it by the Constitution or the law under clause (2) of Article 175 which provides that:

> "(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or under any law."

Constitutional amendments in this case were challenged under Article 184 (3) of the Constitution which grants original power to the Supreme Court over "a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II". Clause (2) of Article 8 in Part II of Chapter 1 of the Constitution provides that the "State shall not make any law which may take away or abridge the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void."

Court acting under its original jurisdiction under Article 184 (3) cannot strike down constitutional amendments as they are not 'law' within the meaning of clause (2) of Article 8. Reference may be made to Fazlul Quader that constitutional amendment is not in the nature of the making of ordinary law as a difference has been maintained in the Constitution between making of law and amendment of the Constitution. Justice Kaikus, writing for the Court, held that:

> "Even ordinarily when in a particular document we are referring to the Constitution as well as to other laws the word "law" would have reference not to the Constitution but to other laws. In the present Constitution a clear distinction between making of law and amendment of the Constitution has been maintained. The amendment of the Constitution appears in a separate part of the Constitution, i.e. in Articles 208 to 210. There is a distinct, procedure provided for amendment of the Constitution and the expression "making law" is not used with respect to such amendment either at the place where the amendment is provided for or, at any other place." (**Emphasis has been added**)

Chief Justice Ajman Mian, as he then was, in the case of Wukla Mahaz distinguished between law and constitutional amendment in the following words:

> "I am inclined to hold that the words "any law" used in clauses (1) and (2) of Article 8 of the Constitution do not include any provision of the Constitution which is evident from the above referred Articles, wherein the word "law" and the word "Constitution" have been used in contradistinction. There is a well-defined distinction between "Legislative power" and

> "Constituent power". The above Articles apparently were framed keeping in view the above distinction. In this view of the matter, the same cannot be treated as synonymous connoting the same meaning. As a corollary, it must follow that the validity of a Constitutional provision cannot be tested on the touchstone of Article 8 of the Constitution."

Justice Saeed-uz-Zaman Siddiqui in Wukla Muhaz clarified the position of the Court further on the question by noting that:

> "The legislative power of the Parliament is inferior to its constituent power, therefore, Parliament exercises its legislative power subject to the constraints mentioned in Article 8 of the Constitution. Therefore, an Enactment passed by the Parliament in exercise of its legislative power can be struck down on ground of its inconsistency with the provision contained in Chapter 1 of Part II of the Constitution. However, the constituent power of the Parliament, which is at a higher pedestal, is not subject to these constraints. The power to amend the Constitution conferred on the Parliament under Articles 238 and 239 of the Constitution is in the nature of a constituent power of the Parliament. Therefore, a Bill passed by the Parliament in exercise of its power under Articles 238 and 239 of the Constitution amending the Constitution though described as an "Act" would not be subject to the same limitations as are applicable to an "Act" passed by the Parliament in exercise of its ordinary legislative power. As soon as an Act amending the Constitution is passed in accordance with the provisions of Article 239 of the Constitution and the Act receives the assent of the President as provided in the Constitution,

> the amendment becomes an integral part of the Constitution. It is a well settled rule of interpretation that all provisions in the Constitution have equal status unless the Constitution itself provides that some of its provisions will have precedence or primacy over the other. Therefore, an amended or a new provision inserted in the Constitution as a result of the, process of amendment prescribed in the Constitution, is not a "law" within the contemplation of Article 8 of the Constitution and as such. the validity of the amended or newly-introduced provision in the Constitution cannot be tested on the touchstone of Fundamental Rights contained in Part II, Chapter 1-of the Constitution. It is a well settled law that the validity of a Constitutional provision cannot be tested on the basis of another provision in the Constitution both being equal in status. The doctrine of ultra vires necessarily implies that one of the two competing provisions or legislations is inferior in status to the other and the validity of the inferior provision or legislation is tested on the touchstone of the superior one. There is nothing in the language of Article 8 to indicate that the Framers of Constitution gave primacy to Article 8 of the Constitution over any other provision of the Constitution." (**Emphasis has been added**)

69. Thus the powers conferred on this Court under Article 184 (3) of the Constitution cannot be exercised to strike down any amendment in the Constitution even if it violates any of the fundamental rights. Such power has not been conferred on the Courts by any other provision of the Constitution. Rather, clause (5) of Article 239 in no ambiguous terms ousts

the jurisdiction of all Courts to call into question any amendment. It reads:

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

Clause (6) again in different language declares that there are no limitations on the powers of the parliament to amend any provision of the Constitution. Clause (5) and (6) were introduced into the Constitution through Presidential Order No. 20 of 1985. Challenge to the Eighth Amendment as a whole has been rejected in the case of Achakzai. It is the Constitutional duty of a judge undertaken by him in his Oath of Office to "preserve, protect and defend the Constitution of the Islamic Republic of Pakistan". This would obviously include amendments in the Constitution. No judge, bound by his Oath, can arrogate to himself jurisdiction which has not been granted or conferred by the Constitution. It is an accepted principle of construction of statutory and Constitutional law that in case the language is clear, no outside or extrinsic aid can be brought to determine their meaning. Reference in this context may be made to the case of **Federation of Pakistan** v. **Durrani Ceramics** (2014 SCMR 1630) and the review order in the same case reported as **Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources** v. **Durrani Ceramics** (PLD 2015 SC 354), wherein extrinsic aid was not allowed to be used in interpretation of the Constitution as the language of the provisions in question were clear and unambiguous. The language of clause (5) and (6) of Article 238 is clear and engenders no ambiguity in meaning or interpretation. Courts

cannot exercise jurisdiction not vested in it by the Constitution so as to place any limitation upon the powers of the Parliament to amend the Constitution. As jurisdiction of the Court has been clearly ousted from reviewing any amendments made by the Parliament to the Constitution, Courts cannot assume such jurisdiction upon itself by relying on any academic theories, doctrines or any other means of construing meaning of the Constitution.

70. An argument was raised at the bar that the Pakistan Army (Amendment) Act, 2015 did not enjoy constitutional protection as it was assented to by the President later in time than the 21st Constitutional Amendment. Reliance in this context was placed upon the numbers given to the two amendment bills as the Army Amendment Act was assigned Act II of 2015 and the Constitution Amendment Act was given Act I of 2015; it was argued that Act II did not exist at the time when the Army Act was sought to be protected by placing it in the First Schedule of the Constitution. Reference was made to clause (3) of Article 75 which provides the machinery whereby a bill introduced under Article 70 and Money Bill under Article 73 becomes law or an Act of Parliament. The same reads:

> "75 (3) When the president has assented or is deemed to have assented to a Bill, it shall become law and be called an Act of Majlis-e-Shoora (Parliament)."

It was argued that both the bills became laws the moment they received assent of the President; that the assent was given in accordance with the sequence of the numbers assigned to the

Acts. Act I became law before the President gave his assent to Act II.

71. Taking up the argument regarding the sequence of assent given by the President to the Constitution Amendment (Act I of 2015) and to the amendment in the Army Act, 1952 (Act II of 2015), it is to be noted that after a bill has become law or an Act, unless the legislature intends otherwise, under Section 5 (3) of The General Clauses Act, 1897 the Act shall come into force from the start of the day when Presidential Assent was given to it. In **Mst. Ummatullah** v. **Province of Sindh** (PLD 2010 Kar. 236), general rules regarding the moment when a particular Act comes into force has been laid down in the following words:

> "16. Examining the first contention as to prospectivity or otherwise of the impugned amended regulations, general rule is that where any statute that does not set out a date on which it is to come into force than date of enforcement is the day it receives the assent from the assenting authority (i.e. President in case of Central enactment, and Governor incase of Provincial enactments)…"

The rule has been more clearly discussed in **Khalid M. Ishaque** v. **Chief Justice and The Judges of the High Court of West Pakistan, Lahore** (PLD 1966 SC 628) in the following words:

> "Thus, if the commencement be declared to take effect on a particular day, say the 6th January 1964 the Act would be deemed to come into force immediately after the stroke of midnight of the 5th January 1964. Equally, if the Act were expressed to come into effect on the granting of assent

> thereto, then if that assent was given on the 6th January 1964, the operation of the order would still commence from midnight on the 5th January 1964."

On the other hand it is a well settled position of law that the provisions of General Clauses Act cannot be applied to construe provisions of the Constitution. In **Government of Punjab** v. **Ziaullah Khan** (1992 SCMR 692), Justice Ajmal Mian, as he then was, writing for a five member Bench, noted that:

> "10. Mr. Irfan Qadir has not been able to press into service the above section 6-A in the case in hand, as it is well-settled proposition of law that General Clauses Act cannot be used in aid while construing a Constitutional provision in the absence of making the same applicable through a Constitutional provision, as it was provided in Article 219 of the late Constitution of Islamic Republic of Pakistan, 1956, which provides as under:
>
> > "219 (1). Unless the context otherwise requires the General Clauses Act, 1897, shall apply for the interpretation of the Constitution as it applied for the interpretation of a Central Act, as if the Constitution were a Central Act.
> >
> > (2) For the application of the General Clauses Act, 1897, to the interpretation of the Constitution, the Acts repealed by the Constitution shall be deemed to be Central Acts."
>
> 11. It may be mentioned that since there is no corresponding provision in the Constitution, the General Clauses Act cannot be pressed into service in the instant case, as has been rightly conceded by Mr. Irfan Qadir..." (**Emphasis has been added**)

The principle was followed in **Muhammad Arif** v. **The State** (1993 SCMR 1589) in paragraph 16 whereof it was held that "the General Clauses Act is not applicable to the Constitution..." Since general rules regarding coming into force or enforcement of a law or Act (as contained in the General Clauses Act, 1897) do not apply to Constitutional Amendment, the latter becomes part of the Constitution and comes into force the moment Presidential assent is given to it, unless a different intention has been clearly expressed by the Parliament. Reference in this context can be made to Saeed-uz-Zaman Siddiqui in Wukla Muhaz, wherein he noted that:

> "Therefore, a Bill passed by the Parliament in exercise of its power under Articles 238 and 239 of the Constitution amending the Constitution though described as an "Act" would not be subject to the same limitations as are applicable to an "Act" passed by the Parliament in exercise of its ordinary legislative power. As soon as an Act amending the Constitution is passed in accordance with the provisions of Article 239 of the Constitution and the Act receives the assent of the President as provided in the Constitution, the amendment becomes an integral part of the Constitution."

Thus, the moment the Bill amending the Constitution receives the assent of the President as provided under the Constitution, the amendment becomes an integral part of the Constitution. Applying these principles to the two Acts in question, it becomes clear that under Section 5 of the General Clauses Act, the amendment in Pakistan Army Act introduced through Act No. II would be deemed to have come into effect from 0:00 hours

of the day when assent was given to it by the President i.e. 7.01.2015. Since, General Clauses Act does not apply to the construction of the Constitution Act No. I being a constitutional amendment came into effect, the moment Presidential assent was given to it later in day on 7.01.2015. Therefore, the amendment in the Pakistan Army Act, 1952 would be deemed to have come into effect before constitutional amendment became part of the Constitution.

72. It should also be noted that after their introduction into National Assembly the constitutional amendment bill was numbered as Act No. I of 2015 while the bill seeking amendment in the Pakistan Army Act, 1952 was numbered as Act No. II of 2015. Both the Acts were passed by the National Assembly after their reading and voting on them had taken place simultaneously. The two bills were then transmitted to the Senate where they were passed in the same sitting. Learned Attorney General by referring to the record of the proceeding in Senate submitted that Act No. II (amendment in Pakistan Army Act) was passed by the Parliament at 5:00 pm while Act No. I (constitutional amendment) was passed at 5:40 pm. Since the bill seeking amendment in the Army Act was passed prior in time to the bill for constitutional amendment in the Senate, it can be assumed that they were placed for assent before the President in the same order. Even otherwise the parliamentarians were conscious that they were according Constitutional protection to the amendments that were being made in the Army Act. The President had signed both the bills when they were presented to him in the same sitting on 7.01.2015. There is no way to determine as to which bill was

signed by him first. In any case, it does not conclusively follow from the sequence of the assignment of numbers to the bills that the President gave his assent to the bills in the same sequence. It follows that the Constitution Amendment (Act No. I of 2015) came was made after the amendment in the Army Act (Act No. II of 2015) had come into force. This argument thus fails.

73. To conclude, as held above, there are no limitations, express or implied on the powers of the Parliament to amend the Constitution and the amendments brought about in exercise of such power are not liable to be challenged on any ground whatsoever before any Court. As this Court lacks jurisdiction to strike down any amendment in the Constitution it is not necessary to examine the grounds on which the 18th and the 21st Amendments have been challenged. However, the decision to select and refer the case of any accused for trial under the Pakistan Army Act, 1952, as amended, and any order passed or decision taken or sentence awarded in such trial shall be subject to judicial review on the grounds of corum non judice, being without jurisdiction or suffering from mala fide. With this observation all the petitions are dismissed.

Sd/-
Chief Justice

Sd/-
Iqbal Hameedur Rahman

Jawwad S. Khawaja, J. These thirty nine Constitution Petitions filed under Article 184(3) of the Constitution have confronted the Court with some of the most fundamental questions of constitutional law that can possibly arise in

any jurisdiction. Some of these petitions, those which pertain to the eighteenth Constitutional Amendment, have been pending in our docket for over five years. But with the enactment of the twenty-first Constitutional Amendment and the number of petitions challenging it, this Court is called upon to address frontally, the questions arising in these cases, in accordance with the law and the Constitution.

2. Twenty four of these petitions relate to and challenge certain parts of the eighteenth Constitutional Amendment which made changes to more than 97 Articles of the Constitution and was passed on 19.4.2010. The remaining fifteen petitions challenge the twenty-first Constitutional Amendment, an amendment made on 7.1.2015 which purports to provide constitutional backing for the trial of certain categories of civilians by military tribunals. The Petitioners before us comprise a range of persons, natural and juristic, from various fields of life. The principal respondent in all petitions is the Federation.

3. Since the Petitioners have sought to impugn the *vires* of two constitutional amendments, the Federation raised a threshold question *viz.* are such amendments even susceptible to judicial review? It will facilitate understanding of the controversy in these petitions and will enable us to focus on the points in contention if the threshold controversy is addressed first. This controversy may be divided into two preliminary questions which may conveniently be framed as under:-

i) Is Parliament 'sovereign' in the sense that there are no limitations on Parliament's power to amend the Constitution?

ii) If there are any limitations, are these political and not subject to judicial determination? or put differently, does this Court have the power to judicially review a Constitutional amendment passed by Parliament and strike it down?

4. For reasons stated in this opinion, I am of the view that Parliament is not sovereign as its power to amend the Constitution is constrained by

limitations which are clear from the reading of the Constitution as a whole. Secondly, these limitations are not only political but are subject to judicial review and, as a consequence, this Court has the power to strike down a Constitutional amendment which transgresses these limits.

5. Part I of this opinion, elaborates my reasons for thus deciding these fundamental threshold questions as to the jurisdiction of this Court to hear these petitions. Parts II and III, embark on the consideration as to whether or not the eighteenth or the twenty-first Amendments or any parts thereof are liable to be struck down as transgressions of the Constitutional mandate granted to Parliament by the Constitution.

PART - I

Limitations on Parliament and the Susceptibility of Constitutional Amendments to Judicial Review

6. The Federation contends that the powers of Parliament are unlimited and any constitutional amendments passed by it in accordance with Article 239 of the constitution are completely immune from judicial review. Its case appears to rely upon four primary arguments: firstly, a decontexualized reading of Part XI of the Constitution providing for Parliament's power to make amendments to the Constitution; secondly, a dogmatic invocation of a concept, in my view alien, represented by A.V. Dicey's notion of parliamentary sovereignty; thirdly, reliance upon the case of *Dewan Textile Mills Ltd. vs. Pakistan* (PLD 1976 Karachi 1368); and fourthly, an unlimited faith in the capacity of the political process for self-correction which supposedly obviates the need for judicial review. The Petitioners, on the other hand, rely primarily upon the 'basic structure theory' as laid down in the precedents of the Indian Supreme Court.

7. The first section of this Part begins with describing the Federation's case and why it is not constitutionally tenable. The next section undertakes an examination of the 'basic structure theory' which the petitioners have

relied upon and explains why such reliance is unnecessary and inapt in Pakistan's unique constitutional context. The third section of this Part highlights how the uniquely worded Preamble of the Constitution provides us with a much more robust and textually grounded touchstone for defining the limits of the powers of Parliament and for carrying out judicial review of constitutional amendments.

The limited usefulness of foreign theories and theories of political philosophy:

8. I have, in this opinion adverted to the dangers of relying on theories of political philosophy and theories which have developed mostly in foreign countries, from the history, social and political context of foreign nations. I have also considered the theory which developed in certain western countries and was, in my humble view, mindlessly relied upon by the Sindh High Court in *Dewan Textile supra.* Thirdly, I have considered the 'basic structure theory' as developed in the jurisprudence of India, by the Indian Supreme Court.

9. This is not to say that theories of political philosophy donot serve any useful purpose. For instance, the social contract theory can be dated back to the times of Socrates (470 BC - 399 BC) but was seriously propounded by Thomas Hobbes, John Locke and Jean Jacques Rousseau in the seventeenth and eighteenth Centuries. Although this was a philosophical theory thought up by the aforesaid philosophers, it was enormously influential in shaping the destinies of republican, post colonial constitution making, which is reflected, though somewhat inadequately, in the preambles of certain colonised nations after they attained freedom. The social contract theory, while it was confined to the realm of philosophy and political science, necessarily remained indeterminate in many ways as a constitutional principle without defined contours, as would be apparent from the US and Indian preambles, considered below. It is in Pakistan, however, that the social

contract theory was reduced into a well defined document, the Preamble to our Constitution as considered below in the light of debates in 1949 on the Objectives Resolution and the significant changes (discussed below) made therein while adopting the Preamble as it exits since 1973. This is evident from the comparison of the Pakistani, Indian and US preambles made in a later part of this opinion.

The Federation's Case:

A Decontextualized Reading of Part XI of the Constitution:

10. The argument advanced by the Federation is that on account of the clear language of Article 239 clauses (5) & (6) of the Constitution, the text of which purports to oust the jurisdiction of the Court, these petitions should be dismissed being not maintainable. To facilitate our understanding of the plea advanced by learned counsel representing the Federation, we reproduce below, the relevant extracts from Part XI of the Constitution:

> "*238. Subject to this Part, the Constitution may be amended by Act of [Majlis-e-Shoora (Parliament)].*
> *239 ……*
> *(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*."

11. The Federation contends that a plain reading of clauses (5) and (6) *ibid* should alone be resorted to while deciding these petitions. It argues that since clause (6) *ibid* stipulates that "*there is no limitation whatever on the power of Parliament to amend any of the provisions of the Constitution*", it follows that Parliament has been invested with the absolute and un-fettered authority to vary any provision of the Constitution in any manner of its choosing. Implicit in this argument is the proposition that it is open to Parliament even to abrogate the Constitution, to bring into place a different Constitution and in

doing so, to disregard the nine commands and directives stated in the Preamble to the Constitution (reproduced below), expressly issuing from the people and stating their will. The Federation's reading of Part XI of the Constitution is not tenable because of three reasons which now follow.

The Rule of Organic Construction:

12. First, the Federation's reading of clauses (5) and (6) of Article 239 overlooks the established rule of interpretation that a provision of the Constitution cannot be interpreted in isolation. It is true that according to these clauses,"*[n]o amendment of the Constitution shall be called in question*" and "*there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend*." But that is by no means the end of the matter. These clauses have to be reconciled with the rest of the Constitutional provisions which provide for, amongst other things, guarantees of due process, fundamental rights, observance of the principles of democracy, safeguarding the legitimate interests of the minorities and independence of the Judiciary which have been expressed by the People with a degree of clarity.

13 In our jurisprudence, it is by now well settled that the Constitution has to be read organically and holistically. Individual Articles or clauses of the Constitution, if read in isolation from the rest of the Constitution, may mislead the reader. This is so because the meaning of the Constitution is to be gathered from the Constitution as an integrated whole not, it may be said, as a mechanical deduction, but based on reason. It is the ancient but simple wisdom of sage wise men which has been distilled through the logic and deductive reasoning of precedent, leading to the rule of interpretation requiring the Constitution to be read as an 'organic whole'.

14. The rationale for the rule is universal logic and transcends the divide between the various prevalent systems of law. Thus we have common law constitutionalists such as Laurence Tribe and Michael Dorf warning us against "*approaching the Constitution in ways that ignore the salient fact that its*

parts are linked into a whole - that it is a Constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories that must be interpreted." It is this very logic which informs the comment of a Civil Law scholar like Dr. Conrad who reminds lawyers "*that there is nothing like safe explicit words isolated from a general background of understanding and language. This is particularly so in the interpretation of organic instruments like a Constitution where every provision has to be related to the systemic plan, because every grant and every power conferred is but a contribution to the functioning of an integrated machinery… it will not do to discuss such concepts as [mere] 'political theory' irrelevant to textual construction"* (quoted in *Munir Bhatti vs. the Federation* (PLD 2011 SC 407).

15. The same undeniable logic comes from the wisdom of such savants as *Maulana* Jalaluddin Rumi in his parable of the elephant in the dark of night or the Greek ancient Hippocrates. The wisdom and logic of this should be self evident, but I can advert briefly to the case of *Munir Hussain Bhatti supra*, wherein was recounted the story of five men and an elephant on a dark night who, groping and touching different parts of an elephant's anatomy, construct an image of the animal which is disjointed and wholly inaccurate. One, touching its ear thinks it is like a fan, the other likens it to a pipe by feeling its trunk and so forth, depending on the part each has touched. That"*[t]he inability of each man to look at the elephant holistically is obvious. As the Maulana says, these men in the dark did not have a lamp to show them that the elephant was one composite organism, whose constituent components were to be seen together if the whole was to be understood, without errors of perception. The Greek ancient, Hippocrates (quoted by Eduardo Galeano in his book 'Mirrors') in the same vein, said that "the nature of the parts of the body cannot be understood without grasping the nature of the organism as a whole". It is, therefore, crucial for us, consistent with reason, to look at the Constitution as a whole if we are to make sense of [its provisions] 'organically'. Looking at the Constitution any other way would lead the reader astray".*

16. This indeed is the irrefutable logic which impels me to the view that Article 239 of the Constitution has to be read as being one small cog in the Constitutional machinery and has little significance as a stand-alone provision. Based on precedent we have observed in the case of Munir Hussain Bhatti *supra* that *"… the Constitution has to be read holistically as an organic document."*

The Dubious Provenance of clauses (5) and (6) of Article 239:

17. Secondly, it is significant to recall the oft ignored fact that clauses (5) and (6) as reproduced above were not part of the Constitution as originally framed. These provisions were inserted in the Constitution by General Zia-ul-Haq in 1985 through a process which does not inspire the same kind of legitimacy as the process which culminated in the framing of the original Constitution. The dubious provenance of these clauses makes it doubly difficult for the Court to rely upon them for overriding the letter and spirit of the entire Constitution. This is a position with regard to clauses (5) and (6) which has already been adopted in various precedents. It has been held in the case titled Mahmood Khan Achakzai vs. Fderation of Pakistan (PLD 1997 SC 426) that *"[i]n the Constitution of 1973 in its original form Article 238 provides for amendment of the Constitution and Article 239 lays down the procedure for such amendment and is composed of seven clauses … [of the] amendments in Article 239, the major amendment is in clause (6) which is substituted by fresh provision providing that for removal of doubts, it is hereby declared that there is no limitation whatever on the power of Majlis-e-Shoora (Parliament) to amend any provision of the Constitution. [F]or the time being it would suffice to say that freedom bestowed upon the Parliament in clause (6) of Article 239 after amendment does not include power to amend those provisions of the Constitution by which would be altered salient features of the Constitution … Article 239 cannot be interpreted so liberally [as] to say that it is [an] open-ended provision without any limits under which any amendment under the sun of whatever nature can be made to provide for any other*

system of governance, for example, monarchy or secular, which is not contemplated by the Objectives Resolution".

The Meaning of "Amendment":

18. What the Federation also seems to have overlooked in its reading of clause (5) as worded is that it only purports to oust the jurisdiction of the Court to judicially review a Constitutional "amendment"; likewise, what clause (6) signifies is the Parliament's seemingly open-ended power to "amend" any of the provisions of the Constitution. Both provisions still donot oust the jurisdiction of the Court to determine with precision what it is that falls within the ambit of the terms 'amend' and 'amendment' and what doesn't. Although there are multiple meanings given for these terms in various dictionaries such as Webster's and the Oxford English Dictionary, one thread which prominently runs through the meanings is that it connotes correction of an error or omission; to make better or change for the better. One useful extract from the case titled *Raghunathrao Ganpatrao vs. Union of India* (AIR 1993 SC 1267) can be cited for its logical exposition of this point. While considering these words it was noted by the Indian Court that the words had a Latin origin "*emendere*" which means "to correct". In relying on the treatise on 'Constitutions', 'Constitutionalism' and 'Democracy', it was observed that "*an amendment corrects errors of commissions or omissions and it modifies the system without fundamentally changing its nature i.e. an amendment operates within the theoretical parameters of the existing Constitution*." Another reason why such reading of clauses (5) and (6) commends itself is that these clauses were thrust into the Constitution by a dictator (as discussed below) and were not consistent with the original Constitution.

19. It is also helpful to note that the wording of clauses (5) and (6) of Article 239 of the Constitution appears to have been borrowed from Article 368 of the Indian Constitution but with some very significant omissions. Article 368 *ibid* provides for an expansively worded power of Parliament,

inter alia, to vary the Indian Constitution. It has been stated therein that *"Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of [the Indian] Constitution in accordance with the procedure laid down in this Article".* This wording was introduced in the Indian Constitution in 1971 and was within the contemplation of the National Assembly in 1972-73 when our Constitution was being debated. It was in this context that questions arose in the Assembly and were considered in relation to the amending power to be granted to Parliament in Pakistan. The significance of this divergence is elaborated later in this opinion.

20. Another useful purpose is served in comparing the amending provisions in Article 239 of our Constitution with clauses (4) and (5) of Article 368 introduced into the Indian Constitution in 1976. These latter clauses precede the introduction of clauses (5) and (6) *ibid* in our Constitution by nine years. Due to the very close similarity of the aforesaid clauses (5) and (6) with clauses (4) ad (5) of Article 368 of the Indian Constitution, it is apparent that the amendments introduced into Article 239 of our Constitution in 1985 were borrowed directly from the wording of clauses (4) and (5) of the Indian Constitution. The fact remains that our Constitution did not contain clauses (5) and (6) in Article 239. It was though undemocratic and dictatorial intervention that on the 17th of March 1985 President's Order 20 of 1985, misleadingly called the Constitution (Second Amendment) Order 1985, was issued. I say misleadingly because there was no pretence at adhering to prescribed Constitutional norms and procedures for amending the constitution. The said Presidential Order 20 of 1985 was subsequently given cover by the Constitution (Eighth Amendment) Act 1985. It is not necessary in this opinion to consider the validity of Presidential Order 20 of 1985 because the same is not before us. However the historical backdrop of clauses (5) and (6) and their undemocratic genesis can help us in interpreting Article 239 and the words 'amend' and 'amendment' used therein. One very significant difference, however, remains between our Constitution and the

Indian Constitution in respect of the amending powers of Parliament. This difference is that the Indian Constitution confers a constituent amending power on the Indian Parliament. Such power has not been conferred on our Parliament even through the amendment brought about through the Presidential Order 20 of 1985 by the originator and draftsman of the said Order. Secondly, while the Indian Constitution as amended provides for a seemingly unlimited power of amendment, this is not the case in Pakistan. To elaborate, clause (5) of Article 368 of the Indian Constitution stipulates that "*there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of [the Indian] Constitution*". Our Constitution in stark contrast does not use the word "constituent" or the words "by way of addition, variation or repeal". The reason for this difference may not be hard to find. The dictatorial proclivities of Gen. Zia ul Haq are a part of our historical record which cannot be ignored. In fact his name was vaingloriously mentioned in Article 270A of the constitution until it was removed therefrom in the year 2010, through the eighteenth Amendment. Many changes (such as the notorious power under Article 58(2)(b) empowering the President to dissolve the National Assembly) were made by him in the Constitution through the (Second Amendment) Order, 1985 which had the effect of distorting the Constitution in material ways. It appears there was an apprehension on the part of General Zia that granting the constituent amending power to Parliament after its revival, would have enabled it to exercise unlimited constituent amending powers and thus to roll-back the amendments so made by the General. In this backdrop it was to provide a backstop to such possible roll-back that only a limited power of amendment rather than a constituent power to amend was introduced into the Constitution. The wording of Article 239(5) and (6) thus highlights the limitations which inhere in Parliament's power to amend as opposed to an unlimited constituent power including the power to repeal vested in the Indian Parliament.

What is the Dogma of Parliamentary Supremacy or Sovereignty?

21. Besides a decontextualized reading of Part XI of the Constitution, the case of the Federation - that it is within the power of Parliament to bring about any change in the content of the Constitution and such change may not be judicially reviewed, appears to be based upon a constitutional theory (considered below) propounded by the constitutional scholar A.V. Dicey in relation to the British Parliament. In my view, this theory cannot be relied upon to answer the seminal questions faced by the Court today. A clear-headed examination of Dicey's theory makes it evident that its was formulated in the historically and sociologically peculiar context of nineteenth century Britain. Even in the British context, this theory is losing its significance over the last century. It is wholly unwarranted to import this theory into the constitutional context of Pakistan, where the theory has never before held sway and where it has in fact been repudiated through a people's struggle translated into the Constitution. It is to this discussion that we can now turn.

What is Parliamentary Sovereignty:

22. The notion of Parliamentary sovereignty or supremacy is a principle of constitutional law in Britain which, on account of our colonial history, has had a lasting impact on our thinking even after independence, and has at times, dulled the significance of our own post independence aspirations. It was towards the later part of the 19th Century in Britain when A.V. Dicey who, in the words of Lord Steyn was Britain's "*greatest constitutional lawyer*," propounded his concept of Parliamentary sovereignty. According to him, Parliament had "*under the English Constitution, the right to make or un-make any law whatever*" and further, "*that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament*". To leave no doubt as to the unchallengable and unlimited authority of Parliament, Dicey went on to state that "*any act of Parliament, or any part of an*

act of Parliament, which makes a new law or repeals or modifies an existing law, will be obeyed by the Courts". This notion has historically been accepted by the Courts in Britain as the defining feature of British constitutional jurisprudence. It is this concept of Parliamentary sovereignty which can justifiably be seen as providing for an obedient judiciary, subservient to a supreme Parliament and without the power of judicial review over legislative acts. In our jurisprudence it is beyond question that Courts in Pakistan do have the power and, in the past, have struck down legislation made by Parliament, though to date, a constitutional amendment has not been struck down.

Critiques of Parliamentary Sovereignty within Britain:

23. Even within Britain, this expansive concept has lately been seen by some scholars and judges as an anachronistic fiction, particularly in the wake of the UK Human Rights Act 1998 and the strident, ever-increasing role of European Community laws and policies in Britain. When such overriding laws and policies are adopted in Britain, there is inevitably an erosion of the sovereignty of the British Parliament as a Constitutional principle. Again, Lord Steyn (writing in the House of Lords) can be quoted from the relatively recent opinion in the case titled *Jackson v. Attorney General* ([2005] UKHL 56). According to him, "*the European Convention on Human Rights as incorporated into [UK] law by the Human Rights Act, 1998, created a new legal order…The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom*." The point to be noted is that the Federation's case relies upon a view of parliamentary sovereignty which is losing currency even inside Britain where it originated and where it still has constitutional relevance.

Why the Doctrine of Parliamentary Sovereignty does not apply in Pakistan:

24. In Pakistan there is no room for the antiquated views expressed by Dicey in the 19th Century. This is on account of at least two reasons: firstly,

this is due to the long-standing difference between our differing constitutional contexts and even more significantly the fact that parliamentary sovereignty did not match with the aspirations of our people who have, through their struggle, replaced it with the notion of the supremacy of the "*will of the People*" as crystallized in our written Constitution. We have observed in the case of *Muhammad Azhar Siddique vs. Federation of Pakistan* (PLD 2012 SC 774) that "*… there is no justification in our dispensation, for muddying the crystal and undefiled waters of our constitutional stream with alien and antiquated, 19th Century Diceyan concepts of Parliamentary supremacy. These concepts have lost currency even in their own native lands.* In the afore cited case, we have held that "*it is about time, sixty-five years after independence, that we unchain ourselves from the shackles of obsequious intellectual servility to colonial paradigms and start adhering to our own peoples' Constitution as the basis of decision making on constitutional issues*".

The difference between Britain's constitutional context and Pakistan's:

25. It is important to recall that Dicey formulated his theory in the constitutional context of the judiciary in Britain. The House of Lords, the apex Court in Britain has historically been an integral part of Parliament and remained so until very recently when in 2009 a Supreme Court was finally created separate from Parliament. Prior to that, the upper house of the British Parliament, apart from being a component of the legislature was also, as a singularly unique feature of the British Constitution, the last Court of appeal in the realm. The legislature, therefore, under the British Constitution contained within its fold the Judiciary and the Executive also. This happened over a period of eight centuries starting with the signing of the document called Magna Carta in 1215. It is on account of statute and constitutional evolution that non-hereditary Lords of Appeal in Ordinary ("Law Lords") were created as part of the upper house of Parliament "*[f]or the purpose of aiding the House of Lords in the hearing and determination of appeals*". This,

however, did not detract from the constitutional principle that it was Parliament which was sovereign and the Law Lords were constitutionally obliged to obey the command of Parliament expressed in legislation. Furthermore a body of persons which is a sub-set of one of the houses of the British Parliament, by its very nature is part of Parliament and not independent of it. One has only to understand this fundamental feature of the British Constitution, to see at once the radical divergence from the British model represented in the notion that in Pakistan "*the independence of the Judiciary*" is to be "*fully secured*."

The Pakistani Context:

26. Even during colonial times, the judiciary in the sub-continent, unlike the apex Court in Britain, remained a separate legal organ of State not a mere subset of the legislature. The courts were, in colonial times created under statutes passed by the British Parliament and were, legally speaking separate from the Indian Legislature or the Indian Executive. In the wake of Pakistan's independence, this principle has been adhered to even more emphatically. The Objectives Resolution of 1949 and every single constitutional document that was subsequently adopted by the framers of our Constitution has given voice to the aspiration of the People that "*the independence of the judiciary shall be fully secured*".

27. Likewise, it is worth recalling that Dicey's theory was formulated in the context of a Britain which did not and, to an extent, still does not, possess a written code encapsulating its Constitution. The British Parliament does not derive its legislative and constituent powers from one Constitutional instrument adopted through an exercise aimed expressly at delineating the powers of the organs of the State. Its power is that of the all-powerful King (pre Magna Carta) which has percolated and diffused so as to be exercised now by the King in Parliament. The British Parliament, in the legal sense, is thus still seen as being above the Constitution and not under it. Again, this

was never the case in Pakistan. At least since the Government of India Act, 1935, constitutional arrangements have remained defined in codified laws from which all institutions of the state, including Parliament (at the time called the "Central Legislative Assembly") derived their powers.

28. Mainly, it is these aspects of the system of Parliamentary sovereignty in Britain which differentiate it from the Constitutional dispensation defining the powers of Parliament in Pakistan. The point that needs to be understood is rather simple: the sovereignty of the Parliament in Britain, as described by Dicey may be a fundamental feature of the British Constitution but it has no room and little relevance in our jurisprudence other than to highlight the contrast between the legal systems prevalent in the two countries. This has especially been the case in the post-Independence era, on account of the long-suppressed aspirations of our people. The history of our constitutional development since 1947 is a story of radical departures from the British constitutional model including the doctrine of Parliamentary Sovereignty. It is this history which must now be examined.

Pakistan's Post-Independence Rejection of Dicean Parliamentary Sovereignty:

29. This story must begin with the days of the pre-independence colonial era. The administration of India at the time was driven in line with the times, by the colonial imperative. The people of India did not have a say in choosing the mode of their own governance. They were, until 1947, the subjects of the 'Emperor of India', the 'India Emperator' (dropped by S.7(2) of the Indian Independence Act, 1947). These imperial legal titles were not merely symbolic but were made manifest in every expression and facet of the government of India. In this constitutional arrangement, the King in Parliament in Britain was at the apex of a pyramid as the source of all laws and power, with the people of India at its base. Thus it was that laws for India were made by a handful of men sitting in Westminister and Whitehall

where, as aptly put by Prof. Ranjit Guha, "*the law did not even remotely issue from the will of the people*." The point here is not to make any political judgment or to comment on what was right or wrong with that system. The purpose is to state objectively the prevailing reality and to identify what was meant to change with the advent of independence. The most fundamental change which, undeniably was intended to occur was the inversion of the power pyramid of the pre-independence era. The governance model i.e. the Constitution of independent Pakistan was to issue from the will of the people of Pakistan as expressly stated in the Preamble itself. The clinical prose of a staid legal opinion cannot come close to describing the anticipation of an order where the people would replace the King in Parliament, as the source of the Constitution. I must, therefore, invoke Faiz *Sahib* who later articulated the hope and belief of the people that the "*promised tomorrow had arrived and those rejected and spurned from the avenues of power, the sanctum sanctorum, were to be enthroned*". That this aspiration has, to date, remained confined to words on paper is not a fault of the Constitution, but of its implementation through governance which recognises the primacy of the People for whose benefit the organs of the State have been created.

Unnecessary servility to the colonial model:

30. It is essential not to lose sight of this bedrock of our Constitutional foundation because it is this foremost premise which, more than everything else must distinguish the colonial era from post-independence Pakistan. It was this central issue which the majority of our Federal Court, in my humble view, overlooked while deciding *Federation of Pakistan vs. Maulvi Tamizuddin* (PLD 1955 FC 240), a case which then set back our polity by holding that despite 1947, Pakistan and its citizens still owed fealty and allegiance to the British monarch. The majority failed to realize the significant paradigm shift - the inversion of the power pyramid of the pre-independence era - which national independence was supposed to bring about. It was only the iconic

Justice A. R. Cornelius, who correctly appreciated the legal significance of the struggle of the people of Pakistan for independence, which had upturned the established constitutional arrangement, bringing the will of the people to the helm of affairs and relegating the King to the position of mere titular head of the new Dominion of Pakistan. The seminal points Cornelius, J. raised in his dissent in the *Tamizzudin* case remain of significance to us, even today as we chart the future course of Pakistan's constitutional law.

31. It was on this fundamental issue that Cornelius, J. differed with the majority. He approvingly noted the reasoning of the Sindh High Court which had held that "*the key to the Indian Independence Act, 1947, is the independence of Pakistan, and the purpose of section 6 of that Act is to efface the supremacy of the British Parliament*." Later in his opinion, Cornelius, J. boldly asserted that the Constituent Assembly of Pakistan was "*not a creation of the British Parliament…*" It was simply "*a body representative of the will of the people of Pakistan in relation to their future mode of Government. The will of the people had, upto that time, been denied expression in this respect, through the presence, by virtue of conquest and cession, of the undisputed and plenary executive power in India of the British Sovereign… that power did not owe its existence to any law…*" Cornelius, J. noted that this state of affairs had changed in 1947. After 1947, "[t]*he autonomy of the country, its independent power to control its own affairs, both internal and external, was embodied in the three great agencies of the State, the Constituent Assembly, the Executive and the Judicature*".

32. By this remark, Cornelius, J. repelled the observation of Justice Akram who concurred with Munir, CJ by concluding that "*[i]t would be a strange supposition to make that the British Parliament, while framing an interim Constitutional Act for Pakistan, acted in a manner contrary to its own principles and traditions…[Therefore,] the assent of the Governor-General is necessary before any constitutional measure framed under section 8(1) of the Indian Independence Act, 1947, can pass into law.*" In effect, then, the majority's entire decision rested on the misleading notion that Pakistan must continue to defer to the principles

and traditions of the British Parliament, even after achieving independence in 1947. For the reasons detailed in this opinion, I find myself unable to agree with the views of Akram, J. And I wholeheartedly subscribe to the views of Cornelius, J. expressed in his dissent which have been vindicated by history and precedent.

***Taking on the reasoning of the* Dewan Textiles *case*:**

33. Both Mr. Khalid Anwar Sr. ASC and the learned Attorney General for the Federation specifically relied on and subscribed to the opinion expressed in the case of *Dewan Textile Mills Ltd. vs. Pakistan* (PLD 1976 Karachi 1368). It is for this reason the postulates in this case must be noted, examined and addressed. In the cited case the Preamble has not only been disregarded, the will of the People has been denigrated as a myth and a fiction. I say with respect, terming the will of the People a 'myth' or a 'useful fiction' flies in the face of every rule of reason and every canon of interpretation. The case of *Dewan Textile Mills Ltd*., (which fortunately is not a precedent for us) and the dangerous implications of its tenor will be examined shortly because the reasoning in the said case appeared to be the mainstay of the Federation's argument before us that Article 239 of the Constitution invested Parliament with unfettered powers, which if exercised, could not be challenged in Court.

34. To start with, after considering the views of a number of philosophers and political theorists, the learned Judge Abdul Kadir Shaikh CJ (writing for a three member Bench of the Sindh High Court) came to the conclusion that "*historical facts show that the proposition that the 'people' establish the Constitutional fabric of the Government under a written Constitution, is just a myth – perhaps a useful fiction – a convenient metaphor*." At another point, swayed by the views of 'some thinkers', it has been remarked that the concept that the "*Constitution proceeds from the people can only be regarded as a rhetorical flourish*". In making these observations, two important circumstances appear to have escaped the attention of the learned Judge. Firstly, that none of the theorists

and political thinkers by whom he was impressed, appear to have had the slightest interest in, or understanding of the Pakistan Constitution or of the historical context in which it was adopted. In fact most, if not all, of these theorists pre-date the Pakistan Constitution; some by centuries. Their thinking was the product of alien circumstances and the theories they expounded, therefore, could only be seen as abstractions or flights of surreal fancy when applied to the Pakistani context. Secondly, the Constitution itself stipulates that the Order established thereunder is created by the will of the People. Such will is also clearly stated in the Third Schedule to the Constitution in express terms, if further textual support for this quintessentially democratic and people centric concept is considered necessary. I cannot, therefore, see how a Judge of a Court created by the Constitution could refer to express words in the Constitution as 'a myth' or 'a convenient metaphor'. Lastly, the important change (considered below) made in the Preamble when compared to the Objectives Resolution, has been completely overlooked by the learned Judge while demeaning the People.

35. We can examine some further observations and findings of the judgment in *Dewan Textile Mills Ltd*. in the light of our own Constitution. While considering the Preamble to the Constitution, it has been remarked that "*there is [a] similar preamble to the Constitution of the USA*". This premise in support of the judgment is inherently flawed. It could not be more removed from the reality made obvious by the vastly dissimilar preambles to the US and Pakistan Constitutions. Likewise, the reference to what Chief Justice John Marshall of the US Supreme Court had to say in the case of *McCulloch v. Maryland* (17 U.S. 316 [1819]) in relation to the preamble to the US Constitution or the process of ratification of that Constitution can hardly have any relevance to the constitutional history of Pakistan or the events of the years preceding the adoption of our Constitution in 1973 which have been briefly adverted to above. What also appears to have been missed out

by the learned Judge while considering the case of *McCulloch v. Maryland supra* is that the people of the United States did ensure their continued ability to exercise their constituent power even subsequent to the adoption of the US Constitution in 1787. This end was achieved by introducing rigidity in the US Constitution. As a consequence, the amending provisions incorporated in Article V of the US Constitution can only be exercised through a constitutionally mandated process actively involving the People. The history of amendments in the US Constitution (proposed or passed), will confirm this as a fact. As a result, only 17 amendments (apart from the Bill of Rights) have been made in over 230 years of US history although over time several thousand have been legally proposed. A similar objective in certain important respects has been achieved with much greater force in Pakistan because of provisions in the Preamble which clearly demonstrate that the amending power delegated as a grant to the chosen representatives is coupled with express directives which circumscribe the extent of the Parliamentary power under Articles 238 and 239 of the Constitution. Thus the amending power exercisable by Parliament as grantee under the said Articles, can only be invoked in obedience to the will of the People and subject to their command as set out in the Constitutional preamble. The debates in the National Assembly in 1972-73, highlighting the nature of the amending power are discussed later.

36. We can now return to the reasoning in *Dewan Textile*, which by adoption forms the basis of the Federation's case in defence of the contentious provisions of the eighteenth and twenty-first Amendments. It may be added that rather than themselves elaborating on or explaining flaws in the reasoning of *Dewan Textile*, learned counsel for the Federation, by whole-scale adoption, make the said case a pillar of their argument. The learned Attorney General, in response to a Court query, also expressly made the *Dewan Textile* case an important basis for refuting the 'basic structure

theory' relied upon by the petitioners. After considering the US Constitution but without noticing the marked differences between the said constitution and the above-noted text of our Constitution, the learned Judge proceeded to examine the 'historical facts' leading to the revolutionary Constitution of France, the Constitution of the Fourth French Republic of 1946, the Weimar Constitution of Germany and the Soviet Constitution. It is on the basis of these five foreign constitutions with their own texts, which were the outcome of their own localized social and political conditions that the derisory remark has been made about the will of the people being a myth etc. It would in my humble opinion, constitute extreme folly to rely on the significantly different language and on the alien "historical facts" which came about in the USA and France in the late eighteenth and mid twentieth Centuries or in Germany and the former Soviet Union in the first half of the twentieth Century, for the purpose of interpreting the provisions of our own Constitution. It would be equally irrational to exclude from consideration those significant events which led to the adoption of our Constitution with the wording and clearly defined contours of our own 'Social Contract' adverted to above. It must be reiterated that any reading of our Constitution must be firmly grounded in our own historical facts and constitutional text and not on the irrelevant historical facts of America or of countries in Europe.

37. After terming the will of the people as legal fiction, the learned Judge nevertheless proceeded to pose for himself the question as to whether "*after the Constitution was framed … the People will retain and can exercise their sovereign constituent power to amend or modify that document by virtue of their legal sovereignty?*" Ignoring for a moment, the inconsistency with other comments of the learned judge noted above, this question, in my humble opinion, is posited on an erroneous premise. The issue is not as to whether the people of Pakistan can amend or modify the Constitution but whether Parliament can do so in such manner as is violative of the directives establishing the will of the People. The learned Judge also then considered

the writings of John Austin, Jameson, Williamson, Willoughby, Carlyle and many others and, based on their views, observed that "*it was in the exercise of the 'constituent power' that the 'people' framed the Constitution and invested the amending body with power to amend the very instrument they created. The instrument so created, by necessary implication, limits the further exercise of the power*". This remark also misses the crucial point that in the petitions decided by *Dewan Textile* as also in the petitions before us the petitioners were/are NOT asserting a right to amend the Constitution. All they seek is to ensure that Parliament (which even according to the learned Judge is a delegate of the people), must remain obedient to and abide by their will which has been expressly set out in the words considered above.

38. It is, in these circumstances that with utmost respect I find the questions framed in the case of *Dewan Textile* to be of little relevance to the real controversy before us *viz*. the power of Parliament to amend the Constitution and the limits on such power. This question was neither posed nor answered in the said case, nor has it been addressed in the arguments advanced before us. Likewise, unnecessary reliance on political theories expounded by the thinkers (none dealing with Pakistan) named above, appears to have led the Court astray. The focus of the judgment was not what the text of our Constitution says about these issues, but rather what 'the Jurists' – a carefully selected list of aliens, to be precise, of like-minded jurists preferred by the learned Judge, have said about the matter. There is no reason why we should fall into the same error by ignoring the wording of the Constitution.

39. I must, at this stage point out most respectfully another flaw in reasoning which has crept into the judgment in *Dewan Textile* and has resulted in the conclusion arrived at by the learned Judge. He has proceeded on the premise that the People have placed the amending power '*in their representatives without reservation*'. This most certainly is not the case. There are in all, nine directives of the People reproduced below. Eight of these

impose obligations on the chosen representatives of the People. The observation of the learned judge, inexplicably, completely ignores the obligation imposed affirmatively on Parliament, *inter alia*, to enforce the principles of democracy or to secure fully the independence of the Judiciary. Inherent in this affirmative obligation is the duty, by necessary intendment, to refrain from doing anything which impairs such independence or undermines such principles or violates any of the other express commands binding the State and its organs. One is led to believe that the basis of the Court's above noted remark is no more than the view of some other jurists expressed either as abstract theory or validated by reference to 'historical facts' which have no nexus with Pakistan. Today when we are called upon to examine the reasoning which drives this judgment, it should be clear that we have no obligation to uphold these views, particularly since no effort was made to found them on the Constitution read as an organic instrument in accordance with principles explained earlier in this opinion. Later in this opinion, I have amply demonstrated the soundness of the view contrary to that of the learned Judge, from the text and context of our own Constitution.

The Doubtful Assurance that the capacity of the Political Process for Self-Correction makes Judicial Review Redundant:

40. A major plank on which the Federation seems to rest its case is the assurance that, left to its own devices, Parliament will never, in the exercise of its amending power or otherwise, encroach on the domain of the judiciary nor will it ever infringe the rights of the people as to enforcement of the principles of democracy and if it attempts to do so the people will check any such transgression. In other words, the Federation wants us to only trust the constraints put on Parliament by the political process which, in the Federation's view, make judicial review of the Parliament's legislative action largely redundant, if not altogether unjustified. This is a view which is not in line with the Constitution read as a whole.

41. It need not be disputed that in a responsible democratic polity, public opinion and free elections will act as checks on Parliament. This, however, does not mean that the Constitution itself does not provide judicially enforceable limits on the powers of Parliament. To identify these limits is to recognise the status of the Judiciary. To deny the existence of such limits and to clothe Parliament with 'sovereignty' and absolute supremacy over other State organs, will amount to creating a supra-Constitutional Parliament capable even of destroying the Constitution which created it. If Parliament is permitted to act thus, it would not, in my view, fall under the ambit of any judicial principle; it would amount to an abdication of our constitutional duty.

42. In a polity where the Courts are created by a written Constitution and not by Parliamentary fiat, it only follows that they owe allegiance to the Constitution and not to Parliament. Therefore, in Pakistan's Constitutional dispensation, the duty of the judiciary is to protect the Constitution as the embodiment of the will of the People. Failing to do so will deny the role for which Courts have been created. This important consideration must be factored into the role of Courts and Judges while interpreting the Constitution. There is no constitutional basis for any extraordinary deference (in the mode of British Courts) being shown to Parliament if in the process, Parliament is to be made free of any checks and constraints which the Constitution imposes on it. I am aware of the principle of interpretation of laws according to which Courts try and harmonise conflicting provisions of a law in an attempt to save it from being struck down through judicial review. Such rule, however, cannot be taken to mean the Court should contrive or invent an interpretation for the purpose of saving a law. This view is consistent with the existence of a written Constitution and was expressed as far back as 1958 in the case of *Abdul Aziz v. the Province of West Pakistan* by Cornelius J.

43. As a Constitutional principle it must also be kept in mind that the powers vested in and exercisable by Courts are not a matter of parliamentary grace or sufferance, but are granted for the purpose noted above *viz.* to protect the people against excesses, *inter alia*, of State organs and functionaries. As such these powers are to be guarded vigilantly against erosion and encroachment because the same are a grant of the Constitution for an important fiduciary purpose. The People who have granted the powers retain primacy in our Constitutional scheme. However, acknowledging the supremacy of the People, is very different from saying that Parliament is unfettered and can encroach on or reduce such powers granted to Courts, under the guise of amending the Constitution. The remarks of Bhagwati, J. of the Indian Supreme Court, sum up most appropriately the role of Judges and Courts in the post colonial dispensation. According to him, "*it is necessary for every Judge to remember constantly … that [the Indian] Constitution … is a document … which casts obligations on every instrumentality including the Judiciary … to transform the status quo ante into a new human order*". Cornelius, J. recognized this change in his lone dissent in the case of *Maulvi* Tamizuddin. The said case placed in historical context (elaborated elsewhere in this opinion) has amply demonstrated that a law made by Parliament does not necessarily represent the will of the People but still it is for Parliament (and not for Courts) to make laws. As constitutional adjudicators, we cannot pretend to be oblivious of the grim realities of our political process as also noted in the discussion below on Article 63A in Part II of this opinion. Given the facts before us in these petitions, we have no cause to accept the Federation's assurance that the political process contains such inherent checks and mechanisms for quick course correction which make judicial review of constitutional amendments redundant.

44. Before parting with this discussion, a quick response may be made to the Federation's assurance that Parliament, when freed of judicial review, will behave only in a benign and rational manner. James Madison, one of the

framers of the American Constitution and an acute political thinker says in the Federalist Papers *"{i}f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."* Judicial review is one of these "*auxiliary precautions*" which acts as a foil to a Parliament which, for all its glory, may be in thrall of a handful of party heads who may not even be part of Parliament. This has been elaborated in Part II of this opinion while examining Article 63A.

The Case of the Petitioners: The Basic Structure Theory:

45. The mainstay of the case of the petitioner's was the 'basic structure' theory, a jurisprudential doctrine that evolved in the Indian jurisdiction. For reasons explained later in this section, I am not inclined to place unnecessary reliance on this doctrine either. However, considering the amount of time which was spent in supporting or opposing the said theory as a basis for decision in these petitions, I consider it necessary to devote some space to the consideration of this Indian theory. Very briefly it can be summarized on the basis of judgments rendered by the Indian Supreme Court. It may be that in some superficial ways, this theory could resemble aspects of our own Constitutional scheme. But on account of the historical overlay carried by the theory and its connotations in our jurisprudence, it is inappropriate to use the term 'Basic Structure' in this opinion when discussing our own Constitution.

What is the Basic Structure Theory:

46. Briefly put, the basic structure theory holds that the power of the Parliament to amend the Constitution does not extend to altering some fundamental features (the basic structure) of the Constitution and if an

Amendment is in conflict with such basic structure, it can and must be struck down. It is interesting to note that initially post-independence judgments in India did not support the basic structure theory. In the case of *Shankri Prasad vs. Union of India* (AIR [38] 1951 SC 458) , the Indian Supreme Court held that Parliament's power to amend the Constitution was not subject to judicial review. This ratio was followed also in the case of *Sajjan Singh vs State of Rajasthan* (AIR 1965 SC 845). However, subsequently the line of reasoning adopted in these judgments was deviated from. This started with the case of *Kesavananda Bharati vs. State of Kerala* (AIR 1973 SC 1461) wherein it was held that certain essential or "basic features" of the Constitution were beyond the amending power vested in Parliament under Article 368 of the Indian Constitution. In a number of subsequent judgments this principle was reiterated and in at least four other instances the Indian Supreme Court invalidated constitutional amendments passed by Parliament, on the basis of this theory.

Critiques of the Basic Structure Theory within India:

47. The basic structure doctrine has been subjected to widespread critique within the Indian context. Critics allege that since the Indian Constitution nowhere specifies what its "basic structure" really consists of, Judges of the Indian Supreme Court have nothing but subjective opinions to rely upon in making this determination. This, in turn, has the effect of transforming the Court into a constituent body capable of over-ruling the elected Parliament of India on the basis of nothing more than the personal subjective opinions of judges.

48 There is indeed a great degree of uncertainty attached to the basic structure doctrine, which is something that the Supreme Court of India is still grappling with. There is some blurring of lines and lack of clarity with respect to the contours of the 'basic structure' in the Indian Constitution; thus what are the 'essential' or 'fundamental' features of the Constitution remains

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

49. The Supreme Court of India has thus over time, in over thirty-nine cases, identified more and more basic features to the constitution; yet till date no exhaustive list of basic features is available for examination in the Indian jurisdiction. Thus at the time when a particular provision is sought to be amended, the people or Parliament in India have no way of knowing beforehand whether that provision would fall within the ambit of the basic structure. As Dr. Dhamija makes clear, *"it is only when the amendment has already been made and the amended provision is challenged before the Supreme Court*

that one can know about that fact and also about the validity of the earlier amendment." In stating this counter intuitive position Dr. Dhamija argues that Article 368 of the Indian Constitution should be read as if the following insertions have been made (when in fact no such clause exists):

> *"(6) Notwithstanding anything in this Constitution (including this article), no basic feature of this Constitution can be amended so as to damage or destroy it.*
> *Explanation: The question whether a particular provision is a basic feature of this Constitution shall be decided in each individual case by the Supreme Court and the decision of the Supreme Court thereupon shall be final"*

50. Though such an Article does not exist in the Indian Constitution, this is the practical effect of adopting the basic structure theory in India. The Supreme Court of India thus has become a "*super constituent*" body rather than an equal organ of the state. This, fortunately for us, is a result which we can safely avoid because of the Preamble to our Constitution as examined below. Therein we find nine expressly stated directives. We are not required to rely on the subjective opinion of Judges. The only question which will remain while deciding a challenge to a Constitutional amendment would be as to whether the amendment is covered by a command spelt out in the Preamble. If an amendment is not covered by such command, it will not be open to the Court to strike it down. So, instead of an elastic and ever expanding list of basic features of the constitution identified by Judges, based on their own proclivities, the only question will be if the amendment under challenge is or is not covered by a directive of the People. This question is very different qualitatively from trying to find out if there is in fact a command at all which exists. This, in my view, is the defining difference between our Constitution and that of India.

Why the Basic Structure Theory is largely Irrelevant in the Constitutional Context of Pakistan:

51. With great respect to learned counsel who appeared for both sides, it should be stated that just like the doctrine of parliamentary sovereignty, the basic structure doctrine which took root in an alien soil under a distinctly different constitution, needs serious critical examination before being pressed into use in aid of Constitutional interpretation in Pakistan. There is need for deep examination of the rationale and specific historical background which underpins foreign doctrines. Any grafting of an alien concept onto our body politic otherwise, is as likely to be rejected as an alien organ transplanted in a human body.

The Preamble in the Context of Constitutional Amendments in Pakistan:

What is the Preamble:

52. In the Pakistani context, judges do not need to make subjective speculations about the basic structure of the Constitution in order to exercise judicial review over constitutional amendments. We possess, in the shape of the Preamble to the Constitution, the surest possible grounds for examining constitutional amendments. The Preamble of the Constitution is a charter comprising nine commands ordained by the people of Pakistan for all instrumentalities of the State, including the Parliament and the Judiciary. The Preamble says that "*it is the will of the people of Pakistan to establish an order*". Here it is of utmost importance to note the debate which took place in the Constituent Assembly and the Constitutional point expressed by Prof. Raj Kumar Chakraverty, examined below. His speech makes it clear that the members of the Assembly were fully aware of the Constitutional question before them. It is a different matter that in 1949, the point of view of Prof. Chakraverty *viz.* that the People be placed above the State was not accepted. What is important is that twenty four years later, while adopting the Preamble, changes were made in the text of the Objectives Resolution which recognized the primacy of the People and as a consequence, the People were

placed above the State and their chosen representatives, as a constitutional principle. The Preamble does, therefore, act as the 'key' to our understanding of the Constitution in terms of defining the legal relationship between the People, the State and the chosen representatives of the People. This has been elaborated below. For the present, for ease of reference, the directives/commands of the People as given in the Preamble are reproduced as under:-

i. *the State shall exercise its powers and authority through the chosen representatives of the people;*
ii. *the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;*
iii. *the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;*
iv. *adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;*
v. *the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;*
vi. *fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association shall be guaranteed, subject to law and public morality;*
vii. *adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;*
viii. *the independence of the judiciary shall be fully secured; and*
ix. *the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded.*

53. It is in view of the well structured and considered wording of the Preamble that it has variously been called the 'grundnorm' or the 'beaconlight' and the 'key' to understanding the Constitution. The significant aspect of the Preamble is that *"it has to be read for the purpose of proper interpretation [of the Constitution] in order to find out as to what scheme of*

governance has been contemplated" for Pakistan. *Mahmood Khan Achakzai vs. Federation of Pakistan* (PLD 1997 SC 426). Such scheme of governance is in fact our own 'Social Contract' spelt out in understandable language and not dependent on theorizing and philosophizing.

54. The language of the Preamble makes it clear that Parliament being a grantee of authority is a fiduciary of the People of Pakistan who are the source of temporal power in this country, and it can exercise only such authority as is delegated to it. Such authority being a grant of the Constitution, by definition, cannot be untrammeled. The Preamble records and reflects the extent of that delegation by giving the commands noted above. The people have given to Parliament the power to make laws for the fulfillment of their nine directives stated in the Preamble. Just like any delegate cannot exceed the terms of his grant, Parliament does not have the power to make any lawful amendments to the Constitution that manifestly defy any of the commands contained in the Preamble. If such amendments are indeed made, it would then be the duty of the judiciary to strike them down so as to ensure that the will of the people embodied in the Constitution prevails over that of one of the instrumentalities of the People *viz* Parliament. The issue as to whether or not an amendment is violative of these commands is a separate matter and will be dealt with in the second part of this opinion dealing with review of the eighteenth and twenty-first Amendments.

55. Although the Preamble has found mention in a number of precedents of this Court, it must be respectfully stated that nowhere has it received the interpretation which its wording calls for. At times a lot of emphasis has been placed on the Objectives Resolution but notice has not been taken of the wording in the Preamble which has redefined the relationship between the People and State of Pakistan. Perhaps one reason for this is that, heretofore, matters such as the meaning of certain terms and concepts in the context of a challenge to a constitutional amendment have ignored the crucial change of

wording adverted to above, and further discussed below. Another reason, I believe, appears to be our unnecessary infatuation with British notions of Parliamentary supremacy. Such notions have served Britain very well, but for Pakistan, it is time we are weaned of the colonial bosom and adhere to our Constitution, by factoring into our context the time, honoured differences of time, place and community, that is *zamaan, makaan and ikwwan.*

The Unique features of our Preamble:

56. To start with, the unique nature of the Preamble to our Constitution may be taken note of. I have examined the Preambles to the Constitutions of various countries of the world. Twelve countries do not display a translation of their preambles in English on their websites. Of the remaining 162 Constitutions only in 10 (not including Pakistan) does the preamble refer to an independent judiciary. It is of relevance that none of these preambles contains wording by way of command, comparable to our Preamble which requires *inter alia,* that the principles of democracy shall be fully observed or that the independence of the Judiciary shall be 'fully secured'. The command is addressed to the instrumentalities and functionaries of the State. This remarkable feature of our Preamble makes it unparalleled in the present day world. Can such uniqueness be disregarded? Surely not. It has, on the contrary, to be given a meaning commensurate with its unparalleled uniqueness. Added to this aspect of the Preamble is the conscious selection of language used therein. How are the words 'principles of democracy', 'independence of the judiciary' and other commands to be read. Guidance must be taken firstly from the express wording of the Preamble itself. The debates, which took place within and outside the National Assembly between December 1972 when the Constitution Bill was introduced in the National Assembly and April 1973 when it was adopted after a number of amendments had been made therein, may also throw light on this.

57. In the cases of *Al-jehad Trust vs. Federation of Pakistan* (PLD 1996 SC 324), *Government of Sindh vs. Sharaf Faridi* (PLD 1994 SC 105) and *Sh. Liaquat Hussain vs. Federation of Pakistan* (PLD 1996 SC 504). The term independence of the Judiciary has been adequately defined. As for the principles of democracy which are to be fully observed, there is no controversy as to the system of elections and governance in place in Pakistan although the term democracy can have various meanings depending upon local context such as the definition of the term in the UK, in the Democratic Peoples Republic of Korea (DPRK) or as used in the cantons of Switzerland. For instance, run off elections or a system of proportional representation as opposed to 'first-past-the-post' (FPTP) could constitute observance of the principles of democracy as considered in Part II of this opinion.

What the Preamble is Not:

58. While discussing the Preamble, it will be useful to examine some generalisations from other Common Law jurisdictions as to the purpose and utility of a preamble as an aid to statutory (as opposed to constitutional) interpretation. This will enable us to examine and expose some misconceptions which, I say with respect, have unthinkingly been imported into our legal corpus from foreign jurisdictions as a result of un-examined assumptions. Thereafter, I will examine our own Preamble and Constitution, which we have already determined, contains exceptional wording.

59. English precedent, and at times the opinions of prominent authors like Crawford, Craies and others are often cited in our jurisdiction as authorities on the rules of statutory interpretation. In determining the role of the preamble, as an aid to interpretation, these commentators have held it to be of limited importance. Thus, in England for instance *if the meaning of the enactments is clear and unequivocal without the preamble, the preamble can have no effect whatever*. (Crawford); furthermore, *[t]he preamble must not influence the*

meaning otherwise ascribable to the enacting part unless there is a compelling reason for it: and a compelling reason is not to be found merely in the fact that the enacting words go further than the preamble has indicated (Crawford).

60. These views, however, are not relevant when determining the role that the Preamble to our Constitution is meant to play in constitutional interpretation. This is so because, as mentioned earlier, our Constitution and the historical origins of its Preamble are materially different from that of the cursory preambles which are merely pointers to the subject matter of British statutes. It is important to note that when the English judges talk of 'preambles', they are talking about preambles of a very different sort. For one, they are concerned exclusively with statutory preambles, not constitutional preambles; as noted earlier, they being obliged to be obedient to Parliament have never had any occasion to consider a constitutional Preamble, as none exists in Britain. The statutory preamble that the English are theorizing about is generally just a "*prefatory statement … explaining or declaring the reasons and motives for, and the objects sought to be accomplished by the enactment of the statute*." (Crawford). This prefatory statement is generally added by draftsmen tasked with putting together the words of the statute itself. The Preamble in a statute follows after the draft Statute has been framed or even if it precedes the framing, it is merely a prefatory statement. The case of a constitutional preamble which emanates from the People and their aspirations for a future order, particularly our unique Preamble with its exalted geneology, is altogether different and applying to it, mindlessly or dogmatically, the rules devised by English Courts for statutory preambles would be to fall, as Prof. Hart notes, into the trap of *alternatives of blind arbitrary choice, or mechanical deduction from rules with predetermined meanings.* Such approach would be wholly unwarranted as it would belittle our Preamble which has been variously referred to as the 'grundnorm', the 'beaconlight', and the 'key' to understanding our Constitution. In my humble view it would be quite inappropriate to use such exquisite adjectives for the

Preamble and then, at the same time to say it is to have no relevance while interpreting provisions of the Constitution such as Articles 175, 175A, 63A and 51 or the changes made therein by the eighteenth and twenty-first Amendments.

61. The preamble to our Constitution, it should be noted, was not framed by mere parliamentary draftsmen after they had completed the text of the constitution, nor does it just 'declare' the reason for the 'enactment' of our Constitution. A detailed look at the historical genesis of our Constitution shows that the chronology here is quite the opposite. The origins of the Preamble to the Constitution can be traced back to the Objectives Resolution passed by Pakistan's first Constituent Assembly in 1949. The debates in the Constituent Assembly at the time show very clearly that the Resolution was to furnish the framework to be followed by the Constituent Assembly in setting out the system of governance for the country. It is the first key constitutional document which emerged after independence and its emergence predates that of the 1973 Constitution by almost a quarter century. It was framed in 1949 by a body comprising personages no less than the founding fathers. It was tabled by Mr. Liaqat Ali Khan and passed by the Constituent Assembly. The Preamble to the 1973 Constitution follows closely the wording of the Objectives Resolution but with some material changes therein, considered earlier and elaborated below.

62. We were taken through the historical parliamentary record of 1949, by learned counsel representing the Supreme Court Bar Association. She has shown that the Objectives Resolution was contentious and was not a consensus document. I do not think this submission has much relevance in these matters before us because I am not required to consider the Objectives Resolutions except for limited though important historical purposes. I am presently concerned only with the Preamble to the 1973 Constitution which after debate on the Draft Constitution Bill and material changes therein, was

adopted unanimously by all including the representatives of the Federating Units. Therefore, any lack of consensus on the Objectives Resolutions can have little bearing on the importance of the Preamble as adopted unanimously and as it remains to date.

63. One historical fact may, however, be noted. Prof. Raj Kumar Chakraverty, a member of the opposition from East Bengal was quite prepared to consider a solution to break the impasse which had emerged in 1949 creating cleavage between members of the Constituent Assembly. A lady member of the Assembly was in agreement with Prof. Chakraverty. The minority members had expressed reservations as to the content of the Objectives Resolution when Prof. Chakraverty in his speech proposed an amendment that for the words 'State of Pakistan through its people' the words 'people of Pakistan' be substituted. His suggestion, however, was not accepted. It is of great significance that when the Objectives Resolution was proposed as a Preamble to the future Constitution and was presented as part of the Draft Constitution Bill in the National Assembly in December, 1972, it was modified along the lines sought by Prof. Chakraverty in 1949 and, I may add, for the same reasons which had motivated Prof. Chakraverty. It was explained by him in 1949 that according to his proposed amendment, it would mean that Allah Almighty had *"delegated His authority to the people of Pakistan". In other words, the people are supreme and the State comes next".* He went on to give his reasoning behind the amendment proposed by him. He said *"First come people and then the State … a State is formed by the people guided by the people and controlled by the people … but as the [un-amended] words stand in the Preamble, it means that once a State comes into existence it becomes all-in-all. It is supreme, quite supreme over the people … that is my objection. A State is the mouthpiece of the people and not its master. The State is responsive to the public opinion and to the public demand. But as the Preamble stands it need not be responsive to the public demand and public opinion. That is the danger and I want to eliminate that danger".* Though Prof. Chakraverty was unsuccessful in 1949,

our Constitution makers in 1972-73 who were fully aware of the divisive debates of 1949, accepted what had been proposed by Prof. Chakraverty as a fundamental Constitutional principle. As a consequence, the People of Pakistan were given due status and recognition and they were specifically mentioned in our Constitutional Preamble as recipients of temporal *"authority to be exercised by [them] as a sacred trust"*. This was a remarkable and fundamental change from the text of the Objectives Resolution where authority had been proposed to be delegated by Allah Almighty to the State of Pakistan and NOT its people. The second fundamental, and in my view crucial, difference was that in 1949 it was the Constituent Assembly which had resolved to frame the Constitution for the State of Pakistan. In 1973 as expressly stated in the Preamble it was the People who were by their will, creating the Constitutional Order as per their commands. These are remarkable features of the Constitution which appear to have escaped the attention of Courts. In the numerous precedents cited before us, it was worth noting that none deals with these crucial and meaningful differences; instead the Objectives Resolution and the Preamble are considered as being interchangeable. In my opinion this clearly is impermissible in view of the above discussion. No theory or philosophy or unexamined assumption can be used for the purpose of disregarding what the Constitution has said. In my humble opinion, the importance of this change was so obvious to Prof. Chakraverty and may well have led to a consensus and thus saved the Objectives Resolution from becoming divisive and from causing misgivings amongst some members of the Constituent Assembly representing the minorities. This crucial change, however, was not commented upon by the learned Attorney General even though he was invited to do so. I may add that the quality of the debate in the Constituent Assembly in 1949 reflects and highlights two relevant aspects of our Constitution; firstly, that the delicate issues of Constitutional law were fully understood and comprehensively

debated by the members of the Constituent Assembly in 1949 and the National Assembly in 1973. Secondly, these debates should leave no doubt at all as to the importance of the Preamble and its relevance for understanding what the Constitution says about the relationship between the People, the State and State organs and also that it is not merely an introduction or preface and nothing more.

64. The Preamble can, in its existing form, be seen as the embodiment of the nation's social contract in outline. The architectural plan and mould which the People of Pakistan gave to their representatives in the National Assembly for the 'order' which they had chosen to construct for themselves, the State and its institutions. The relationship of the People with their instrumentalities is clearly contained in the Preamble. It is the Constitution which was created to match this plan and to fit this mould and not the other way round. The job of the representatives of the People, as fiduciaries, was to adhere loyally to such architectural plan and thereby, to fulfil the fiduciary obligation owed by them to the People of Pakistan. It must not be forgotten that the said plan dictated by the People contained, and still does, the nine commands reproduced above, including the requirement of a judiciary whose independence the State and its instrumentalities are required to fully secure and the principles of democracy which have to be fully observed. It would, in these circumstances, constitute grave error to apply the reasoning of English case law on statutory preambles to our Constitutional Preamble or to apply philosophical theories (examined below) to cases such as these petitions which require resolution in accordance with the Constitutional text and not on the basis of choosing one theory over the other because it matches the ideological leanings of the Judge. As Judges we must leave our personal inclinations behind when we sit in Court as interpreters of the Constitution, and stay close to the Constitution which we are obliged by our Oath to *"preserve, protect and defend"*.

65. There is another reason why case law from the British jurisdiction, relating to the relevance of preambles, is of limited significance for us. I have not come across any preamble forming part of a statute enacted by the British Parliament, which contains any command let alone commands comparable to the ones contained in our Preamble. It is a necessary aspect of the British Constitution, and its fundamental feature of Parliamentary sovereignty, that preambles can at best serve as aids to the construction of statutes and no person or body can give a command to Parliament. This is clear from a study of British statutes; even those which are considered to have great Constitutional significance. For instance, the whole preamble to the Government of India Act 1935, which was to be the 'Constitution' of India, is all of eleven words stating that it is "*[a]n Act to make further provision for the Government of India.*" This preamble is not very different from the preamble to some statutory Preambles of Acts passed in 2015 including the Control of Horses Act 2015 and the Recall of MPs Act 2015. The preamble to the Control of Horses Act 2015 simply states it is '*An Act to make provision for the taking of action in relation to horses which are on land in England without lawful authority, and for connected purposes*'. And, the preamble to the Recall of MPs Act 2015 also simply informs the reader that it is an '*An Act to make provision about the recall of members of the House of Commons; and for connected purposes*' These Preambles, respectively, to the Government of India Act 1935 and the Control of Horses Act 2015 and the Recall of MPs Act 2015 say it all about preambles coming up for consideration before British Courts. In fairness to the learned Attorney General, he did advert to the relatively longer preamble to the Government of India Act 1919; but that preamble is also descriptive of the contents of the said statute and has, in the usual mode, been crafted for no other purpose, and certainly not with the object of describing the scope or limits of the statute or the relationship of the people of India with their colonial masters.

66. It is no wonder, therefore, that Courts in Britain have accorded such an insignificant, and almost irrelevant, status to preambles generally. This generalisation appears at times to have been stated in some judgements cited before us, as a rule of universal application. However, for reasons explained in this opinion, this generalisation cannot be extended to the Preamble to our Constitution. The origins and historical value of the Preamble does not permit relegating it to the status of any ordinary statutory preamble similar to the typical preambles 'merely prefatory' to enactments of the British Parliament. The value of our own Preamble in setting out the relationship between the People of Pakistan and their instrumentalities, has already been discussed above and the Preamble should, therefore, be seen as *sui generis*, bearing no comparison to those statutory preambles which have resulted in the impression reflected in the works of text-book writers such as Craies and Crawford, quoted above. Bearing in mind the extraordinary difference in the status of our Preamble compared to the usual statutory preamble, it is, I say with great respect, not possible to agree with the remark that the Preamble to our Constitution *will serve the same purpose as any other preamble.* *State vs. Zia ur Rehman* (PLD 1973 SC 49). Applying this dictum dogmatically would amount to comparing the proverbial apples and oranges and concluding that there is no difference between the two because both are fruits.

67. The complete absence of any meaningful debate on statutory preambles in the British Parliament over the past two hundred years, will demonstrate irrefutably the insignificance of preambles in the laws made by the British Parliament. This undeniable truth is clearly established from a review of Hansard, the authorised record of transcripts of debates in the British Parliament. By comparison the intense and extensive debate on the Objectives Resolution spread over many days in 1949 in the Constituent Assembly shows the exact opposite. It is this remarkable difference which has been overlooked by the learned judge (a Barrister trained in the English legal

tradition) while making the above quoted remark about our Preamble. It is in this background, with respect to the learned Judge, I donot find it possible to agree with the remark that our Preamble "*will serve the same purpose as any other preamble.*"

Comparison with other Constitutional Preambles:

68. Having established the key differences between the understanding of statutory preambles in England, and our own Constitutional Preamble, it is important to consider for comparative analysis, the role of constitutional preambles in other countries notably those in the U.S Constitution and the Indian Constitution referred to during arguments and in case law. The Preamble to the United States Constitution– all 52 words of it – is quoted below in full for reference*:*

> *"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."*

69. Despite the brevity and indeterminate fluidity of the US preamble, constitutional theorists in the US such as Lawrence Tribe and Michael Dorf are quite clear "*that it is improper to refer to the preamble in constitutional argument on the theory that it is only an introduction, a preface, and no part of the Constitution as enacted*". The Courts in the United States have thus frequently adverted to and placed reliance on their preamble despite its amorphous nature. The two learned authors are equally clear that a rule of construction will have to be invented without "*apparent grounding in the Constitution itself*" to disregard the preamble or to relegate its status to that of a mere introduction, or preface, or to treat it as not being part of the Constitution. The entire nature and scheme of our Constitution require the same approach, having a much stronger footing than that in the US.

70. The Indian Constitution and case law relating to a 'basic structure' theory devised by the Indian Supreme Court were also referred to by learned counsel for both sides. While examining the same the Indian Court is seen to have adverted to the Indian Preamble, so it would be appropriate to also reproduce the same *in extenso*. It says:-

> *"We, the people of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:*
> *Justice, social, economic and political;*
> *Liberty of thought, expression, belief, faith and worship;*
> *Equality of status and of opportunity; and to promote among them all*
> *Fraternity assuring the dignity of the individual and the unity and integrity of the Nation;*
> *IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION"*

71. The Indian Supreme Court has accorded much importance to the preamble to the Indian Constitution. In a series of cases, the most famous of which is the case of *Kesavananda Bharati* and more recently *Ashoka Kumar Thakur*, the Court held that *"when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star … The preamble embodies the hopes and aspirations of the People…" Ashoka Kumar Thakur vs. Union of India* (2008 [6] SCC 1). The wording of the Indian preamble, and its recognition by Courts in India as the 'guiding star', does attempt to provide the source of the Indian Constitution, indicating its basis in social contract. Significantly, however, the Indian preamble does not contain language comparable to or nearly as explicit as that of our Constitution. In particular, it is important to note that the structural elements of our Constitution and the representative – fiduciary relationship does not find expression in the Indian preamble, nor do we find any commands similar to the express directives from the People which are the hallmark of

our Constitution. These are very significant differences between the Indian and Pakistani Constitutions which point to inadequate textual support for the basic structure theory in India and which highlight the opposite in Pakistan. More on this will be said below.

72. There is ample precedent, not just from our jurisdiction, which establishes the unique role the preamble to a Constitution plays in constitutional interpretation. Nevertheless, both U.S and Indian Courts face a real problem while expounding the precise values outlined in their constitutional preambles. This is so because, unlike our Preamble, the US and Indian preambles are nebulous and imprecise in terms of identifying with exactness both, the values of the Constitution and the relationship between the people and their representatives. It is a sense of frustration with this noticeable vagueness of language in the Indian preamble that recently compelled the Indian Supreme Court to declare that *it is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the preamble [to the Indian Constitution] - Ashoka Kumar Thakur*. Faced with a not very helpful preamble, the Indian Supreme Court was forced to rely on the individual inclinations of its Judges to come up with varying definitions of what constituted a basic structure of the Indian Constitution which then was held to be beyond the powers of Parliament to amend. Therefore, while I may admire the lyrical and revolutionary tone of the Indian preamble, borrowed mainly from Revolutionary France, I must sympathize with the Indian Supreme Court judges who have had to expound a whole 'basic structure' theory on the basis of these few uncertain words.

73. We fortunately do not encounter this difficulty in Pakistan because the National Assembly in 1973 had the foresight to recognize the People of Pakistan as the repositories of temporal authority and to limit the State and their instrumentalities by imposing on them the constraints spelt out in the Preamble, whereby the People *inter alia,* instructed their representatives that a Constitutional order was to be established *"by the will of the People wherein*

the State shall exercise its powers and authority through the chosen representatives of the People … the principles of democracy … shall be fully observed … the territories … shall form a Federation wherein units will be autonomous … wherein provisions shall be made to safeguard the legitimate interests of minorities … wherein the independence of the judiciary shall be fully secured". These extracts from the Preamble are being specifically referred to because of their relevance to those provisions in the eighteenth and twenty-first Constitutional amendments which will need to be examined for the purpose of determining if the same are in breach of the fiduciary duty of the representatives to remain bound by the will of the People so expressed.

74. Here it may also be remarked that while there are no commands or even references to the judiciary in the preambles respectively, of the U.S or the Indian Constitutions, our Constitutional preamble employs express words, including well understood legal terms examined above and contains also the specific directives noted above. There are thus, clear commands in our preamble which have the effect of circumscribing the powers of the State organs and functionaries and, in particular, dictating their relationship and responsibility towards the people generally, minorities specially, and the judiciary. It is on account of these commands it must be held that the people, minorities among others, and the Judiciary respectively derive their rights and independence directly from the Constitution and not from Parliament. As noted earlier, these express directives, in unamended form, remain firmly imbedded in the Constitution even today.

75. It is in this background that we can now appreciate the reason why Courts in Pakistan, with some exceptions, have accorded such extra-ordinary importance to the Preamble not merely as an aid to construing the Constitution but also as the 'grundnorm' and 'beaconlight' defining the Constitutional Order ordained by the People of Pakistan. In Asma Jilani's case, Hamood ur Rahman CJ approvingly described it as the "*cornerstone of Pakistan's legal edifice …* and *as the bond which binds the nation* and as *a*

document from which the Constitution of Pakistan must draw its inspiration. Recently in the case of Dr. Mubashar Hassan v. Federation of Pakistan (PLD 2010 SC 265), Ch. Ijaz Ahmed, J. has most accurately summed up the position of the Preamble. He noted that *the Preamble … shows the will of the people … and is the key to understand[ing] the constitutio*n. These are not idle words meant to pay lip service or to sing vacuous paeans to the Preamble without the intention of giving meaning to its exceptional nature and content. If indeed the Preamble is the cornerstone of Pakistan's legal edifice or the key to its understanding then it cannot be reduced to the status of meaningless verbiage which is what necessarily will happen if it is held that Parliament has an absolute, unfettered and limitless power to change the Constitution, regardless of the commands in the Preamble.

76. The arguments on behalf of the Federation imply that the Preamble, far from being the 'cornerstone' or 'key' to the understanding of the Constitution, has no meaning when it comes to defining the scope of Parliament's power to amend the Constitution. It may well be possible for Courts in India or the US to be non-plussed by the nebulous ideals expressed in their Constitutional preambles. As Prof. Tribe says *"[o]ne basic problem is that the text [of the US Preamble] leaves so much room for the imagination … [it] speaks of furthering such concepts as 'Justice' and the 'Blessings of Liberty'."* According to Tribe, however, *"[i]t is not hard, in terms of concepts that fluid and that plastic, to make a linguistically plausible argument in support of more than a few surely incorrect solutions"*. However, we as Judges and Courts created by our own Constitution donot find much difficulty in identifying the commands which limit the Parliamentary power to change the Constitution, nor do we face any problem in noting that members of Parliament are but 'representatives' of the People having limitations and operating under constraints as next considered.

Representatives : What does it signify:

77. The expression "representatives" as used in the Preamble is very well understood in the jurisprudence of Pakistan. However, in order to explain the significance of the word in the context of the present discussion, it will help to start by looking at the dictionary meaning of this word.

i) Black's Law Dictionary (8th Edition) defines a representative as *"one who stands for or acts on behalf of another"*.

ii) The Shorter Oxford English Dictionary (3rd Edition) defines a representative as one *"holding the place of, acting for, a large body of persons (esp. the whole people) in the working of governing or legislating; pertaining to, or based upon, a system by which the people is thus represented"*.

iii) Webster's Unabridged Dictionary (2nd Edition) defines a representative as *"a person duly authorized to act or speak for another or others"*.

78. These and countless other dictionaries, precedents and legal texts from common law jurisdictions the world over, spell out the same meaning. The word "representative", therefore, connotes one thing above all else; that the one who acts in a representative capacity is a person who has no power or authority of his own but derives his power or authority from a different repository and source of authority. In the present context, looking at the wording of the Preamble, the repository and source of authority are obviously the People of Pakistan while the members elected to the National Assembly who were entrusted in 1972-73 with the task of framing the Constitution in conformity with the directives of the People were to be seen as what they were *viz.* representatives of the People of Pakistan for the purpose. The speech of Prof. Chakraverty in 1949 in the Constituent Assembly (reproduced above) spells out the Constitutional principle which was accepted in 1973 by the National Assembly.

The Limits of a Fiduciary's Powers:

79. As has been stated above, the language of the Preamble relevant for our present purpose is well defined in law. The form of the Preamble, is distinct and its uniqueness has been considered above. The important feature that emerges from the constitutional language is that the members of Parliament hold their office in a representative capacity only, with all the limitations which inhere in such representative capacity. For instance a representative who is a grantee of certain powers cannot disobey the grantor or dislodge the grantor. Whatever they do in the capacity of chosen representatives, effects the rights and interests of the people they represent, in matters relating to governance. It is well established in our jurisdiction that wherever a person is placed in a position where he exercises powers on behalf of others, and whereby the interests of such others are represented, the former is said to be acting as a fiduciary for such others. It is not necessary at this stage to mention the vast sea of authority and precedent defining what it means to be a fiduciary acting in a representative capacity, because the basic meaning of the word does not admit of much debate or ambiguity. It will be sufficient to refer to Suo Motu case No. 10 of 2009 where this Court has held that State functionaries "*are fiduciaries, ultimately responsible to their paymasters i.e. the People of Pakistan"* [2010 SCMR 885]. Moreover, the same basic meaning permeates the legal corpus of all common law jurisdictions. Thus a good definition of the word fiduciary is given in a relatively recent English case titled *Bristol and West BS vs. Mothew* [1996 (4) AER 698] where a fiduciary is defined as "*someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty*". In the context which is presently being examined, it should be evident that the representatives of the People of Pakistan are meant to be single mindedly loyal to the People of Pakistan. This loyalty, as discussed below, can only be manifested if, in obedience to the command of the People, these representatives of the People, fully abide by and ensure fulfillment of such

command. This is a necessary and inextricable incident of being a representative of the People of Pakistan. This also highlights the reservations of Prof. Chakraverty, referred to above and accepted by the National Assembly twenty-five years later in 1973.

80. It, therefore, logically follows that as the command of the People for instance, requires an independent Judiciary whose independence is to be fully secured or that the principles of democracy are fully observed or that the legitimate interests of minorities are safeguarded, the representatives of the People comprising Parliament, cannot violate these dictates without breaching the fiduciary obligation owed by them to the People. It is this aspect of the present petitions which defines the limits of the power and authority of Parliament to make laws including acts of Parliament under Article 239 for amending the Constitution. This essential aspect of our Constitution imposes a bar on Parliament and Parliamentarians from acting as free agents unconstrained by their Constitutional status as fiduciaries of the People limited by the terms of their grant.

81. The speech of Mr. Liaqat Ali Khan in the first post independence Constituent Assembly in 1949 sums up the legal and Constitutional position most aptly. He proclaimed that "*the people have been recognized as the recipients of all authority and it is in them that the power to wield it has been vested.*" Mr. Sirish Chandra Chatopadhyaya, another member of the Constituent Assembly echoed the same opinion but with even greater humility when he said that "*the citizens of our country are our masters. We are their servants.*" The same ethos of humility and servility pervades "*[the] timeless and prophetic principle of governance, encapsulated in the well-known saying:* سید القوم خادم هم *(The leader of a people is their servant)*". In the case titled Baz Muhammad Kakar vs. Federation of Pakistan (PLD 2012 SC 923), it was held that "*[o]ur constitution manifests the embodiment of this very principle when it obliges the highest executive functionary to carry out the commandments expressed*

by the people in the form of the constitution and the law. Deviations by fiduciaries from these commandments must remain of the gravest concern to citizens and courts alike." For further historical context and relevance, it may be noted that the President in 1973 was late Mr. Zulfiqar Ali Bhutto, and the committee tasked with proposing the draft Constitution was a star-studded galaxy of legal luminaries (both treasury and opposition) with distinctly people centric orientations and must, therefore, be taken to have been particularly conscious of the nuances and connotations of the language which found its way into the Preamble as finally adopted. The People of Pakistan were no longer to be treated as subjects or as *riyaya*. They were, thenceforth to be the fountain-head of all power in Pakistan replacing the King in Parliament. It was this political creed which was then articulated in the starting lines of the Constitution that it was indeed the People of Pakistan who were the repositories of authority and that the Constitutional Order which was being established by their will had to have the well defined characteristics given in the Preamble as noted above. In the light of the Constitutional hierarchy mentioned above there is no legal principle which can justify disobedience to the Constitution, which embodies the will of the People. This interpretation of the Constitution is not only consistent with the letter of the Constitution, it is in my opinion, the only legally sound way of reading the Constitution to reflect the meaning to be gathered from the words of the historic charter.

82. The 1973 Constitution was adopted with consensus of the representatives of the federating provinces. This is a remarkable feature of the Constitution and can be acknowledged as the main reason why it has withstood the onslaughts of military dictators, and political parties elected with overwhelming majorities and has survived, although with some major distortions. At this stage, it is important to examine the historical debates which led to the adoption of the 1973 Constitution on 12.4.1973. The United Democratic Front (UDF) which was the combined opposition in the National

Assembly had balked at giving its concurrence to the Constitution. The stance of UDF is most important and was issued on 9.4.1973 as a rejoinder to President Z.A. Bhutto's *'Aide Memoire'* which was issued five days earlier. It may be noted as an historical fact that two federating units namely, Balochistan and North West Frontier Province (now Khyber Pakhtunkhwa) had serious reservations which UDF spelt out in the rejoinder. In these two Provinces the National Awami Party and the Jamiat Ulema-e-Islam were in a position to form the provincial governments. The representatives from these Provinces were also important components of the UDF. It is in this backdrop that the UDF rejoinder stated in categorical terms *"that in any country which has a written Constitution, the Constitution must be supreme. There is no question of any Institution of the State created by the written Constitution being in a position to override the Constitution or to nullify it"*. Most importantly, two aspects of the Constitution were highlighted. Firstly, it was stated that *"some Institutions may have the power under the Constitution to amend it but that is not an inherent power of those organs but is a grant of the Constitution"*. Ignoring this fundamental principle is to undermine the Constitution itself. Secondly, it was rightly noted that *"it is impossible to conceive a federal system in the context of absolute power over all state organs vesting in the National legislature …"*. It was also stated in the rejoinder that *"a federal system cannot work without an independent judiciary"*. To give context to the rejoinder, it may be noted that the precise wording in Chapter VII (Judicature) of the Constitution for ensuring the independence of the judiciary was a sticking point of difference between the majority in the National Assembly and the UDF. The difference was resolved when Part VII was drafted after material changes were made in the Draft Constitution Bill and moreover in Part XI there was no provision ousting the Court's jurisdiction.

83. It is with these material provisions of the Constitution that we are concerned because of the Court's role as the protector and defender, as

fiduciary of the People and as guardian of the Constitution. These constitutional provisions have no parallel in the Indian Constitution. In the circumstances, as will be discussed shortly, the doctrine developed by the Indian Supreme Court holding that the Indian Constitution has an unamendable basic structure, has little relevance for us, notwithstanding the emphasis placed thereon during arguments by both sides, for and against the adoption of such doctrine in Pakistan. The simple fact which emerges from a reading of our Constitution remains that as a constitutional principle, the stipulations commanded by the People have to be secured by the organs and functionaries of the State as a bounden duty. It is this fiduciary obligation which operates as a constraint on Parliament. The language used in clauses (5) and (6) of Article 239 of the Constitution can only be read in a manner which recognizes the fiduciary (and, therefore, subordinate) status of Parliament having derivative powers only, granted by the People of Pakistan. It is relevant that members of Parliament and Judges of this Court undertake through their respective Oaths that they shall *"preserve, protect and defend the Constitution"* and not just one provision thereof.

Fiduciary Obligations:

84. The obligation of representatives as delegates and fiduciaries needs to be further elaborated at this point. We already have a well entrenched understanding of the limits which the law attaches to a representative fiduciary position. Representatives with powers such as those mentioned in Article 239 will nevertheless have to remain obedient and loyal to those by whom they are chosen and for whom they act as representatives/fiduciaries. From amongst the extensive case law on fiduciary representatives, which exists in common law jurisdictions, there is one particularly articulate exposition of the fiduciary principle by Frankfurter J. of the U.S. Supreme Court. {*SEC v. Chenary Corpn.* [518 US 80 (1943)]. According to him, *"to say a man is a fiduciary only begins analysis; it gives direction to further inquiry. To*

whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect he has failed to discharge these obligations? And What are the consequences of his deviation from duty"? We can pose these questions in the context of the present petitions. It has already been demonstrated through express provisions in the Constitutional Preamble that the People's elected members in Parliament are only their representatives and act in a fiduciary capacity towards the People of Pakistan. As to the second question, it is equally clear that the fiduciary obligations which are owed by the representatives of the People include the obligation to loyally obey the command of the People. The command has been expressed in the Preamble to the Constitution requiring adherence to the same. The answers to the third and fourth questions articulated by Frankfurter J will be found in the sections of this opinion which follow.

85. At this point, I wish to record that we repeatedly asked learned counsel representing the Federation but they did not answer the questions put to them from the Bench and to say if it was within the amending power of Parliament to do away with the principles of democracy by doing away with elections altogether, or to extend the life of Parliament; or to abolish fundamental rights; or to emasculate the Judiciary by interfering with its independence or to install a hereditary monarchy. It is these questions which arise most prominently from the stance adopted by the Federation. The learned Attorney General was also asked to state his position on these questions but he did not do so. What must the Court infer from this silence and lack of response other than to conclude that the Federation and its principal Law Officer cannot say that Parliament has such power. It appears the Federation has no basis, other than the decontextualised wording of Article 239 or the faulty reasoning of the High Court in *Dewan Textile,*, to argue that Parliament may do away with any provision of the Constitution including democracy and fundamental rights or that it can interfere with the independence of the Judiciary. It may be added that these queries were not

merely rhetorical, but were based on the text from the Constitution reproduced above. The Constitution does not state that Parliament enjoys supremacy over the Constitution itself. In fact quite the contrary is established in our jurisdiction wherein the supremacy of the Constitution over all State organs has to be recognized. It is in this context the foregoing questions were raised as a means of identifying the limitations of Parliament and to emphasize its status as a subordinate instrumentality of the People, created by them to subserve and implement their will. It is this wording in the Constitution which has been ignored by learned counsel representing the Federation.

86. The stance of the Federation is, in effect, that Parliament is capable of doing anything with the Constitution including the ability to distort and disfigure the Constitution in such manner that it no longer remains the Constitution willed and adopted by the People. It will be such distortion and disobedience to the will of the people which may lead to overthrow and revolution. In the case of *Mobashir Hassan vs. Federation of Pakistan* (PLD 2010 SC 265), I had the opportunity of writing an additional note in support of the unanimous decision of the Court. I reaffirm what was noted that stability and rule of law are the responsibility of and must be assumed by the executive organ of the State which also commands the majority in the legislature. This is the requirement of the Parliamentary democratic dispensation ordained by our Constitution. It was held that *"political stability and the rule of law will flow as a natural consequence of giving sanctity and respect to the Constitution both in letter and in spirit"*. It was also noted that *"adherence to the Constitution can never lead to destabilization of the law. On the contrary any breach of constitutional norms is likely to destabilize the rule of law"*.

87. While expressing an opinion in the case of *Sindh High Court Bar Association vs. Federation of Pakistan* (PLD 2009 SC 879), it was stated and I reiterate that *"the people of Pakistan have consciously chosen the method for their own governance. The Constitution is a document which at a conscious level records,*

in classical terms, the social contract between the people and those who they choose to entrust with the governance of the State". I must not allow myself to forget it was deviation from Constitutional principles which brought the nation to grief in the constitutionally significant cases of *Maulvi Tamizuddin Khan, the Governor General's Reference* and *Dosso* when the Court went beyond the Constitution and founded its judgments on notions such as '*salus populi suprema lex'* and a distorted version of Hans Kelsen's doctrine of revolutionary legality. Reliance on theories, counter theories and variants of the same thus highlight another hazard in the adjudication of Constitutional cases as such reliance may stray from the Constitution.

The place and relevance of theories and philosophy in Constitutional adjudication:

88. We have seen during the course of the above discussion that political philosophy and theories have been referred to and relied upon by various counsel representing both sides. In particular, reference may be made to the "social contract theory", the "basic structure theory" and the theory of "Parliamentary sovereignty and supremacy" adverted to above.

89. As stated earlier, I have often found that a great deal of emphasis is placed by counsel on legal theories and doctrines of constitutional law. Such doctrines which mostly took root in the foreign soils of the United States, Britain and other Commonwealth countries require serious critical examination before being pressed into use in Pakistan. This is necessarily so because legal theory and constitutional construction must spring from our own experience and historical context. The danger of adhering to theory divorced from context can be illustrated through a simple but instructive tale told of the Turk *Mulla* Nasruddin. *Mulla* has been fictionalized as a didactic character in the teaching tradition of the *sufi* savants of the East on account of his ability to highlight logical fallacies resulting from uncritical and fragmented thinking. Thus we have the story of *Mulla* dropping a gold *dirham* in his house at night. He goes into the *bazaar* and starts searching for it

under a street-light. The people who gather around him ask where he lost the *dirham*. When told, they advise *Mulla* to go and search for it at home where he had lost it. *Mulla*, with his singular logic, says: "But I can't. There is no light in my house and the night is dark." Thus, as surely as *Mulla* will not find his *dirham* in the *bazaar* we are likely to keep groping and floundering if we continue searching for answers to our Constitutional conundrums in models constructed in different political climes by philosophers and political scientists who are products of their own times and social conditions. As the knower of Reality, the *aarif* realized:

آب درکوزه و من تشنه دہن می گردم

[With water in flask, parched, I roam all over in search of it.]

90 There is another serious problem with decontextualized theories of political and legal philosophy. While academics can philosophize on issues of jurisprudence, sociology, politics etc., and in doing so avail professorial license, such space is not available to Courts and Judges who must remain within the discipline of the law and precedent and deal with concrete controversies and without basing judgment on unexamined assumptions. Thus, in the realm of Constitutional philosophy we find that each theory is critiqued by an equal or even more rational variant or counter-theory. For example, we have the present day version of Social Contract theory articulated by John Rawls which has been forcefully critiqued by someone like Amartya Sen in his recent treatise '*The Idea of Justice*'. Sen has a much broader world-view which also takes into consideration the eclectic tradition of the sub-Continent and draws on teachings of the *Gita*, the *sufi* masters, and others who have contributed towards the creation of a multi-hued collage, different from the monochromatic vision of some philosophers who have not had the occasion or the ability to draw from multiple streams of wisdom. (Extract from the Foreword to "The Politics and Jurisprudence of the Chaudhry Court").

91. In my humble view, the above discussion represents the only legally sound way in which our Constitutional scheme can be understood. The People, who are the originators of the Constitution, must remain its owners. It would not be justifiable if their representatives who are entrusted with the Constitution and are deputed to preserve, protect and defend the Constitution, are allowed without restraint to make any and all changes in the Constitution. Having thus concluded that this Court has the power to judicially review a constitutional amendment passed by Parliament, the second part of this opinion becomes simple. The above principle can now be applied to see if the eighteenth or twenty-first amendments or any parts thereof challenged before us can be struck down for being violative of the Parliamentary mandate allowing it to amend the Constitution.

PART - II.

Reviewing the Eighteenth Amendment

92. For reasons appearing below it is my humble view that applying the principles enunciated in Part I above, the eighteenth Amendment, as further amended by the nineteenth Amendment to the extent of Article 175A, does not require interference in exercise of the Court's power of judicial review. However, aspects of the eighteenth Amendment which have amended parts of Article 63A and which have substituted and replaced parts of Article 51 of the Constitution are liable to be set aside to the extent discussed below.

Article 175A:

93. The eighteenth Amendment was passed on 19.4.2010. It purported to bring about changes in 97 Articles of the Constitution. Of these, the challenge to Article 175A can first be taken up. The main contention of learned counsel for the petitioners is founded on the principle that the independence of the Judiciary constitutes a basic feature of the Constitution and that Article 175A being violative of such feature, is beyond the competence and scope of the

amending power of Parliament. It was Mr. Hamid Khan Sr. ASC who was forceful in his submission that the Parliamentary Committee constituted under Article 175A *ibid* was in breach of the principle of trichotomy of powers and infringed the independence of the Judiciary and therefore should be struck down. According to him, the inclusion of eight members of the Parliamentary Committee (separate from the Judicial Commission) in the process of appointment of Judges of the High Court and this Court was *per se* contrary to the notion of the independence of the judiciary. The main thrust of his argument was that any involvement of persons outside the Judicial Commission, in the process of appointment of Judges was, therefore, contrary to the independence of the judiciary was thus not within the permissible scope of the parliamentary power to amend the Constitution.

94. We have carefully considered this argument and find the same to be untenable for reasons which have been noted in the judgments rendered in the two cases titled *Munir Hussain Bhatti vs. Federation of Pakistan* (PLD 2011 SC 407) and *Federation of Pakistan vs. Munir Hussain Bhatti* (PLD 2011 SC 752). In these two judgments, the eighteenth amendment as amended by the nineteenth amendment, has been considered. We have noted that there are adequate safeguards in the amended Article 175A which ensure that the independence of the judiciary is fully secured. The contention of learned counsel is not tenable for two fundamental reasons. Firstly, that the elements of the previous system involving the Chief Justice of Pakistan and the executive appointing authority namely, the President on the advice of the Prime Minister in appointing judges have now been retained but in expanded form. The decision making process has been diffused over a collegium comprising of the persons forming part of the Judicial Commission. These persons now include, apart from the members of the judiciary, the Law Ministers of the Federation and the Province concerned as

well as the members nominated by the Pakistan Bar Council and the Bar Council of the Province concerned.

95. Secondly, Mr. Hamid Khan's concern that a separate body such as the Parliamentary Committee constituted interference in the independence of the judiciary is misconceived. It is to be noted that the Parliamentary Committee, as per ratio in the above cited cases of *Munir Bhatti* has ensured that it takes decisions objectively which are justiceable and have to stand the test of judicial review. For these reasons, in my humble opinion, Article 175A, as amended, does not adversely effect the independence of the judiciary and is not violative of the Peoples' directive that such independence shall be fully secured.

96. In view of the above, although the eighteenth amendment as it was originally passed, may have conflicted with the independence of the judiciary and may, therefore, have been liable to be struck down, the nineteenth amendment passed by Parliament brought about substantial changes in the eighteenth amendment and as a consequence, the amended Article 175A as interpreted in the two cases of *Munir Hussain Bhatti supra* are not open to judicial review on the ground that the Parliamentary Committee undermines the independence of the judiciary.

Article 63A:

97. The eighteenth amendment purports to make a very significant change to Article 63A of the Constitution, which can now be considered. This Article deals with party discipline and stipulates that members of Parliament can be un-seated from Parliament if found guilty of defection from their respective parties. Article 63A defines defection and was first introduced into the Constitution through the Constitution (Fourteenth Amendment) Act, 1997, in view of the rampant allegations of ill-motivated floor-crossing, and in order "*to prevent instability in relation to the formation and functioning of*

Government". (Preamble, to 14th Amendment). Up until 2010, defection was to be attracted only by, a member who, *inter alia:*

> *"(b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to –*
>
> *(i) election of the Prime Minister or the Chief Minister; or*
>
> *(ii) a vote of confidence or a vote of no-confidence; or*
>
> *(iii) a Money Bill."*

98. There was a need for introducing an anti-defection provision in the Constitution and it was considered necessary to do so because of a desire to strengthen and bring about stability in our parliamentary democracy. Members of political parties individually or collectively had to face the very real possibility of being un-seated if they defected. This objective was achieved through two means; firstly, by giving to the leader of the parliamentary party the ability to initiate a process whereby a party member who had defected by voting against party lines on the three issues noted in clause (1)(b) of Article 63A; secondly, parliamentarians were left free to exercise their voting rights in Parliament in accordance with their conscience and the Oath taken by them to preserve, protect and defend the Constitution, except in the three instances noted above. Article 63A was very carefully crafted to draw a balance between the right of parliamentarians to be true chosen representatives of the People and at the same time achieving the objective of lending stability to parliamentary democracy.

99. Article 63A was subject matter of contention before this Court in the case of *Wukala Mahaz Barai Tahafaz-e-Dastoor vs. Federation of Pakistan supra.* It was held in the cited case that Article 63A was not violative of any constitutional provision. I need not go into a discussion on this aspect of Article 63A because the said Article (as it existed prior to the eighteenth Amendment) addressed a prevalent malaise and was, therefore, helpful in furthering *"the principles of democracy".*

100. The issue which has now arisen on account of changes brought about in Article 63A by the eighteenth Amendment can be highlighted at this point. Firstly, in clause (1)(b)(iii), the words *"or a Constitutional (Amendment) Bill"* have been added after the words *"a Money Bill"*. Secondly, *"a party head"* has been invested with the power to make a declaration that a parliamentarian has defected. A party head has been described in Article 63A as *"any person, by whatever name called, declared as such by the party"*. The effect of these changes in Article 63A are significant and can now be examined.

101 After the adoption of the Constitution in 1973 and in line with the aspirations reflected in the Preamble, it is the chosen representatives of the People sitting in Parliament who are to preserve, protect and defend the Constitution. It is these representatives who have to perform the function of amending the Constitution and in doing so they have to rise above personal interests and inclinations in line with their Oath, to protect, preserve and defend the Constitution. A parliamentarian, in matters of constitutional amendments is the chosen representative of the People and not a representative of a political party or a party head. As noted above, Article 63A as it previously existed was narrowly framed to ensure that a parliamentarian was free to vote on any issue in Parliament in accordance with his understanding of how the Constitution was to be preserved etc., except for the three matters noted in clause (1)(b) of Article 63A. The stability of government was thus ensured because the three types of votes mentioned in clause (1)(b) had the potential of bringing down the government as a result of defection. The addition of the words *"or a Constitution (Amendment) Bill"* in Article 63A donot advance the principles of democracy and in fact constitute a constitutionally mandated pressure on a parliamentarian to vote on an amendment bill in accordance with party lines and not in accordance with his Oath and his fiduciary duty as a chosen representative of the People. The fiduciary obligation, as explained in Part-I of this opinion demands total

loyalty to the Constitution, which according to the express words in the Third Schedule to the Constitution, *"embodies the will of the People"*. Furthermore, there is no possibility at all of any destabilization of a government on the basis of a vote one way or the other on a Constitution (Amendment) Bill.

102 Another important aspect of the changes in Article 63A is that a party head who now wields influence over a parliamentarian may not be a member of Parliament or he may in fact be ineligible to be elected to Parliament by virtue of Articles 62 and 63 of the Constitution; yet he may be able to exert influence on the content of the Constitution. The addition of these four words in clause (1)(b) has no nexus with furthering the principles of democracy. Such a situation is not tenable in the light of the Constitution for a number of reasons.

103. Firstly, it may be mentioned that it is the individual elected members of Parliament, and in particular those of the National Assembly, who have the best claim to being considered *"the chosen representatives of the people of Pakistan"*. The Preamble asserts that it is these representative who shall possess the power to amend the Constitution and none else. Leaders of political parties, it may be recalled, need not be elected or chosen by the people. It follows that an amendment which puts the directly chosen representatives of the people under constitutionally permitted influence of persons outside (or even inside) Parliament cannot be seen as furthering the principles of Parliamentary democracy.

104. Secondly, we need to compare the democratic legitimacy of the electoral processes through which party heads and parliamentarians respectively are elected to office. Parliamentary elections are governed through a rigorous procedure laid down in the Representation of Peoples Act, 1976, conducted and overseen by a constitutionally-protected Election Commission. The election of party heads, on the other hand, are much less

rigorously democratic or transparent as these are not conducted or overseen by the Election Commission or by any independent body outside the party. Even if there is an election oversight body within the party structure, it may be rendered ineffective or its decisions ignored.

105. At this juncture, it is important to note that prior to the eighteenth amendment, by virtue of clause (4) to Article 17 every political party was obliged to hold intra party elections to elect its office-bearers and party leaders as a Constitutional obligation. This requirement has been done away with and as a result intra party elections are no longer required by the Constitution. The erosion of popular legitimacy of a party leader has, therefore, been made even more questionable than before. Granting to such political leader the ability to cast a shadow on the Constitution, flies in the face of the command that *"the State shall exercise its powers and authority through the chosen representatives of the People"*. In this background, party heads cannot be allowed such influence over individual parliamentarians whose democratic credentials as chosen representatives of the People are so much stronger than their own. Moreover, the individual standing of an elected member and the fact he is not necessarily dependent on the popular support of the party, is amply demonstrated by the fact that in the last general elections in 2013, in many constituencies, the very same voters have elected the ticket holder of one political party to the National Assembly, but have chosen the ticket holder of another party for the provincial constituencies in the same area.

106. Finally, it must be reiterated that enabling a person, whether within or outside Parliament, to influence Members of Parliament to adhere to party lines when voting on Constitutional Amendments is in violation of the terms of their oath of office. The Constitution itself stipulates that before assuming office, every Member of Parliament must take an oath to *"preserve, protect and defend the Constitution of the Islamic Republic of Pakistan"*. (Article 65 read with

Third Schedule). It is a necessary incident of this oath that, when voting on a Constitutional Amendment, every Parliamentarian must search deeply into his own conscience and ensure that he does not become a party to its erosion or destruction. This is a fiduciary obligation of a Parliamentarian in addition to being a term of his Oath of Office. Under acknowledged and well settled legal principles established in our jurisprudence, such discretionary responsibility cannot be delegated by a fiduciary nor can it be allowed to be clouded by any external influence. Thus, in making his decision, party considerations cannot be allowed to bear influence on him. The requirement of the Parliamentarian's Oath cannot be reconciled with the insertion into sub-clause (iii) of clause (1)(b) of Article 63A made by the eighteenth Amendment. The Constitution it may be emphasized, envisages the conscience of individual parliamentarians as its own first line of defence, a defence which comes into operation even before judicial review can set in.

107. Learned counsel representing the Bar Associations of the Supreme Court and the Sindh High Court respectively, drew the Court's attention to the chilling effect Article 63A can have on members of Parliament, thus preventing them from voting their conscience. Both learned counsel referred to a report appearing in the Press on the day after the twenty first Amendment Bill was passed. On 7.1.2015 it was reported by the daily 'Dawn' that PPP Senator Raza Rabbani stated *"in choked voice that during his time in the Senate he, never felt so ashamed as today in voting for military courts"*. Mr. Raza Rabbani, it may be noted is currently the Chairman of the Senate. He is a Parliamentarian of high standing and moral integrity. He has also consistently demonstrated his commitment to advancing the cause of constitutional rule and Parliamentary democracy. It is on this basis that Mr. Abid Zubairi representing SHCBA argued that the twenty first Amendment could not be permitted to stand because the vote on this amendment could not be treated as an independently cast vote by the requisite two-thirds of the

two Houses of Parliament. Here it is important to bear in mind that it is not necessary to determine if a Parliamentarian was or was not, in fact, influenced by his party head. What is relevant is whether a party head can be allowed Constitutional (as opposed to political or moral) authority for pressing his views on members of Parliament while they vote on a Constitutional amendment? In my humble view, this plainly is impermissible for reasons noted above.

108. It may also be noted that the Constitution amending function is qualitatively very different from the function which a Parliamentarian performs while voting on a Money Bill, or when he votes to elect the Prime Minister or when he votes on a no confidence (or confidence) motion because defection on these matters can destabilise democracy by bringing down a government. It was suggested that the Parliamentarian was not debarred from voting according to his conscience on the aforesaid matters. That, however, is not the issue because of the real possibility that he could be unseated by voting in accordance with his conscience and his Oath on a Constitution (Amendment) Bill. In my view this Amendment represents the extraordinary danger that a member of Parliament is made susceptible to external pressure on an issue which has no nexus with stability of parliamentary democracy. At this point we may usefully advert to the Preamble to the Constitution (Fourteenth Amendment) Act, 1997 which states that "*it is expedient further to amend the Constitution of the Islamic of Pakistan in order to prevent instability in relation to the formation or functioning of government*". The words added to Article 63A in clause (1)(b) by the eighteenth Amendment, have no connection with this objective.

109 For the foregoing reasons, the addition of the words "*or a Constitution (Amendment) Bill*", in my view, constitutes a breach of the duty cast on a Parliamentarian as the chosen representative of the people as explained in Part I of this opinion. I, therefore, hold that these words "*or a Constitution (Amendment) Bill*" are liable to be struck down.

Article 51 of the Constitution:

110**.** Article 51 of the Constitution was substantially amended by the eighteenth Amendment in respect of seats reserved for minorities. These amendments (reproduced below) have been challenged by Julius Salak, a member of the minority Christian community, in Constitution Petition No. 43 of 2010. He raised objections to sub-clauses 6(c) and (e) of Article 51 of the Constitution as amended by the eighteenth Amendment. These provisions, for ease of reference, are reproduced as under:-

> ***"Article 51.*** *(1) There shall be three hundred and forty-two seats for members in the National Assembly, including seats reserved for women and non-Muslims.*
> *……..*
> *(6) ……*
> *(c) the constituency for all seats reserved for non-Muslims shall be the whole country;*
> *(e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the National Assembly:"*

111. According to learned counsel, the provisions referred to above are liable to be struck down because the same are violative of three of the express commands of the people, firstly, that *"adequate provisions shall be made to safeguard the legitimate interests of minorities …"* secondly, that "*the State shall exercise its powers and authority through the chosen representatives of the people*" and thirdly, "*that the principles of democracy shall be fully observed*". In the new arrangement brought about in the Constitution through Article 51 *ibid* it was contended firstly, that members of the minorities were left with no ability either to participate in such elections or even to offer themselves for election because there was in fact no election at all. The challenged provisions of the above Article are such that at the time of election, a member of a minority whose name appears on the electoral roll will have no choice to fill the seats

reserved for non-Muslims or to offer himself for election. There is merit in the submission of learned counsel that this scheme introduced in the Constitution does not conform to any of the principles of democracy which would allow the minorities to choose their own representatives. Instead the major parties will choose the minority members and there would be no election to the seats reserved for minorities; there would be a selection of members instead, and that too which is not made by the minority community.

112. The learned counsel representing the Federation and the learned Attorney General did not respond to the aforesaid objections. It was, however, suggested in passing by counsel in some other petition that minority members could always contest elections on general seats and that Article 51 *ibid* provides to them additional representation. On this basis it was contended that the minorities should be content with the above referred provisions of Article 51. This contention is misconceived because additional seats for minorities are not a matter of grace and benevolence of political parties but are a requirement of the above commands which are made in the Preamble requiring that the legitimate interests of the minorities are provided for. These commands are to be loyally obeyed for the reasons which have been explained in Part I above.

113. The case of Julius Salak illustrates violation of some of the basic Constitutional tenets. Two of these tenets relate to minorities. One of these as stated in the Preamble in express words requires that *"adequate provision shall be made to safeguard the legitimate interest of minorities …"*. It is here that the amendment to Article 51 introduced through the eighteenth Amendment is open to challenge.

114. In addition to the above noted commands, it would also appear that the principles of democracy required by the will of the people, have also been violated. Mr. Salak has stated in his petition, with some justification, that the

valuable right of the minorities to elect their representatives directly, has been taken away and that *"this system can be used by the political parties to introduce such people in the National Assembly who will work under the command of the political parties and will have no concern with the betterment of the minorities"*. The petitioner, has stated in his petition that he was elected thrice to the National Assembly on a seat reserved for non-Muslims. This was a result of elections where members of the minority community could offer themselves to their own community for election and to be chosen through a democratic electoral process to be the representatives of their community.

115. In the post amendment dispensation according to the petitioner a person like him cannot be elected to the National Assembly unless he compromises with or kowtows to the leader(s) of a political party which may then select him. There will be no opportunity for such minority member to have his name put on a ballot by himself and thus there will be no possibility at all of him being chosen as a representative of his community even though (like Julius Salak) he could have won an election on the basis of his popularity amongst his community.

116. It was suggested, not by the learned Attorney General, but by some other counsel that the pre-amendment procedure was very burdensome because the whole country was a single member constituency and, therefore, only very rich members of minorities could contest the election and get themselves elected. I have not found any debate in Parliament in relation to the above noted amendments in Article 51 *ibid*. Various proposed amendments appear to have been considered by the Parliamentary Committee on Constitutional Reforms (PCCR). This Committee held as many as 77 meetings with each meeting on average lasting five hours, thus the Committee spent 385 hours on its deliberations. Amendments to 97 Articles were proposed. It does not appear from the report of the PCCR that any consideration was given to Article 51 although through a separate note of reiteration Senator Prof. Khursheed Ahmed did comment on the said Article

and in certain respects agreed with the petitioner, although he otherwise did not support the creation of reserved seats for non-Mulsims. The report of the PCCR does not refer to any discussion on the proposed amendment to Article 51. Furthermore, a disconcerting aspect of the report is that out of 27 members of the PCCR there was not a single member belonging to any minority community and nor does it appear that views of the minorities were solicited by PCCR at any stage, for its consideration. It, therefore, appears that the command contained in the Preamble directing the State to ensure that adequate provision is made to safeguard the legitimate interests of the minorities, was not within the contemplation of the two Houses of Parliament when the eighteenth Amendment Bill was adopted. Such absence of debate lends support to the contents of the Constitution Petition filed by the petitioner Julius Salak.

117. No one appears to have considered the possibility (consistent with the principles of democracy) of numerous alternatives whereby the State could, for instance, fund the travel and election campaigns of a selected few contestants on the reserved seats. Such handful could easily be identified through a threshold requiring them to be proposed by a small yet substantial number of voters of the minority community borne on the electoral rolls. Other alternatives could have included free air time on State TV and Radio to such candidates who cross the threshold. This would have ensured the principles of democracy being fully observed while allowing non-Muslims to choose their own representatives. It is however, for Parliament to decide on the content of a Constitution Amendment Bill. I can only highlight the deviation of such Bill from the Constitutional principles discussed above.

118. In view of the total absence of any debate on the foregoing issue, it may not be unreasonable to accept the contents of Constitution Petition No.43 of 2010 which insists that the new arrangement *"can be used by the political parties to introduce such people in the National Assembly who will work under the command of political parties … In fact [the new system] will open*

floodgates of exploitation [of] such representatives" and the ultimate effect will be non representation of the minorities in the National Assembly. It would indeed be unfortunate if the minorities were to justifiably perceive the new arrangement as a cynical ploy or condescension on the part of the majority which does not take into account the '*legitimate interests of the minorities*'. It would be equally tragic if the minorities (inspite of the historic promises of the Quaid-e-Azam and every other leader) come to regard themselves, on account of the new Article 51 as second class citizens or the 'children of a lesser god', forever to remain subservient to the majority's goodwill and unrepresented by their own chosen representatives.

119. For the foregoing reasons, I would agree with learned counsel for the petitioner Julius Salak that the aforesaid provisions are liable to be struck down. Parliament may substitute these provisions if it so chooses, by such provisions which recognize the high degree of importance given to minorities and to the principles of democracy as explained in Part-I of this opinion. Similar considerations would be relevant for Article 106 of the Constitution also which deals with reserved seats for minorities in provincial Assemblies.

PART - III.

Reviewing the twenty-first Amendment

Article 175 and Schedule-I to the Constitution:

120. I have had the privilege of going through the judgment proposed to be rendered by my learned brother Qazi Faez Isa, J., in respect of the twenty-first amendment. I am in full agreement with the reasoning and conclusions of my learned brother and, therefore, concur in the same, by holding that the said Amendment is liable to be struck down. I would like to add that the objectives of the twenty first amendment could have been achieved while staying within the Constitution, but apparently such possibility did not receive the attention of Parliament.

121 I wish to add that on account of the finding recorded by me on Article 63A, the twenty-first Amendment is liable to be struck down as a necessary consequence of my opinion that the words *"or a Constitution (Amendment) Bill"* are liable to struck down.

Summary of Conclusions:

122. The conclusions of Parts I, II and III above are as under:-

a) That Parliament is not sovereign or supreme in the sense that there are no limitations on its power to amend the Constitution;
b) The limitations on Parliament are not only political but are borne out from the Constitution itself:
c) This Court has the power to judicially review a Constitutional Amendment passed by Parliament and to strike it down where appropriate;
d) Article 175A as amended by the nineteenth Amendment is not liable to be struck down as it does not transgress the limitations of parliamentary power to amend the Constitution;
e) The words *"or a Constitution (Amendment) Bill"* added in clause (1)(b) of Article 63A are liable to be struck down;
f) The provisions of sub-clauses 6(c) and (e) of Article 51 of the Constitution are liable to be struck down;
g) The twenty-first Amendment is liable to be struck down.

Ending Observations:

123. Our legal and constitutional history has amply demonstrated that laws can be made by Parliament which do not necessarily represent the aspirations of the people in the manner discussed earlier in this opinion. In the case of *Mubashar Hassan vs. Federation of Pakistan* (PLD 2010 SC 265), it was remarked that even so it is for Parliament (not the Judiciary) to make such laws regardless of whether the same are unpopular or are based on expediency. This power to make laws (including Constitutional Amendments), however, is not absolute and untrammelled. I have expressed my opinion in the said case that *"what is good or bad for the people must be left to the elected representatives of the people, subject only to the limitations imposed by the*

Constitution". The object of the present opinion is precisely to define such limits which constrain Parliament when it decides to amend the Constitution.

124. In our troubled constitutional history starting with the case of *Maulvi Tamizuddin supra* in 1954 the present Constitution Petitions are of equal if not even more importance. In the case of *Muhammad Azhar Siddique v. Federation of Pakistan* (PLD 2012 SC 774), it was observed *"it is important to remember that all organs of the State have to act in harmony and with due humility as instrumentalities and servants of the people".* There is no question of any one organ claiming supremacy over the other in our constitutional scheme which provides for checks and balances. In the case of *Munir Hussain Bhatti supra*, it was also observed that *"… there is nothing unusual or exceptional about differences as to constitutional questions cropping up between constitutional bodies or State functionaries in a democratic dispensation. Such differences may arise particularly when new provisions are incorporated in the Constitution. However, as nations mature and polities evolve, their maturity is reflected in the manner in which such differences are resolved in accordance with the governing compact, which is the Constitution …".* Differences of opinion between the constitutional bodies or organs of State *"cannot be seen as adversarial turf-wars between the two bodies".* All constitutional bodies and functionaries must have the common aim that the Constitution *"which embodies the will of the People"* (as discussed in Part-I of this opinion) is enforced because this is an obligation set out in the Constitution itself. It, therefore, must be accepted and implemented both in letter and in spirit with sincerity by every organ and functionary of the State.

125. Finally, as Courts and Judges, we are obliged to adhere closely to the Constitution and must avoid being swayed by unexamined assumptions or get trapped into *"mechanical deduction from rules with predetermined meanings".* It is equally important to avoid basing our legal judgment on alien theories and philosophies, divorced from our own historical and Constitutional context. Our search for answers to constitutional issues cannot afford to

ignore the kernel within. We may also usefully heed the wisdom of Hafez, the peerless sage of Shiraz, who said:

سالھادل طلب جام جم ازمامی کرد وآنچہ خوددا شت زبیگانہ تمنامی کرد

Sd/-
(Jawwad S. Khawaja)

NOTE: To meet the requirement of Article 251 of the Constitution, the Urdu version of this judgment is also issued. In view of Article 251(3), the Provinces may issue translations in provincial languages.

Sd/-
(Jawwad S. Khawaja)

SH. AZMAT SAEED, J.- These Constitutional Petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973, have been variously filed to call into question the *vires* of the Constitution (18th Amendment) Act, 2010, Constitution (21st Amendment) Act, 2015, and the Pakistan Army (Amendment) Act, 2015. After hearing the learned counsel for the parties, the issues requiring adjudication by this Court have concretized. The elemental questions which have floated to the surface are whether there are any implied limitations on the power of the Parliament to amend the Constitution, if so, whether such limitations can be invoked by this Court to strike

down a Constitutional Amendment. Such limitations, if any, would also need to be identified and in this behalf whether it can be inferred that the amendatory power of the Parliament *qua* the Constitution is circumscribed so as to place certain fundamental provisions of the Constitution beyond the pale of the exercise of such powers by the Parliament.

2. In the context of the threshold question pertaining to the implied limitation upon the Parliament and the jurisdiction of the Court in respect thereof, it was contended by Mr. Hamid Khan, learned Sr. ASC on behalf of the Petitioners that all Constitutions have a basic structure consisting of its Salient Features, which in the context of the Constitution of the Islamic Republic of Pakistan, 1973, would include Democracy, Federalism, Fundamental Rights, Independence of Judiciary and the Islamic Provisions, etc. The Parliament, being a creature of the Constitution and not being a Constituent Assembly cannot destroy or fundamentally change such Salient Features and therefore, there is an implied

restriction on the amendatory powers of the Parliament in this behalf. This doctrine, it was urged, is not unknown to Jurisprudence having been accepted and applied in various Countries, including Germany, Turkey, India, Bangladesh and may also be acknowledged, accepted and enforced in Pakistan. Counsels for some of the Petitioners also canvassed the point of view that the Objectives Resolution passed by the First Constituent Assembly in March, 1949, is the foundational document of our Constitutional Law and was, therefore, adopted as a preamble to the Constitutions of 1956, Constitution of 1962, and now is not only the preamble of the current Constitution but also forms a substantive part thereof by virtue of Article 2A. It was their case that the Objectives Resolution/Preamble sets forth in a great detail and with precision the Salient Features of the Constitution of the Islamic Republic of Pakistan, 1973, and thereby provides the touchstone against which the Constitutional Amendments can be tested. It was further maintained that an overview of the various

pronouncements of the Courts in Pakistan, including this Court reveal that the doctrine of Implied Restriction of the powers of the Parliament to amend the Constitution so as to destroy its Salient Features has slowly evolved in our Jurisprudence reaching towards the logical conclusion of its acceptance and enforcement and this Court should now return a definitive finding in its favour.

It was also urged at the bar that the Constitutional Amendments in question have been passed by a Parliament whose Members were not free to exercise their right to vote in accordance with their conscience or as per the will of the people who elected them. It was contended that by virtue of Article 63A of the Constitution, the right of the Members of the Parliament to vote, *inter alia,* on a Constitutional Amendment has been made subservient to the command of the party head who may not even be the Member of the Parliament, therefore, in fact, the Constitutional Amendments in question reflect neither the will of the people nor of the Members of the Parliament but represent the

wishes of the party leaders only. The provisions of Article 63A of the Constitution were also separately subjected to challenge.

3. Ms. Asma Jehangir, learned ASC appearing for one of the Petitioners did not subscribe to the aforesaid view and limited her grievance to the 21st Constitutional Amendment. The main thrust of the argument of the learned counsel was that it is a myth that the Objectives Resolution was a document of consensus. She drew the attention of the Court to the Parliamentary Debates in the Assembly on the said Resolution. She highlighted the opposition by various Members of the House especially those representing the minorities. In the circumstances, it was contended, undue emphasis on the Objectives Resolution in our Constitutional Law is not warranted. She added that Pakistan has its own Constitution forged in its own historical perspective, therefore, reliance upon judgments from foreign jurisdiction would not be advisable. She further contended that 21st Constitutional Amendment came into force prior to the Pakistan

Army (Amendment) Act, 2015, hence the latter was not protected under the Constitution.

4. Mr. Hamid Khan, learned Sr. ASC with regard to validity and *vires* of the 18th Constitutional Amendment and the 21st Constitutional Amendment contended with reference to Article 175A incorporated by the 18th Constitutional Amendment that two new Institutions have been introduced into the process of appointment of Judges i.e. (a) Judicial Commission, and (b) The Parliamentary Committee. The learned counsel stated only the validity and *vires* of the Parliamentary Committee is being questioned by him.

5. In pith and substance, it was the case of the learned counsel that the Independence of the Judiciary is a Salient Feature of the Constitution based on the Trichotomy of powers. The mode of appointment of Judges and Chief Justices is germane to the Independence of the Judiciary, as has been held by this Court in the case, reported as Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v.

Federation of Pakistan and others (PLD 1996 SC 324) and is evidenced by Articles 175, 203 and 209. In this behalf, reference was also made to the judgments, reported as (1) Haji Syed Abdul Haleem Shah v. Wali Dad and 6 others (PLD 1993 SC 391) and (2) Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others (PLD 1994 SC 105). Furthermore, the matters dealing with the judiciary find mention in PART VII of the Constitution, titled "The Judicature" and the provisions thereof must be read as an organic whole to which the concept of a Parliamentary Committee is alien. In this behalf, the learned counsel referred to the case of Arshad Mahmood and others v. The Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 SC 193). It was added that the procedure prescribed under newly added Article 175A will lead to politicization of the judiciary, undermining its independence and impairing its ability to render independent verdicts. Hence, the provisions of Article 175A pertaining to the

Parliamentary Committee are *ultra vires* the Constitution.

6. With regard to the 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015, it was contended that the same offends against the Articles 2A, 8(1) and (2), 9, 10, 10A, 23, 75(3), 184(3), 185, 190, 199(3), 245, First Schedule Part-I (3) and the Fourth Schedule Item 55. It was the case of the learned counsel that the principle of Separation of Powers has been violated as judicial power will be exercised by an Executive Authority. Such a course of action is not permitted by law or the Constitution, as is obvious from the cases, reported as (1) Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1999 SC 504) and (2) Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) wherein it was held that the Military Courts are *ultra vires* the Constitution. It was added that the rights conferred under Articles 4 and 10A to ensure a fair trial are not catered for in the procedure to be adopted by the Military

Courts. In the above context, the learned counsel stressed that the 21st Constitutional Amendment is invalid, as it offends against the Salient Features of the Constitution and the Pakistan Army (Amendment) Act, 2015 is *ultra vires* the Constitution.

7. Mr. A.K. Dogar, learned Sr. ASC, additionally took exception to Articles 63(g) & (h) and 175A(8) of the Constitution. The learned counsel contended that the Islamic Ideology is emphasized by Article 2A and the various judicial pronouncements of this Court, including (1) Miss. Asma Jilani v. The Government of the Punjab and another (PLD 1972 SC 139), (2) Mahmood Khan Achakzai and others v. Federation of Pakistan and others (PLD 1997 SC 426) and (3) Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657). The learned counsel submitted that the removal of Article 17(4) by the 18th Constitutional Amendment is anti-democratic. Furthermore, political justice is a right guaranteed by Article 2A and every political worker has the right to become an office bearer or party leader.

The removal of Article 17(4) deprives them of such right. He challenged the validity of Article 63(g) and (h) on account of their leniency. He also contended that by virtue of amendment to Article 91(5), the restriction on the terms of the Prime Minister was removed, which was previously limited to two terms. He contended that the essence of democracy is change in leadership. To allow one person to continue *ad-infinitum* would amount to denial of such right of other aspiring leaders. The learned counsel also challenged Article 175A (8) whereby it is stated that the Judicial Commission shall nominate a candidate against a vacancy to the Parliamentary Committee. He submitted that such process of nomination violates Articles 2A, 9 and 25. He maintained that in fact applications should be invited from persons desirous of being appointed as Judges and selection made through a transparent and objective process.

8. Mr. Abdul Hafeez Pirzada, learned Sr. ASC, appearing for himself traced the Constitutional history of Pakistan and shed light on the process of Constitution making, which

culminated in the Constitution of the Islamic Republic of Pakistan, 1973. The learned counsel submitted that sub-clauses (5) and (6) to Article 239 were added to curb the power of this Court. Furthermore, Article 199(2) was intended to keep Fundamental Rights unabridged, and it has direct nexus with Articles 8 and 184. He further submitted that some provisions are mandatory, while others are directory, so all provisions cannot be treated at par. The learned counsel did not contest the *vires* and validity of the 21st Constitutional Amendment or the Pakistan Army (Amendment) Act, 2015.

9. Other counsels for the various Petitioners also challenged the validity of the 18th and 21st Constitutional Amendments. It was also argued that in the presence of Article 63A, the Members of the Parliament could not vote in accordance with their conscience and in pith and substance, the decision in this behalf was taken by the party heads who may neither be or even qualified to be Members of Parliament. Hence, both the Constitutional Amendments and the Amending

Law are not valid, as they do not reflect the will of the people. The change of name of the Province formerly known as North West Fortier Province (NWFP) to Khyber Pakhtunkhwa (KPK) was also challenged.

10. The Respondents led by Mr. Khalid Anwar, learned Sr. ASC for the Federal Government, responded with a blistering critique of the Indian judgments, more particularly, the judgment in the case, reported as Kesavananda Bharati v. State of Kerala (AIR 1973 SC 1461). It was contended that there is no textual basis for the doctrine of Implied Restriction in the Constitution. The Parliament is sovereign and vested with constituent powers, which can be exercised under Article 239 without any fetters. The scope of the said Article is singular in its amplitude with a specific ouster of jurisdiction of the Courts to examine the validity and *vires* of any Amendment on any ground whatsoever. Thus, it was maintained, that the Parliament can even repeal the Constitution. It was further contended that the doctrine of Implied Restriction on the Parliament to

amend the Salient Features of the Constitution has never been accepted in Pakistan. At best, such Salient Features or basic structure may be descriptive but not prescriptive. It may be used as a tool for interpretation only. It was urged that the Constitution, as originally framed has undergone changes through innumerous amendments, which have improved the Constitution by enhancing its effective working. The Constitution, it was contended, was a living document, which must necessarily evolve with and adapt to the changing time. Rigidity is not conclusive to the health of the Constitution or to the well-being of the people, who cannot be made prisoners of the past. It was further contended that the Constitution of 1973 was not framed by the Founding Fathers of the State but was adopted a generation later, hence, does not command any special reverence on this account. It was added that the Salient Features of the Constitution have never been settled with certainty even in India let alone Pakistan. Great stress was also laid on the argument that this Court itself has been created by the Constitution

and only has such powers and jurisdictions as are vested in it by the Constitution or the Law and the power to strike down a provision of the Constitution has neither been granted to this Court by any provision of the Constitution or the law nor can be inferred therefrom. It was also contended that it has been consistently held by this Court in its previous judgments, that the jurisdiction to strike down a provision of the Constitution or an amendment thereof is not available to this Court.

11. The learned Attorney General for Pakistan as well as the Advocates General of the Provinces adopted the arguments of the learned Sr. ASC appearing on behalf of the Federal Government. However, the learned Sr. ASC appearing on behalf of the Government of Khyber Pakhtunkhwa, drew our attention to the Constitutions of various Countries to contend that some of such Constitutions contain substantive provisions to the effect that specified Articles of the Constitution cannot be amended. In the above backdrop, it was urged that if the intention of the

framers of the original Constitution of the Islamic Republic of Pakistan, 1973, has been to make some Articles immune to the amendatory powers of the Parliament, appropriate provisions in this behalf would have been made in the Constitution.

12. With regard to the 18th Constitutional Amendment, Mr. Khalid Anwar, learned Sr. ASC appearing for the Federal Government contended that in terms of the Constitution of the Islamic Republic of Pakistan, 1973, as originally framed, the appointment of Judges was an Executive Act and the appointment of Judges of the Superior Courts by the Judiciary itself was not envisaged. The judgment in the case, reported as Al-Jehad Trust through Raeesul Mujahideen Habibi-ul-Wahab-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324) made the consultation with the Chief Justice binding. By Article 175A the process for such appointments has been enlarged so as to formally include the input of Non-Judicial Members of the Commission and the Parliamentary Committee making the process broad based and more inclusive. The

learned counsel submitted that under Article 175A, in the Judicial Commission, the majority of Members are from the Judiciary. With the introduction of the 18th Amendment, the exclusive power of appointment was taken away from the Chief Justice to be shared with his senior most colleagues, and this, it was contended, is an improvement in the appointment process. The relationship between the Judiciary and Legislature must be one of mutual respect, while the relationship between the Judiciary and the Executive may have some tension and friction so as to enable the Judiciary to oversee acts of the Executive. He referred to the process of appointment of the Judges in Australia, Bangladesh, Canada, Germany, France, India, New Zealand, South Africa, UK and the US to show that the involvement and the input of the Executive and Legislature in the process of appointment of the Judges is an internationally recognized norm.

13. Syed Iftikhar Hussain Gillani, learned Sr. ASC appearing on behalf of the Government of KPK, contended that the Parliament is free to

amend the Constitution, subject to the explicit restrictions and procedural requirements set forth in Articles 238 and 239. The learned counsel further contended that the changing of the name of North West Frontier Province (NWFP) as Khyber Pakhtunkhwa (KPK) is in accordance with the wishes of the people of the Province manifested in the Resolutions to this effect passed by the Provincial Assembly. He referred to various academic works to maintain that the name now chosen is rooted in history and gives identity to the Province and its people.

14. The learned Attorney General for Pakistan with regard to the 18th Constitutional Amendment prefaced his arguments with the reiteration of his contention that this Court has only the jurisdiction as is conferred upon it by the Constitution in terms of Article 175(2) and such jurisdiction does not include the power to strike down any provision of the Constitution and in this behalf reference was made to the judgment of this Court, reported as The State v. Zia-ur-Rehman and others (PLD 1973 SC 49). It was the case of the

learned Attorney General for Pakistan that the provisions of Article 175A, more particularly, the provisions challenged i.e. the constitution and the Role of the Parliamentary Committee does not offend the Independence of the Judiciary especially after the judgment in the case of Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 308 and PLD 2011 SC 407). Even otherwise, during the course of the proceedings of the instant Petitions pertaining to the 18th Constitutional Amendment, an interim Order was passed and positively responded to by the Parliament by adopting the 19th Constitutional Amendment and this issue has now come to pass.

15. With regard to the 21st Constitutional Amendment, it was contended by the Attorney General for Pakistan that the Constitution envisages that any person acting against the Defense of Pakistan or who is a threat to the Country, in times of war or peace, can be subjected to a law relating to the Armed Forces and can be legally tried by the Courts established under the Pakistan Army Act. This, it was contended,

evidenced by a reading of Articles 5, 12, 148(3), 175, 199, 232, 237 and 245. Under the Constitution, the Parliament is vested with the power to subject any person to the jurisdiction of any Court with respect to any matter. He submitted that in the previous judgments, Article 245 has been incorrectly interpreted. Its provisions can be invoked to deal with three types of situations: for defense against “external aggression”, “threat of war”, or “act in aid of civil power”. Action can be taken on the direction of the Federal Government under Article 245, which manifests the Defense power of the State and falls within the Executive function and is not justiciable under Article 199.

16. He further submitted that where there is a threat of war or insurgency, offenders can be tried under the Pakistan Army Act, for the Defense of the Country, and this course of action is permitted under Article 245. He next submitted that the Pakistan Army Act was amended only to include certain specified persons within the purview thereof.

17. The learned Attorney General for Pakistan referred to the case of *Sh. Liaquat Hussain (supra)* relied upon by the Petitioners to contend that trial by the Military Courts of civilians for such civil offences that have no nexus with the Armed Forces or Defense of Pakistan is not permissible under the Constitution. However with regard to offences relating to the Defense of the Country the existing Military Courts can try civilians.

18. The learned Attorney General for Pakistan contended that a class of persons waging war against Pakistan has been placed under the Pakistan Army Act and Article 245 read with Federal Legislature List, items 1 and 55 authorize the Federal Legislature to legislate on this subject.

19. He relied upon the case, reported as Brig. (Retd) F.B. Ali and another v. The State (PLD 1975 SC 506), to contend that different laws can be made for different classes of persons. Almost all legislation involves some level of classification, which is permissible. The learned Attorney General submitted that there is no discrimination under the Act because there is a valid and permissible

classification. It was further contended that in the case of *Brig. (Retd) F.B. Ali's case (supra)* wherein it has been held that the right to fair trial including the right to framing of charges, right to present evidence, right to representation by Counsel, right to defense and right to appeal are clearly available and protected in trial by a Court Martial. The Pakistan Army Act does permit trial of civilians by the Military Courts in time of peace. In support of his contention, he also relied upon the cases of (1) Mrs. Shahida Zaheer Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632) and (2) Col. (R) Muhammad Akram v. Federation of Pakistan through Secretary Ministry of Defence, Rawalpindi and another (PLD 2009 FSC 36).

20. With regard to the contention that the 21st Constitutional Amendment came into an effect prior to the Pakistan Army (Amendment) Act, 2015, hence the latter was not protected from the rigors of Article 8 of the Constitution, he submitted that both Bills were moved by the Ministry of Law on the same day and were introduced in the National

Assembly and debated on at the same time. He further submitted that numbering of the Bills was done by the National Assembly, wherein the Pakistan Army (Amendment) Act is Bill 1 of 2015 and the 21st Constitutional Amendment is Bill 2 of 2015. He next submitted that the Senate passed the Pakistan Army (Amendment) Act at 1700 hours whereas the 21st Constitutional Amendment was passed at 1740 hours, and the President subsequently assented to the Acts. It is impossible to determine what time the President signed the two Amendment Acts. He contended that according to the General Clauses Act, 1897, a Federal Act comes into force at 0000 hours on the said day but this provision does not apply to a Constitutional Amendment. Therefore, he submitted that the Pakistan Army (Amendment) Act, 2015, was already in force when the 21st Constitutional Amendment came into force. He next contended that in view of Articles 50, 66 and 69, the Court cannot look into Parliamentary proceedings. He also submitted that in the case of A.M. Khan Leghari, C.S.P., Member Board of Revenue, West

Pakistan v. Government of Pakistan through Secretary to Government of Pakistan, Establishment Division, Rawalpindi and others (PLD 1967 Lahore 227), it was held that since the process of making an amendment in the National Assembly is "proceeding in Parliament", the same cannot be questioned in the Court.

21. To round up his arguments, the learned Attorney General for Pakistan contended that there is a bar on the jurisdiction of High Court under Article 199(3) in relation to the Members of the Armed Forces of Pakistan, or the persons subject to this law, and in support of his contention, he relied upon the cases, reported as (1) Ex-Capt. Muhammad Akram Khan v. Islamic Republic of Pakistan through the Secretary to the Government of Pakistan, Ministry of Law and Parliamentary Affairs, Islamabad and another (PLD 1969 SC 174), (2) Mrs. Naheed Maqsood v. Federation of Pakistan through Secretary, Ministry of Interior, Government of Pakistan, Islamabad and 4 others (1999 SCMR 2078) and (3) *Brig. (R) F.B. Ali's case (supra)*. The learned Attorney General for Pakistan

maintained that terrorism is a worldwide phenomena and many countries have opted for trial of terrorists by the Military Courts. Such course of action has been held to be valid by their Courts. Reference in this behalf is made to the United States of America.

22. Heard and available record perused.

23. During the preceding 65 odd years, the question of the implied limitation on the Power of the Parliament to amend the Constitution has come up before the Courts of various Countries. It appears that the concept of implied limitation upon the power to amend the Constitution may have its genesis in Germany where such restrictions were identified and enforced by the Federal Constitutional Court. In the Subcontinent, this issue was first raised before the Supreme Court of India as far back as 1951 when a Constitutional Amendment was challenged primarily on the ground that it violated the Fundamental Rights. The challenge was repelled in the judgment, reported as Sankari Prasad v. Union of India (AIR 1951 SC 458). Subsequently, the 17th Amendment

to the Indian Constitution was called into question again on the ground of violating the Fundamental Rights. Though the Petition was dismissed vide judgment, reported as Sajjan Singh v. State of Rajasthan (AIR 1965 SC 845), however, two of the five Judges on the Bench expressed some reservations in this behalf. However, vide judgment, reported as Golak Nath v. State of Punjab (AIR 1967 SC 1643) through a variety of opinion and with a narrow majority, it was held that there was an implied restriction upon the amendatory powers of the Parliament with respect to abridgement of Fundamental Rights. The matter further crystallized when the 24th Amendment was challenged and the Supreme Court of India in its judgment, reported as *Kesavananda Bharati (supra)* held that the Indian Constitution was bestowed with certain specified Essential Features, which could not be altered or destroyed by the Parliament through a Constitutional Amendment. The Parliament was a creation of the Constitution and could only exercise such Constituent powers, as were conferred by the people and could not

amplify its own powers at the expense of the Fundamental Rights of the people. The said judgment was reaffirmed by the Supreme Court of India in the cases, reported as (1) Indira Nehru Gandhi v. Raj Narain (AIR 1975 SC 2299) and (2) Minerva Mills Limited v. Union of India (AIR 1980 SC 1789). The essential concept of the Constitution having a basic structure and the same being inalterable through a Constitutional Amendment was reiterated in the cases, reported as (1) Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. (AIR 1983 SC 239) and (2) Shri Raghunathrao Ganpatrao v. Union of India (AIR 1993 SC 1267). The aforesaid view has not been deviated from by the Supreme Court of India, as is apparent from the judgments, reported as (1) AR Kelu v. State of Tamil Nadu (AIR 2007 SC 861) and (2) State of West Bengal v. Committee for Protection of Democratic Rights (AIR 2010 SC 1467). Thus, it may be stated without fear of contradiction that the doctrine of “Basic Structure” i.e. the Constitution has Salient Features, which cannot be altered or destroyed through a Constitutional

Amendment, is firmly entrenched in the jurisprudence of the said country.

24. The Indian view referred to above has also been accepted in Bangladesh. Reference, in this behalf, may be made to the case, reported as Anwar Hussain Chaudhry v. Bangladesh (1989 BLD Sp. 1 p. 1). Kesavananda Bharati Sripadagalvaru and others *(Supra)* casts a very long shadow by crossing the oceans and finding approval in the Caribbean where it was followed in Belize. However, nearer home the said doctrine was rejected in Sri Lanka by the Supreme Court [See (1990) LRC (Const.) 1]. In Singapore, *Kesavananda Bharati (supra)* was considered and held not applicable. The Courts in Malaysia also refused to apply such doctrine. Reference in this behalf may be made to the cases, reported as (1) Government of Sate of Kelantan v. Government of the Federation of Malaysia [(1977) 2 MLJ 187] and (2) Phang Chin Hock v. Public Prosecutor [(1980) 1 ML.J 70].

25. There can be no denying of the fact that the doctrine of implied restriction on the power to amend the Constitution so as to destroy its Salient Features, if any, is neither universally accepted nor is universally rejected. Each State has a unique history and each Constitution is worded differently attracting different interpretations. Though wisdom may not recognize any national borders, yet it may not be safe to rely too much on the Constitutional Jurisprudence of other Countries, especially as Countries practicing in generic terms, the same Legal System and having a written Constitutions, when confronted with the question of implied restrictions on power to amend the Constitution have come to diametrically opposite conclusions. In the Common Law Jurisdiction with a written Constitution, India, Belize and Bangladesh have accepted and enforced the doctrine, while Sri Lanka, Malaysia and Singapore have rejected the same. In the circumstances, we must primarily draw from our own Constitutional history and Jurisprudence to answer the questions that we are currently confronted with. The judicial

pronouncements in the field need to be contextualized and examined so that their true meaning and import can be discovered.

26. The matter in issue has been dilated upon by this Court, including in the judgments, reported as (1) The State v. Zia-ur-Rehman and others (PLD 1973 SC 49), (2) The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan, Rawalpindi v. Saeed Ahmed Khan and others (PLD 1974 SC 151), (3) Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs, Islamabad v. Abdul Wali Khan, M.N.A., former President of Defunct National Awami Party (PLD 1976 SC 57), (4) Federation of Pakistan through the Secretary, Ministry of Finance, Government of Pakistan, Islamabad, etc. v. United Sugar Mills Ltd., Karachi (PLD 1977 SC 397), (5) Fauji Foundation and another v. Shamimur Rehman (PLD 1983 SC 457), (6) Khawaja Muhammad Sharif v. Federation of Pakistan through Secretary, Cabinet Division, Government of Pakistan, Islamabad and 18 others (PLD 1988 Lah. 725), (7) Sharaf Faridi and 3

others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (PLD 1989 Kar. 404), (8) Pir Sabir Shah v. Federation of Pakistan and others (PLD 1994 SC 738) and (9) Federation of Pakistan and another v. Malik Ghulam Mustafa Khar (PLD 1989 SC 26).

27. The 8th Amendment to the Constitution of the Islamic Republic of Pakistan, 1973, came up for consideration before this Court and the various judgments, both from the domestic as well as foreign jurisdictions, were considered and the Petitions in this behalf adjudicated upon vide judgment, reported as Mahmood Khan Achakzai and others v. Federation of Pakistan and others (PLD 1997 SC 426). Upon the insertion through Amendment of Article 63A of the Constitution of the Islamic Republic of Pakistan, 1973, the same was challenged before this Court and the matter adjudicated upon vide judgment, reported as Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others (PLD 1998 SC 1263). The 17th Amendment to the Constitution was called into question and the matter was

decided vide judgment, reported as Pakistan Lawyers Forum and others v. Federation of Pakistan and others (PLD 2005 SC 719).

28. The threshold questions referred to above involved in the instant *lis* also finds reference in the judgments of this Court, reported as (1) Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869) and (2) Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879).

29. As far back as 1966, this Court in its judgment, reported as R.S. Jhamandas and others v. The Chief Land Commissioner, West Pakistan and others (PLD 1966 SC 229) referred to the "conscience of the Constitution". In the case, reported as Mr. Fazlul Quader Chowdhry and others v. Mr. Muhammad Abdul Haque (PLD 1963 SC 486) a reference was made that the Constitution contains a "Scheme" for distribution

of powers between the different organs and the authorities. It was also held as follows:

> "... The major duty upon all concerned including the President was to bring these fundamental provisions into operation. What has actually been done is that instead of implementing these basic provisions, they have been altered in a fundamental way so as to change the form of Government from the pure Presidential form to an anomalous Parliamentary form. It is quite impossible to regard the operation as one in aid of bringing the integral provisions of the Constitution into operation." (emphasis are supplied)

Both the aforesaid judgments perhaps allude to the concept that the Constitution may have a meaning though derived from the interpretation of its text but not necessarily stated in as many words.

30. In the celebrated judgment, reported as *Miss. Asma Jilani (supra)*, the concept of *grund norm* was introduced into our Jurisprudence by Hamood-ur-Rehman, CJ. (as he then was). The relevant extract of the judgment is reproduced herein below:

> "In any event, if a grund norm is necessary for us. I do not have to look to the Western legal theorists to discover one. Our own grund norm is enshrined in our own

> doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exerciseable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objective Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "cornerstone of Pakistan's legal edifice" and recognized even by the learned Attorney-General himself "as the bond which binds the nation" and as a document from which the Constitution of Pakistan "must draw its inspiration". This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or Civil. Indeed, it cannot be, for, it is one of the fundamental principles enshrined in the Holy Qur'an ... ." (emphasis are supplied)

Some Judges of the learned Lahore High Court, in a case, variously concluded that the Objectives Resolution was "to be a transcendental part of the Constitution" and "supra-Constitutional Instrument which is unalterable and immutable". Though the observations referred to above formed part of the minority view of the Court, Appeals were filed before this Court with the main object to have the law settled with regard to the

Constitutional position, as is mentioned in the judgment, passed in that said Appeal, reported as The State v. Zia-ur-Rehman and others (PLD 1973 SC 49). The observations in the judgment of *Miss. Asma Jilani (supra)* reproduced above, as interpreted by the learned Lahore High Court in terms mentioned above came under scrutiny along with several other fundamental Constitutional questions, though primarily with reference to the Objectives Resolution.

31. With regard to the conclusion drawn by the learned Lahore High Court from the observations made in the case, reported as *Zia-ur-Rahman (supra)* it was held as follows:

> "It will be observed that this does not say that the Objectives Resolution is the *grund norm*, but that the *grund norm* is the doctrine of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it. I did not describe the Objectives Resolution as "the cornerstone of Pakistan's legal edifice" but merely pointed out that one of the learned counsel appearing in the case had described it as such. It is not correct, therefore, to say that I had held it, as Justice Ataullah Sajjad has said in his judgment, "to be a transcendental part of the Constitution" or, as Justice

> Muhammad Afzal Zullah has said, to be a "*supra*-Constitutional Instrument which is unalterable and immutable". (emphasis are supplied)

In the same context, it was held as under:

> "Having said this much about the constitutional position of the Courts and their relationship with the other equally important organ of the State, namely; the Legislature. It is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether the judiciary can, in the exercise of its judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of Government they wish to be established. I for my part cannot conceive a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions *ultra vires* or void. This will be no part of its function of interpretation. Therefore, in my view, however solemn or sacrosanct a document, if it is not incorporated in the Constitution or does not form a part thereof it cannot control the Constitution. At any rate, the Courts created under the Constitution will not

> have the power to declare any provision of the constitution itself as being in violation of such a document. If in fact that document contains the expression of the will the vast majority of the people, then the remedy for correcting such a violation will lie with the people and not with the judiciary. It follows from this that under our own system too the Objectives Resolution of 1949, even though it is a document which has been generally accepted and has never been repealed or renounced, will not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it. If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof. …". (emphasis are supplied)

The afore-quoted observations echoed in the future Jurisprudence of Pakistan for a very long time.

In the same judgment, following observations were also made, which are as under:

> "… It cannot, therefore, be said that a Legislature, under a written Constitution, possesses the same powers of "omnipotence" as the British Parliament. Its powers have necessarily to be derived from, and to be circumscribed within, the four corners of the written Constitution."

32. It may be noticed that on the one hand, the concept of an all powerful, completely sovereign and omnipotent Parliaments akin to the British Parliament was rejected. It was also held that the Objectives Resolution *per se* was not a *supra*-Constitutional Document and, therefore, by necessary implication the provisions of a subsequent written Constitution could not be struck down on the ground that it was in conflict therewith. It was also observed that a touchstone for examining the validity or *vires* cannot be founded upon any amorphous concept of a higher law or outside the Constitution itself. However, though the observations with regard to the *grund norm* made in the case of *Miss. Asma Jilani's case (supra)* were clarified yet that some aspects of the Constitutional Law may be inalterable was not refuted.

33. The aforesaid view was reiterated in the case, reported as *Brig. (Retd) F.B. Ali' (supra)* in the following terms:

> "... the Courts cannot strike down a law on any such higher ethical

> notions nor can Court act on the basis of philosophical concepts of law as pointed out by me in the case of Asma Jillani".

The same view was followed in the judgment of this Court, reported as Federation of Pakistan through the Secretary, Ministry of Finance, Government of Pakistan, Islamabad, etc. v. United Sugar Mills Ltd., Karachi (PLD 1977 SC 397). In the said judgment, the insertion of sub-clause 4A in Article 199 of the Constitution was called into question. However, no specific challenge on the ground that the said amendment violated the Salient Features of the Constitution was made, as is categorically mentioned in the judgment itself.

34. In April, 1977, in view of the civil disturbances, Article 245(1) of the Constitution was invoked by the Federal Government and the Armed Forces were called in to restore order. The aforesaid action was called into question before the learned Lahore High Court. The Constitution Petitions, in this behalf, were decided through a judgment, reported as Darwesh M. Arbey, Advocate v. Federation of Pakistan through the Law Secretary

and 2 others (PLD 1980 Lahore 206). In the said judgment, it was observed 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.".

35. Apparently, the opinion expressed in the case of *Kesavananda Bharati (supra)* was adopted though no reference was made thereto. Time and events overtook the said judgment and Marshal Law was imposed by Gen. Muhammad Zia-ul-Haq on the 5th July, 1977, and the Constitution was suspended and held in abeyance. Thus, there was no occasion to challenge the said judgment. However, the aforesaid judgment could not withstand the scrutiny of this Court when examined in the judgment, reported as Fouji Foundation and another v. Shamimur Rehman (PLD 1983 SC 457) wherein it was held as follows:

> "202. Moreover the effect of the decision in Smt. Indira Nehru Gandhi's case was done away with by clauses 4 and 5 inserted in Article 368 by the Constitution (Forty-Second Amendment) Act, 1976, Clause (4) debars the Court of the jurisdiction to call in question any of the amendments

made in the Constitution. Clause (5) declares that there shall be no limitation whatsoever on the constituent power of the Parliament to amend any provision of the Constitution either by way of addition, variation or repeal. So what is now left is only a theory of basic structure or framework of the Constitution evolved by the Constitutional interpretation of the provisions having no legal compulsion as a Constitutional principle. Reliance was placed by the learned counsel for the respondent on Darvesh M. Arbey v. Federation of Pakistan PLD 1980 Lahore 206. Shamim Hussian Kadri, J. said: 'the Parliament is not sovereign to amend the Constitution according to its likes and dislikes muchless than changing the basic structure of the Constitution'. This opinion of the learned Judge is based on Kesavananda Bharati's case (AIR 1973 SC 1461) which again is subject to the same criticism as I ventured to highlight while reviewing Sint. Indira Nehru, Gandhi's case: It does not advance the case of the respondent any further as 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. The statement in my opinion, is too broadly stated as what the learned Judge refers to is a political question and a matter of policy for the Parliament. Such a question is also not justiciable."

In the said case, a challenge was thrown to a legislative measure on the ground of *mala fides.* This was the primary issue before the Court. The principle enunciated by the Supreme Court of India in the case, reported as *Indira Nehru Gandhi's case (supra)* was not followed for being inconsistent with the previous judgments of the same Court. However, in the subsequent judgments, the principle of implied restriction on the legislative power to amend the Constitution was repeatedly reiterated by the Supreme Court of India in its various judgments, some of which have been referred to hereinabove and the said doctrine is now firmly entrenched in the Indian Jurisprudence.

36. The imposition of Martial Law on the 5th July, 1977, and violation of the Constitution was challenged before this Court but unfortunately, the actions of Gen. Muhammad Zia-ul-Haq were validated in the judgment, reported as Begum Nusrat Bhuttoo v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657). By way of the aforesaid judgment, the Chief Martial Law

Administrator was also clothed with the Authority to amend the Constitution. In the above background, Presidential Order No.14 of 1985 was issued by Gen. Muhammad Zia-ul-Haq, purporting to make widespread changes in the Constitution. In the meanwhile, the elections were held on a non-party basis and the Parliament passed the 8th Amendment to the Constitution, incorporating most of the Amendments effected through the Presidential Order No.14 of 1985. The Constitution was revived vide Revival of the Constitution Order 1985. The most significant Amendments in the Constitution effected through the 8th Constitutional Amendment, included incorporation of Article 2A whereby the Objectives Resolution was made a substantive part of the Constitution and Article 58(2)(b) of the Constitution was also inserted empowering the President to dissolve the National Assembly.

37. At the point of time of the pronouncement with regard to the Objectives Resolution in *Zia-ur-Rehman's case (supra)* the same was not a substantive part of the

Constitution. After the insertion of Article 2A, an attempt was made to control and restrict the powers of the President under Article 45 of the Constitution to grant pardons to convicted prisoners. The contention raised was that exercise of such powers by the President offended against Article 2A of the Constitution. However, this Court repelled the contentions in its judgment, reported as Hakim Khan v. Government of Pakistan (PLD 1992 SC 395).

38. The question of the implied limitation on the power of the Parliament to amend the Constitution in the context of the 8th Constitutional Amendment and Article 58(2)(b) including with reference to Article 2A and the Objectives Resolution came up before this Court in the case, reported as Mahmood Khan Achakzai and others v. Federation of Pakistan and others (PLD 1997 SC 426), wherein the following Short Order was passed:

> "For reasons to be recorded later, we pass following short order.
>
> 2. 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 as Article 2A inserted by the Eighth Amendment.

3. The Objectives Resolution was Preamble of the Constitutions made and promulgated in our country in 1956, 1962 and 1973. Perusal of the Objectives Resolution shows that for scheme of governance the main features envisaged are Federalism and Parliamentary Form of Government blended with Islamic provisions. The Eighth Amendment was inserted in the Constitution in 1985, after which three elections were held on party-basis and the resultant Parliaments did not touch this Amendment, which demonstrates amply that this Amendment is ratified by implication and has come to say in the Constitution unless amended in the manner prescribed in the Constitution as contemplated under Article 239. Article 58(2)(b) brought in the Constitution by the Eighth Amendment, which maintains Parliamentary Form of Government has 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." (emphasis are supplied)

However, in the said judgment, Sajjad Ali Shah, CJ. (as he then was) made the following observations:

> "... We are going into tier question of validity of the Constitution (Eighth Amendment) Act, 1985, later but for the time being it would suffice to say that freedom, bestowed upon the parliament in clause, (6) of Article 239 after amendment 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 these 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." (emphasis are supplied)

It was further observed as follows:

> "The Objectives Resolution and the speech of Quaid-e-Azam quoted above clearly show that the Constitution was to be based on Islamic principles of democracy, equality, freedom, justice and fairplay. These were the guiding principles which were to be moulded in the form of Constitution. These were inter alia the basic features on which the Constitution was to be framed."

Saleem Akhtar, J. (as he then was) in his judgment signed by four other Judges, made the following observation:

> "34. It 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 has 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 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." (emphasis are supplied)

It was further observed by the learned Judge, as follows:

> 42. ... However there are factors which restrict the power of the Legislature to amend the Constitution. It is the moral or political sentiment, which binds the barriers of Legislature and forms the Constitutional understandings. The pressure of public opinion is another factor which restricts and resists the

unlimited power to amend the Constitution. In Pakistan although Article 239 confers unlimited power to the Legislature, yet it cannot by sheer force of morality and public opinion make and 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 can perish only with the Constitution. It seems to be an emerging legal theory that even if the Constitution is suspended or abrogated, the judiciary continues to hold its position to impart justice and protect the rights of the people which are violated and impinged by the actions of the powers and authorities which saddle themselves by unconstitutional means. As held in Asma Jillani's case, such actors are usurpers and the Courts had only condoned their action without approving it. The provisions of the Constitution cannot be suspended except as provided by the Constitution itself. The concept of abrogation of the Constitution is alien to the Constitution. The fact that whenever there occurred Constitutional deviation, it was legalised by condonation or validation granted by the Supreme Court, clearly demonstrates that such deviations and actions were void ab initio and unconstitutional. The validation or condonation was granted merely to avoid any disruption of civil and personal rights, to maintain continuity of administration and governance and to bring the polity and system

> of government on democratic and constitutional rails. But such situation, with reference to Article 6 of the Constitution has to be viewed with greater seriousness." (emphasis are supplied)

It was added that:

> "As observed earlier, there are some characteristic features in every Constitution which are embedded in the historical, religious and social background of the people for whom it is framed. It cannot be denied that every Constitution has prominent features, characteristics and picture-frame studded with public aspiration, historical inspiration, geographical recognition, political formulations and people's expectation. …". (emphasis are supplied)

The Hon'ble Judge also observed that:

> "43. It is a well-recognized principle of interpretation of Constitution that if two provisions conflict with each other the Courts should first resolve the same by reconciling them. But if reconciliation seems difficult, then such interpretation should be adopted which is more in consonance or nearer to the provisions of Constitution guaranteeing fundamental rights, independence of judiciary and democratic principles blended with Islamic provisions. Thus it is the lesser right which must yield in favour of higher rights. Reference may be made to Shahid Nabi Malik, v. Chief Election Commissioner PLD 1997 SC 32, Halsbury Laws of England, 4th

> Edition, Vol.44, page 532 and para. 872 and Corpus Juris Secundum, Vol. 16, page 97. Ajmal Mian, J, while explaining his observation in the case of Al-Jehad Trust PLD 1996 SC 324, relating to conflict between Article 209(7) and Article 203-C held that Article 209(7) carried higher right preserving the independence of judiciary and should prevail over Article 203-C which negated the same." (emphasis are supplied)

39. In the judgment authored by Sajjad Ali Shah, C.J. (as he then was) signed by one other Judge, it was stated in no uncertain terms that the Constitution has Salient Features (which were identified) and the power to amend the Constitution does not extend to alter substantively or destroy such Salient Features.

40. Saleem Akhtar, J. (as he then was) in his judgment, endorsed by the majority of the Court acknowledged that the Constitution has Salient Features and in substantial terms did not differ with the judgment authored by Sajjad Ali Shah, C.J. (as he then was) in this behalf. It was also stated that the Parliament is not as omnipotent, as the British Parliament and further that abrogation is a concept alien to the Constitution. The

limitation on the Legislature to amend the Salient Features was acknowledged however, only a pious hope was expressed that political sentiment, morality and the force of public opinion would restrain the Parliament from altering the same.

41. In the unanimous order of the Court, it was held that the question of "Basic Structure" is academic in nature. However, the Constitution does have Basic Salient Features, which can be gathered from the Objectives Resolution and the amendment in the Constitution on examination was found only to provide Checks and Balances in the Parliamentary Form of Government, a Salient Feature of the Constitution.

42. In July, 1997, by virtue of 14th Constitutional Amendment, Article 63A was inserted pertaining to disqualification of the Members of the Parliament on the ground of defection. The said Amendment was called into question before this Court, which was adjudicated upon vide judgment, reported as *Wukala Mahaz Barai Tahafaz Dastoor and another (supra)*. In the minority opinion of Mamoon Qazi, J. (as he then

was) the implied limitation on the powers of the Parliament were fully endorsed and the said Article i.e. Article 63A was held to be *ultra vires* the Constitution. The learned Judge made the following observations:

> "... But the power bestowed upon the Parliament by the Constitution does not include the power to destroy or abrogate the Constitution or to alter what has been referred to as its basic structure or essential features. ..." (emphasis are supplied)

It was added that:

> "... Therefore, it has to pass through the same test as an ordinary law. Only the amendments made by a Constituent Assembly can claim the status of Constitutional provisions and can claim immunity from such examination. Therefore, only an amendment that does not violate or destroy any essential feature of the Constitution or does not abrogate a fundamental right can acquire the status of a Constitutional provision. But until it acquires such status, it may be subjected to the same test as an ordinary amendment in the law. The power to make Constitution vests in the people alone. It is doubtful if the Parliament can make amendments in the Constitution if such amendments violate any essential feature in the Constitution or a fundamental right guaranteed by it. The provisions of clauses (5) and (6) in

> Article 239 are, therefore, to be read in harmony with the other provisions of the Constitution. ..."

43. However, in the majority judgments, a different view was taken. Ajmal Mian, C.J. (as he then was) observed as follows:

> "12. From the above case-law, it is evident that in Pakist which could have been treated as altering the basic feature/ structure of the Constitution. If the Parliament by a Constitutional Amendment makes Pakistan as a secular State, though Pakistan is founded as an Islamic Ideological State, can it be argued that this Court will have no power to examine the vires of such an amendment." (emphasis are supplied)

Saiduzzaman Siddique, J. (as he then was) observed as followed:

> "From the preceding discussion, it emerges that finally the Supreme Court both in India and Pakistan have taken the view that power to amend the Constitution vesting in the Parliament does not include power to repeal or abrogate the Constitution. ..." (emphasis are supplied)

44. Though it was held that under Article 239 of the Constitution, the Parliament exercises not just Legislative Powers but also Constituent Powers but it was observed that:

> "This, however, would not mean that the power to amend the Constitution vesting in the Parliament under Article 239 of the Constitution is unlimited and unbridled." (emphasis are supplied)

45. With regard to the dictum laid down in the case of *Wukala Mahaz (supra)*, the learned Judge observed as follows:

> "The short order which was signed by all the learned seven learned Judges of the Bench, shows that the question relating to basic structure of the Constitution was not answered authoritatively and finally as it was considered to be academic in nature but salient features of the Constitution reflected in Article 2A were pointed out as Federalism and Parliamentary form of Government blended with Islamic provisions."

In the aforesaid case, the order handed down by the Court is reproduced herein below:

> "By majority of 6 to 1 it is held that Article 63A of the Constitution is intra varies but by 4 to 2 subject to the following clarifications:
>
> > (i) That paragraph (a) to be read in conjunction with paragraphs (b) and (c) to Explanation to clause (1) of Article 63A of the Constitution. It must, therefore, follow as a corollary that a member of a House can be disqualified

> for a breach of party discipline in terms of the above paragraph (a) when the alleged breach relates to the matters covered by aforesaid paragraphs (b) and (c) to the above Explanation to clause (1) of the aforementioned Article and that the breach complained of occurred within the House.
>
> (ii) That the above paragraph (a) to Explanation to clause (1) of Article 63A is to be construed in such a way that it should preserve the right of freedom of speech of a member in the House subject to reasonable restrictions as are envisaged in Article 66 read with Article 19 of the Constitution.
>
> Whereas by minority view paragraph (a) in the Explanation to clause (1) of Article 63A and clause (6) in the said Article of the Constitution are violative of the fundamental rights and are to be treated as void and unenforceable."

46. In the majority judgment authored by Ajmal Mian, CJ. (as he then was) it was held, though in rhetorical terms that implied limitation exists in the Constitution regarding the power of the Parliament to amend the same and the Court has the jurisdiction to examine the *vires* of such amendments, if for example, the Parliament through a Constitutional Amendment was to make

Pakistan a secular State. Saeeduzzaman Siddiqui, J. (as he then was) while agreeing with the majority view observed that the power to amend the Constitution does not include the power to repeal or abrogate. The minority judgment authored by Mamoon Qazi, J. (as he then was) fully endorsed the inherit limitation on the Parliament to amend the Constitution so as to alter or destroy its Salient Features.

47. The amendment i.e. insertion of Article 63A was subjected to Judicial Review and examined by the Court, while the minority of the Judges found the said Article violative of the Salient Features of the Constitution, the majority on examination came to the conclusion that the said Article is *intra vires* the Constitution, subject to clarifications, as is evident from the Order of the Court in the said case.

48. The doctrine that the Constitution has Salient Features, which cannot be altered, abrogated or destroyed through an Amendment made by the Parliament and this Court is vested with the jurisdiction to examine the *vires* of such

Amendment on this account appears to have been endorsed in the Order of the Court.

49. It may also be pertinent to refer the observations made by this Court in the judgment, reported as Dr. M. Aslam Khaki etc. v. Syed Muhammad Hashim and others (PLD 2000 SC 225), which reads as follows:

> "... All its Articles have to be interpreted in a manner that its soul or spirit is given effect to by harmonizing various provisions. Again in The State v. Syed Qaim Ali Shah (1992 SCMR 2192) it was observed that the Courts while construing the provisions of statute should make efforts that the interpretation of the relevant provision of the statute should be in consonance with Article 2A of the Constitution and the grund norms of human rights."

50. History repeated itself on the 12th of October, 1999, and a duly elected Government was overthrown by Gen. Pervez Musharaf. Said action was yet again challenged before this Court but unfortunately, the Constitution Petition filed, in this behalf, was dismissed in the case, reported as Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869). Yet again the power to amend

the Constitution was given on this occasion to Gen. Pervez Musharaf but with rather interesting limitations, as is evident from the judgment, the relevant portion thereof is reproduced hereunder:

> "281. ... We are of the considered view that if the Parliament cannot alter the basic features of the Constitution, as held by this Court in Achakzai's case (supra), power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of 'State necessity'. We have stated in unambiguous terms in the Short Order 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 Provision cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down in the Short Order vide sub-paragraphs (i) to (vii) of paragraph 6." (emphasis are supplied)

The aforesaid is a clear declaration of law that the Basic Features of the Constitution i.e. Independence of Judiciary, Federalism and

Parliamentary Form of Government blended with the Islamic Provisions, cannot be altered, even by the Parliament.

51. After some years of dictatorship, the process of transition to democracy commenced. As usual again amendments were effected in the Constitution through Legal Framework Order (LFO) and followed by the 17th Constitutional Amendment passed by the newly elected Parliament. The said Amendments were called into question and the Constitution Petitions, in this behalf, were dismissed by this Court in the judgment, reported as Pakistan Lawyers Forum and others v. Federation of Pakistan and others (PLD 2005 SC 719). However, it was held in para 56 of this judgment, as follows:

> "56. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior Courts of this, country have consistently acknowledged that while there may be a basic

> structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, i.e., the people of Pakistan. In this context, it may be noted that while Sajjad Ali Shah, C.J. observed that "there is a basic structure of the Constitution which may not be amended by Parliament", he nowhere observes that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. The theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features." (emphasis are supplied)

The provisions of 17th Constitutional Amendment were scrutinized and found not to offend against any of the Salient Features.

The observation of the Hon'ble Judge in paras 38 to 40 of the Report are also very illuminating, the same are also reproduced hereunder for ease of reference:

> "38. The present Constitutional structure rests on the foundation of the 17th Amendment. Without it, the civilian rule may not have been possible. In similar

circumstances, while examining the validity of the 8th Amendment in Abdul Mujeeb Pirzada's case, Ajmal Mian, J. (as he then was), observed as follows:--

> "I may observe that the elections of 1988 on party basis were held on the basis of the amended Constitution, everyone has taken oath including the Judges to protect the Constitution as was in force on the day of taking of oath. The said oath was taken by everyone after the Martial Law was lifted and the Fundamental Rights were restored. Incidentally I may mention that I and all other sitting Judges of this Court, were appointed during the Martial Law and, therefore, the first oath, which we had taken on 1-1-1986 under the Constitution, was of the amended Constitution. If I were to declare certain amended provisions of the Constitution as violative of the Objectives Resolution or of the basic structure of the Constitution, it would disturb the basis on which the present structure of the democracy is grounded. It will be difficult to demarcate a line, where to stop. The present legal edifice is based on the amended Constitution. If we take out some amended provisions, the superstructure of democracy built on it may collapse. For example, under Article 41(3) read with Second Schedule to the Constitution electoral college for election of the President has been made more representative by P.O. No.14 of 1985 by providing that the Provincial

> Assemblies will also form part of the electoral college. If I were to hold the above amendment as illegal, it will affect the incumbent of the office of the President, which in turn will affect the incumbent of the office of the Prime Minister as the President had nominated the Prime Minister under amended Article 91(2). It is true that the Prime Minister had obtained a vote of confidence but the challenge to the National Assembly can be thrown on the grounds that its seats by direct and indirect election have been increased and the qualifying age for a voter has been raised from 18 years to 21 years, by P.O. No.14 of 1985, which deprived right of franchise to a sizeable number voters between the age of 18 to 21 years. A number of other incumbents of other offices and a number of other institutions, who are not before us, will also be affected. This will be an unending process. In my view, there is no manageable standard or the objective standard available with this Court to decide, which of the amendments should be stuck down and which of them should be retained. This is a highly sensitive and politicized controversy, which has unfortunately assumed great significance in view of polarized and charged political climate obtaining in the country."

39. General Elections have now been held here and 18 year olds have voted. This enlarged electorate has cast its votes for an expended Parliament and four

Provincial Assemblies. The elected members have taken oath of their respective offices. The Speakers and Deputy Speakers of the National Assembly and Provincial Assemblies have been elected. The Chairman and Deputy Chairman Senate have been elected. The Prime Minister and the four Chief Ministers have been elected. Governors have been appointed in the four provinces. The President has taken a Vote of Confidence as required by clause (8) of Article 41 of the Constitution. All these Constitutional functionaries have made oath under the Constitution and are occupying their respective offices. Appointments to civil services and armed forces have been made. Service Chiefs have been appointed. Judges and the Chief Justices of the superior Courts have been appointed and have taken oath under the Constitution.

40. The Government is functioning in accordance with the Constitution. If the petition is accepted and the 17th Amendment struck down, this entire Constitutional edifice will collapse. The President, the Prime Minister, the Governors, the Chief Ministers, the Parliamentarians, the Members of the Provincial Assemblies, 3 Services Chiefs and Judges of superior judiciary appointed by the President, all will cease to hold office at once. The Government of the country will cease to function and total anarchy will prevail. The Government under the Constitution will be undone and a vacuum will be created. This is not the function of the judiciary. In short, accepting the petitions

> and striking down the 17th Amendment would invite chaos and create a Constitutional crisis. This Court must allow the Government to function and the institutions to gain strength and mature with time. The alternative route leads straight to the political thicket and since the decision in Ziaur Rehman's case this Court has always avoided such a course. If the petitioners have a grievance, their remedy lies with the Parliament and failing that in the Court of the people and not with the Court." (emphasis are supplied)

In the aforesaid judgment, the existence of the Salient Features of the Constitution was not disputed. It was also accepted that there are implied limitations on the power of the Parliament to amend such Salient Features. However, it was opined that the enforcement of such limitation lay in realm of politics and not through the Court.

52. The entire judgment appears to be underpinned by the awkwardness of the point of time in history when the judgment was delivered. The exercise of jurisdiction in the opinion of the Court, would have resulted in the collapse of recently revived democratic system and lead to legal anarchy. The falling of the proverbial Heaven

was avoided but perhaps prudence trumped jurisprudence.

53. An examination and analysis of the law on the subject, as it developed and evolved through the judicial pronouncements of the Courts reveal that it has been settled conclusively that the Constitution has Salient Features. It is not too difficult to trace the crystallization of this concept in our Jurisprudence emerging initially as a reference to the "scheme" of the Constitution with its "Fundamental" and "Integral Features" in Fazlul Quader*'s case (supra)*. The concept of *grund norm* was introduced into our Constitutional Jurisprudence through *Zia-ur-Rehman's case (supra)*. In *Mahmood Khan Achakzai's case* (*supra*) though it was held that an academic exercise would be required to identify the basic structure of the Constitution and to gauge its amplitude yet it was held that the Constitution has "prominent Characteristics" which were enumerated therein. It was also held that the Constitution has Salient Features. In the majority judgment, it was observed that some Salient Features were embodied in the

Constitution. The existence of a basic structure with its Salient Features was acknowledged in both the majority and minority views in *Wukala Mahaz case (supra)*. In the *Pakistan Lawyers Forum's case (supra)* the existence of a basic structure consisting of Salient Features of the Constitution was acknowledged and enforced.

54. In view of the aforesaid, it is clear and obvious in our Jurisprudence as it has evolved through the pronouncements of the Courts, it has been firmly established and acknowledged that the Constitution is not a bunch of random provisions cobbled together but there is an inherent integrity and scheme to the Constitution evidenced by certain fundamental provisions, which are its Salient and Defining Features.

55. This aspect of the matter was not even seriously disputed by the learned Senior Counsel appearing on behalf of the Federal Government, who had no cavil with the assertion of the Petitioners that the Constitution has Salient Features but contended that the same were only descriptive.

56. During the course of our journey through the various judicial pronouncements of our Courts to discover the Salient Features of the Constitution, a constant reference to the Objectives Resolution was noticed. The said Resolution was adopted by the First Constituent Assembly in March, 1949, but not without controversy. A lot of misgivings were expressed by some of the Members, especially those from the minorities, as is obvious from the Parliamentary Debates. Concerns were voiced that some of the declarations therein were couched in general terms susceptible to a wide variety of subjective interpretations which may lead to unexpected and unacceptable results. Sensitivity to such concerns was expressed by the majority party, as is obvious from the said Debates. The Objectives Resolution was a milestone or even a signboard on the long road to the Constitution-making but it was not the destination which as it turned out was the Constitution of the Islamic Republic of Pakistan, 1973, whereby the declarations of guiding aspirations of the Constitution-making were eventually actualized.

57. Initially, the Objectives Resolution in substance was incorporated as a preamble to the Constitution. At that stage of our Constitutional history a notion was canvassed that the Objectives Resolution was "supra-Constitutional" or "transcendental part of the Constitution". This argument was rejected by this Court in *Zia-ur-Rehman's case (supra)*. The relevant part of the judgment has been reproduced hereinabove.

58. After the insertion of Article 2A of the Constitution whereby Objectives Resolution was made a substantive part of the Constitution, it again became subject matter of a *lis* before this Court in *Hakim Khan's case (supra)* wherein it was held that the Objectives Resolution is a part of the Constitution, which must be read as a whole to determine the true meaning and import of any particular provision (including Article 2A of the Constitution) and every effort must be made to harmonize the various provisions. The principle of interpretation, as stated above, is in accordance with the settled law. In the Construction of

Statutes by Earl T. Crawford, it is observed as follows:

> "**Statutes as a Whole:-** Inasmuch as the language of a statute constitutes the depository or reservoir of the legislative intent, in order to ascertain or discover that intent, the statute must be considered as a whole, just as it is necessary to consider a sentence in its entirety in order to grasp its true meaning."

In *Al-Jehad Trust's case (supra)*, it was observed as under:

> "The Constitution is to be read as a whole as an organic document."

In Fazal Dad v. Col. (Retd) Ghulam Muhammad Malik and others (PLD 2007 SC 571), it was held as under:

> "... It is a settled law that provisions of law must be read as a whole in order to determine its true, nature, import and scope as law laid down by this Court in Mian Muhammad Nawaz Sharif's case PLD 1993 SC 473. ..."

In the case of Kamaluddin Qureshi, etc. v. Ali International Co., etc. (PLD 2009 SC 367), it was observed as follows:

> "10. While interpreting the statutes an interpretation leading to conflicting judgments is to be

> avoided as held in Hafiz Abdul Waheed v. Mrs. Asma Jehangir and another PLD 2004 SC 219. The intention of the law maker is always gathered by reading the statutes as a whole and meanings are given to each and every word of the whole statute by adopting a harmonious construction. In this regard, the principles for interpretation have been settled by this Court in the cases of Messrs Mehboob Industries Ltd. v. Pakistan Industrial Credit and Investment Corporation Ltd. 1988 CLC 866, Shahid Nabi Malik and another v. Chief Election Commissioner and 7 others PLD 1997 SC 32, M. Aslam Khaki v. Muhammad Hashim PLD 2000 SC 225, Mysore Minerals Limited v. Commissioner of Income Tax 2000 PTD 1486, Hafeezullah v. Abdul Latif PLD 2002 Kar. 457, Hafiz Abdul Waheed v. Mrs. Asma Jehangir PLD 2004 SC 219, Zafar Ali Khan and another v. Government of N.W.F.-P through Chief Secretary and others PLD 2004 Peshawar 263, D. G. Khan Cement Company Limited and others v. Federation of Pakistan and others 2004 SCMR 456, Muhammad Abbas Gujjar v. District Returning Officer/ District Judge Sheikhupura and 2 others 2004 CLC 1559 and Shoukat Baig v. Shahid Jamil PLD 2005 SC 530."
>
> (emphasis are supplied)

In the case "Regarding Pensionary Benefits of the Judges of Superior Courts from the date of their Respective Retirements, Irrespective of their

Length of Service as such Judges" (PLD 2013 SC 829), it was held as under:

> "a. That the entire Constitution has to be read as an integrated whole.
>
> b. No one particular provision should be so construed as to destroying the other, but each sustaining the other provision. This is the rule of harmony, rule of completeness and exhaustiveness."

In the case of Reference by the President of Pakistan under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 (PLD 2013 SC 279), it was held as under:

> "33. The Constitution, being a living organ for all times is to be interpreted dynamically, as a whole, to give harmonious meaning to every Article of the Constitution."

In the cases of (1) Reference by the President of Pakistan under Article 162 of the Constitution of the Islamic Republic of Pakistan (PLD 1957 SC 219), (2) Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 SC 779), (3) Mumtaz Hussain and Dr. Nasir Khan and others (2010 SCMR 1254) *Mahmood Khan*

Achakzai's case (supra) and *Wukala Mahaz case (supra)* a similar view has been taken. In this behalf, reference may also be made to the judgment of this Court, reported as Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 308 and PLD 2011 SC 407), the relevant para of the judgment is reproduced hereunder:

> "22. The rationale for this rule is also universal and transcends the divide between the various prevalent systems of law. Thus it is that we have common law constitutionalists such as Laurence Tribe and Michael Dorf warning us against "approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole that it is a Constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories that must be interpreted. "(Tribe, Lawrence H.; Dorf, Micheal C., "Chapter 1: how not to read the Constitution" on reading the Constitution, Harvard University Press, Cambridge, 1991). This very same logic also informs the comment of a scholar like Dr. Conrad from the European Civil Law tradition, who reminds judges and lawyers "that there is nothing like safe explicit words isolated from a general background of understanding and language. This is particularly so in the interpretation of organic instruments like a Constitution

> where every provision has to be related to the systemic plan, because every grant and every power conferred is but a contribution to the functioning of an integrated machinery... it will not do to discuss such concepts as [mere] 'political theory' irrelevant to textual construction". ("Limitation of Amendment Procedures and the Constituent Power;" the Indian Yearbook of International Affairs, 1967. P.375)"

59. The controversy was finally laid to rest by a judgment of a fourteen Member's Bench of this Court, reported as Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another (PLD 2010 SC 483), wherein it was held as follows:

> "48. ... The Objectives Resolution remained a subject of discussion in various judgments and the judicial consensus seems to be that "while interpreting the Constitution, the Objectives Resolution must be present to the mind of the Judge and where the language of the Constitutional provision permits exercise of choice, the Court must choose that interpretation which is guided by the principles embodied therein. But that does not mean, that Objectives Resolution is to be given a status higher than that of other provisions and used to defeat such provisions. One provision of the Constitution cannot be

> struck down on the basis of another provision. The Objectives Resolution made substantive part of the Constitution provides a new approach to the constitutional interpretation since the principles and provisions of the Objectives Resolution have been placed in the body of the Constitution and have now to be read alongwith the other provisions of the Constitution." (emphasis are supplied)

In view of the aforesaid judgments, it is clear that the harmonious and wholistic interpretation of the Constitution is necessary even for discarding its Salient Features.

60. An overview of the judgments reproduced or cited herein above, more particularly, *Mahmood Khan Achakzai's case (supra)*, *Wukala Mahaz case (supra)*, *Zafar Ali Shah's case (supra)* and *Pakistan Lawyers Forum's case (supra)*, reveal that this Court has referred to the Prominent Characteristics, which define the Constitution and are its Salient Features. Some of such Characteristics mentioned in the aforesaid judgments, including Democracy, Federalism, Parliamentary Form of Government blended with the Islamic Provisions, Independence of Judiciary,

Fundamental Rights, Equality, Justice and Fair Play.

61. It may not be necessary to conclusively determine the Salient Features of the Constitution, however, Democracy, Parliamentary Form of Government and Independence of Judiciary are certainly included in the Prominent Characteristics, forming the Salient Features, which are primarily relevant for the adjudication of the *lis* at hand.

62. The power of the Parliament to amend the Constitution is embodied in Articles 238 and 239 of the Constitution. A bare perusal of the aforesaid provisions reveals the presence of some explicit limitations on such powers. The number of Members required and the mandatory procedure to be followed, in this behalf, obviously imposes restrictions. Similarly, additional requirements with regard to altering the boundaries of a Province have also been mentioned, which too impose explicit restrictions. However, it is the case of the Petitioners that in addition to the above there are implied restrictions on the powers of the

Parliament to amend the Constitution so as not to substantively alter, repeal or abrogate the Salient Features of the Constitution. It is the said question, which needs to be dealt with.

63. The Parliament in Pakistan unlike the British Parliament is not completely sovereign. A contrary view was canvassed before this Court but was resoundly repelled in *Zia-ur-Rehman's case (supra)* by holding in no uncertain terms that the Legislature does not possess the powers of omnipotence, as did the British Parliament. The Parliament too is a creature of the Constitution and has only such powers as may be conferred upon it by the said Instrument. Such view has been consistently reiterated by this Court including the judgments mentioned above. A contrary view has never been expressed.

64. Before proceeding further it may be necessary to contexturise and analyze two basic judgments of this Court, which are the mainstay of the case, as presented by the Respondents i.e. *Zia-ur-Rehman's case (supra)* and *Hakim Khan's case (supra)*.

65. As it has been mentioned hereinabove, in a minority judgment, the learned Lahore High Court by relying upon the observations made in the judgment of this Court in the case of *Miss. Asma Jilani's (supra)* with regard to *grund norm* and the Objectives Resolution concluded that the Objectives Resolution was a transcendental part of the Constitution and supra-Constitutional. Upon challenge, the observations made in *Miss. Asma Jilani's case (supra)* were clarified by the author Judge himself and in the context of the status of Objectives Resolution, which had since become the preamble of the Constitution, it was observed that in the presence of the formal written Constitution, no document other than the Constitution can be given a similar or higher status on the basis whereof the provisions of the Constitution may be struck down by the Court. It is the said statement of law, which has been reiterated by this Court in *Brig. (Retd) F.B. Ali's case (supra)*, wherein it is held that some higher ethical notions on a philosophical concept of law cannot be the touchstone for determining the validity or *vires* of a law. Similar

views were echoed in *Wali Muhammad Khan's case (supra)*, *United Sugar Mill's case (supra)* and *Fouji Foundation's case (supra)*. In *Zia-ur-Rehman's case (supra)*, the question of implied limitation on the power of the Parliament to amend the Constitution was not directly in issue. Primarily the judgment related to the status of Objectives Resolution.

66. The Objectives Resolution was made a substantive part of the Constitution by incorporation of Article 2A in the Constitution through an Amendment. In *Hakim Khan's case (supra)* the validity of such Amendment was not challenged. The matter before the Court was the effect of such Amendment upon the pre-existing provisions of the Constitution, including Article 45 and it was held that the Constitution must be interpreted as a whole.

67. However, what can be safely derived from the aforesaid two judgments in respect of the *lis* at hand is that for deterring the Salient Features of the Constitution which, as canvassed by the Petitioners, limit the power of the Parliament to amend the Constitution, we cannot and should not

look outside the Constitution to abstract, political, philosophical, moral and ethical theories. No doubt, the debates preceding the enactment of a legislative instrument may be referred to in order to discover the intent of the Legislature where the words of the enactment are not open to a plain meaning. However, entering the realm of polemics should be avoided.

68. In the backdrop of the observations made in *Zia-ur-Rehman's case (supra), Hakim Khan's case (supra)* and the validity and *vires* of the Constitutional Amendments were repeatedly called into question before the learned High Courts as well as this Court. In the meanwhile, the "Basic Structure" theory had been adopted and enunciated by the Supreme Court of India and challenges were thrown at the Constitutional Amendments in Pakistan, primarily on the basis of such judgments from across our Eastern boarders. The "Basic Structure" theory as patented in India did not find too many admirers especially in view of its initial lack of clarity as was evident from the difference of opinions of several Judges in the same

judgment. There was an obvious difference in the text of the relevant provisions of the two Constitutions. In respect of some of the jurisprudential principles, which formed the building blocks of the 'Basic Structure" theory, the view of the Superior Courts of the two Countries was not congruent. In Pakistan, much emphasis was placed on Article 2A, which for obvious reasons had its difficulties which have been dealt with hereinabove. The judgments of the Supreme Court of India were subjected to a rather harsh criticism by the Respondents. It is not necessary to comment thereupon as we are not sitting in Appeal over the said judgments. Be that as it may, existence of implied restrictions on the power of the Parliament to amend the Constitution was canvassed before this Court and was dealt with by interpreting the Constitution as a whole.

69. In *Mahmood Khan Achakzai's case (supra)*, relevant portions whereof have been reproduced herein above, Sajjad Ali Shah, J. (as he then was) in no uncertain terms held that the Parliament in terms of Article 239 is not vested

with the powers to amend the Constitution so as to substantively alter, repeal or abrogate its Salient Features. Salim Akhtar, J. (as he then was) in the same judgment, which is perhaps the real majority view after referring to the limitation to the power of Judicial Review of the Constitutional provisions so as to determine their *vires* conceded that there are implied limitations on the power of the Parliament to amend the Constitution by holding that the Parliament cannot convert the Democratic Form of Government into a completely Undemocratic Form of Government nor can the Parliament amend the Constitution so as to abolish the Courts, etc. However, it was held that such restrictions belong to the political realm to be enforced by the force of public opinion and morality. However, the Constitutional Amendment in question was scrutinized and found not to offend against the Salient Features. In the *Wukala Mahaz case (supra)* in the minority judgment Mamoon Qazi, J. (as he then was) categorically held that the Constitution cannot be amended so as to destroy or abrogate its Salient Features and in his opinion certain

provisions of the Amendment under challenge were in fact *ultra vires* the Constitution. In the majority judgments, though it was held that the Parliament under Article 239 is vested with Constituent powers yet it was clarified by Saeeduzzaman Siddiqui, J. (as he then was) that the power to amend the Constitution is not unlimited and unbridled. Such limitations were even acknowledged by Ajmal Mian, J(as he then was) in his judgment though in rhetorical terms In the aforesaid case, in the Order of the Court without any reservation the power of Judicial Review was exercised and by majority it was held that Article 63A inserted through Amendment was *intra vires* the Constitution, subject to clarifications. Thus, in the said case, this Court unanimously, in the ultimate analysis, as is reflected in the Order of the Court conclusively held that the powers of the Parliament to amend the Constitution are not unlimited and the Judicial Review was exercised without any caveat to examine whether the Constitutional Amendments impugned substantively altered, repealed or abrogated any of

the prominent Characteristics or Salient Features thereof. In *Zafar Ali Shah's case (Supra)*, it was declared in no uncertain terms that Parliament is not vested with the powers to amend the Constitution so as to alter the Salient Features thereof. In *Pakistan Lawyers Forum's case (supra)* after reviewing the case law on the subject the clear cut view of this Court unanimously taken in *Wukala Mahaz case (supra)* and Zafar Ali Shah *(Supra)* was watered down. Though the general principle that there are implied restrictions on the Parliament to amend the Constitution so as to substantively alter, repeal or abrogate the Salient Features of the Constitution was accepted and the observations in this behalf of Sajjad Ali Shah, J. (as he then was) referred to and not refuted though it was held that such limitations involved belong in the political realm and the Court should not exercise its jurisdiction in this behalf. However, the provisions of the challenged amendment were examined and found not to offend against the Salient Features of the Constitution.

70. At this juncture, it may be appropriate to contextualize the aforesaid judgment in terms of the contemporaneous ground realities mentioned in the judgment itself especially in paragraphs 38 to 40 reproduced hereinabove. The Country after Martial Law was slowly limping back to civil rule with the Military Dictator surrendering some powers to the civilian setup while retaining some critical powers as the Head of the State while still in uniform. To give effect to this new scheme of things, the Constitution was amended through an Executive Order, which the newly elected Parliament substantially endorsed through the Amendment in question. It was observed that the country was being governed under the newly amended Constitution where under the Army Chiefs as well as the Judges of the Supreme Court had been appointed and taken oath and striking down such Amendment would result in political and legal anarchy, which may force the country back into the abyss of a dictatorship. We are left wondering as to how much of the law laid down in

the said judgment is plain prudence as opposed to jurisprudence.

71. Be that as it may, from an overview of the aforesaid judgments, it is clear and obvious that therein it has been held both in the minority and majority opinions that there are implied restrictions upon the Parliament to amend the Constitution so as to substantively alter, repeal or abrogate its Salient Features. It is a settled law that the Short Order/Order of the Court is in fact the Judgment of the Court and is valid even in the absence of supporting reasons [The State v. Asif Adil and others (1997 SCMR 209), Accountant General Sindh and others v. Ahmed Ali U. Qureshi (PLD 2008 SC 522) and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan and others (PLD 2010 SC 61)]. In the cases of *Mahmood Khan Achakzai (supra), Wukala Mahaz (supra)* and *Pakistan Lawyers Forum's (supra)* in the Order of the Court specific findings were recorded in respect of *vires* and validity of the Constitutional Amendment questioned therein including with regard to its conformity or otherwise

with the Salient Features of the Constitution. Thus in fact the power of Judicial Review was exercised by this Court. However, a view also emerged that perhaps the Court should not enter into this controversy as it may involve a political question. Needless to say despite a lot of reluctance and hesitation in each and every one of the aforesaid cases in fact the Amendments in question were examined and the power of Judicial Review was exercised and thereafter held that the Amendments did not substantially alter the Salient Features of the Constitution.

72. In the circumstances, the contentions of the learned counsel for the Respondents as well as the learned Attorney General for Pakistan that there are no implied limitations on the Parliament to amend the Constitution in our Jurisprudence, as evidenced by the judicial pronouncements of this Court is wholly unfounded.

73. The reliance upon Article 239, in this behalf, to set up a contrary view is misconceived. In the aforementioned judgment, such limitations have been examined in the context of Article 239.

Reference thereto has been specially made, that too in the context of the purported expanse of the power to amend the Constitution in Article 239 and its protection from challenge. Be that as it may, Amendment is a term derived from the Latin word "*emendere*", which means to correct or improve. In Corpus Juris Secundum, A complete Restatement of the Entire American Law, Volume 3A "Amendment" is defined as follows:

> "In general use, the word "amendment" has different meanings which are determined by the connection in which it is employed.
>
> The term necessarily connotes a charge of some kind, ordinarily for the better, but always a change or alteration, and indicates a change or correction of the thing sought to be amended. By very definition, it connotes alteration, improvement, or correction.
>
> It is generally recognized that the word implies something upon which the correction, alteration, improvement, or reformation can operate, something to be reformed, corrected, rectified, altered or improved.
>
> The word "amendment" is defined as meaning a change of something; an alteration or change; a change or alteration for

> the better; a continuance in a changed form; an amelioration of the thing without involving the idea of any change in substance or essence; a correction of detail; not altering the essential form or nature of the matters amended; nor resulting in complete destruction, abandonment, or elimination, of the original."

In P Ramanatha Aiyar's Concise Law Dictionary with Legal Maxims, Latin Terms, and Words & Phrases, Fourth Edition 2012 – LexisNexis, Butterworths Wadhwa – Nagpur, it is explained as follows:

> "**Amendment.**
> .....
>
> *In legislation :* A modification or alteration to be made in a bill on its passage or in an enacted law; modification or change in an existing act or statute."

In Black's Law Dictionary, Ninth Edition, it is defined, as follows:

> "**amendment.** (17c) **1**. A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or correction; esp., an alteration in wording. [Cases: Constitutional Law – 515-527; Federation Civil Procedure – 821; Pleading – 229; Statutes – 131.] **2**. The process of making such a revision."

In the judgment of this Court, reported as Abdul Muktadar and another v. District and Sessions Judge, Jhang and 2 others (2010 SCMR 194) in respect of the word "amendment", it was observed as follows:

> "... Let we make it clear at the outset that "amendment" means addition, deletion, insertion or substitution. ..."

In view of the aforesaid, the expression amendment is susceptible to an interpretation that it means to correct and improve but does not extend to destroy or abrogate. No doubt, the expression amendment may also have a wider connotation but with reference to the context in which it has been employed in the presence of implied limitations on the Parliament to amend the Constitution, therefore, the term "Amendment" as used in Articles 238 and 239 has a restricted meaning. Therefore as long as the Amendment has the effect of correcting or improving the Constitution and not of repealing or abrogating the Constitution or any of its Salient Feature or substantively altering the same, it cannot be called into question.

74. Reservations as expressed regarding the exercise of Judicial Review in respect of Constitutional Amendments are based on the notion that such an exercise involves a political question must now be examined. In Ballentines Law Dictionary "political question" has been defined as follows:

> "A question, the determination of which is a prerogative of the legislative or executive branch of the Government, so as not be appreciate for judicial inquiry or adjudication."

In Corpus Juris Secundum, Vol. 16, it has been stated that:

> "It is not easy to define the phrase 'political question', nor to determine what matters fall within its scope. It is frequently used to designate all questions that lie outside the scope of the judicial power. More properly, however, it means those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or to regard to which full discretionary, authority has been delegated to the legislative or executive branch of the Government. A political question encompasses more than a question *about* politics, but the mere fact that litigation seeks protection of a political right or might have political consequences

> does not mean it presents a political question."

It was further observed :-

> "The doctrine is based on Constitutional provisions relating to the distribution of powers among the branches of Government, and it is as a function of the separation of powers that political questions are, not determinable by the judiciary. Thus, the limitations on judicial review imposed by the political question doctrine apply only when the Court is faced with a challenge to action by a coordinate branch of the Government, and not where the issue involved falls within the traditional role accorded to Courts to interpret the law or the Constitution."

This Court in the case, reported as Federation of Pakistan and others v. Haji Muhammad Saifullah Khan and others (PLD 1989 SC 166), observed as follows:

> "The circumstance that the impugned action has political overtone cannot prevent the Court from interfering therewith, if it is shown that the action taken is violative of the Constitution. The superior Court have an inherent duty, together with the appurtenant power in any case coming before them, to ascertain and enforce the provisions of the Constitution and as this duty is derivable from the express provisions of the Constitution itself the Court will not be

> deterred from performing its Constitutional duty, merely because the action impugned has political implications. …"

In the case of Watan Party and others v. Federation of Pakistan and others (PLD 2012 SC 292), it was held as follows:

> "7. We are cognizant that there may be situations where the Government may want to justify non-disclosure of information on a matter of public importance. That plea, however, does not arise and nor has it been taken in these cases. It is, therefore, not necessary to comment on the same as a mere speculative exercise. Learned ASC for Mr. Haqqani contended that these petitions raise a political question and the Court should, therefore, avoid deciding the same. This argument has been adequately discussed in the reasoning of Hon'ble the Chief Justice. I would only add that the conduct of a government's foreign policy is indeed, by and large, a political question. But the fact is that the present petitions do not require us to devise the country's foreign policy or to direct the government in that regard. These petitions only seek to enforce the People's right to know the truth about what their government, and its functionaries, are up to. And that is by no means, a political question. It is a fully jusiticiable fundamental right enumerated in Chapter II, of the Constitution no less. We need not look any further than Article 19A, for this

conclusion."

In the case reported as State of Rajasthan and others v. Union of India (AIR 1977 SC 1361), it was held as under:

> "... Of course, it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. ..." (emphasis are supplied)

In the case, reported as Muhammad Nawaz Sharif v. Federation of Pakistan (PLD 1993 SC 433), this Court held as follows:

> "... It is not easy to draw line of demarcation between political and non political questions. This has to be determined by the Court on the facts of each case. The Courts' function is to enforce, preserve, protect and defend the Constitution. Any action taken, act done or policy framed which

> violates the provisions of the Constitution or is not permissible under the Constitution or law, the Court irrespective of the fact that it is a political question, must exercise power of judicial review. The abuse, excess or non-observance of the provision; of the Constitution has to be checked by the Courts unless its jurisdiction is barred by the Constitution or law." (emphasis are supplied)

After considering the aforesaid judgments, this Court in the judgment, reported as Ishaq Khan Khakwani and others v. Mian Muhammad Nawaz Sharif and others (PLD 2015 SC 275), held follows:

> "Thus the consistent view of the Courts has been that if the determination of any question raised before the Court requires interpretation or application of any provision of the Constitution the Court is obliged to adjudicate upon the same notwithstanding that the action impugned or the questions raised has political overtones. ..." (emphasis are supplied)

75. The doctrine of "Political Question" is based on the trichutomy of powers, as integrated into the provisions of the Constitution. A matter pertaining to the Judicial Power of Interpreting the Constitution, identifying the limits of the Executive and the Legislature thereunder and enforcing such

limits is the sole and exclusive jurisdiction of the Courts. While exercising such powers, the Court will not abdicate its jurisdiction merely because the issue raised, has a political complexion or political implication. Once the authority of the Legislature has been delineated through interpretation, how such authority is exercised and what policies are to be framed and enacted through the legislation is the prerogative of the Legislature and as long as such legislative action is consistent with the provisions of the Constitution the Court will not interfere and this would involve a "Political Question". It cannot be disputed that this Court has the jurisdiction to interpret the Constitution, identify its Salient Features and examine if there are implied restrictions on the amendatory powers of the Legislature *qua* the Constitution and to ensure as the Guardian of the Constitution that the Legislature remains within such limits as can be gathered from the Constitution. Therefore, there can be no occasion to decline to undertake such an exercise.

76. In view of the aforesaid, it is clear and obvious that this Court is vested with the jurisdiction to scrutinize the Amendments made by the Parliament in the Constitution in order to determine whether the implied limitations upon such amendatory powers have been transgressed. We do so as "The Constitution contains a scheme for the distribution of powers between various organs and authorities of the State, and to the superior judiciary is allotted the very responsible though delicate duty of containing all other authorities within their jurisdiction, by investing the former with powers to intervene whenever any person exceeds his lawful authority." ... "... The Judges of the High Court and of this Court are under a solemn oath to "preserve, protect and defend the Constitution" and in the performance of this onerous duty they may be constrained to pass upon the actions of other authorities of the State within the limits set down in the Constitution, not because they arrogate to themselves any claim of infallibility but because the Constitution itself charges them with this necessary function, in the

interests of collective security and stability.". (Fazlul Quader Chowdhry v. Shah Nawaz (PLD 1996 SC 105).

77. States evolve through times and are the product of history with its inhabitants subjected to diverse historical experiences. All people politically organized within a State, at some point of time in their history are confronted with elemental questions regarding the internal Organization of the State and the Social Contract between the citizens and the State. In countries with longstanding political continuity, such decisions are made through an evolutionary process punctuated with watershed historic events. Where continuity is interrupted or disrupted by foreign occupation and colonization, the people are subjugated and thereby deprived of the power and the responsibility to express and enforce their rights in this behalf. Upon the demise of colonial rule when a new State emerges, its people are confronted with a task of formulating a Charter incorporating the Social Contract between the Citizens and the State and determining and

identifying the basic norms for the organization of the State through the framing of a Constitution. In compact countries with ethnically, culturally, religiously and historically homogeneous population, this task may not be too difficult. However, countries with ethnic, linguistic, cultural, religious sectarian and historical diversity, the task of Constitution making can be much more arduous but desperately urgent. The price of neglect indecision or incorrect and insensitive decisions without the requisite consent of the people is paid in blood by the future generations and some time even by the State itself.

78. The First Constituent Assembly of Pakistan, after the death of the Father of the Nation, proved unequal to the task of Constitution making. It did not act with due dispatch and diligence and merely perpetuated its own existence. Time does not stand still. Ground realities changed resulting in serious erosion of the confidence of the people in the Constituent Assembly. The mere passing of the Objectives Resolution in the absence of an actual formal

Constitution acceptable to the people did not fill the political vacuum. The feeble attempt of framing the Constitution in 1956 was of no avail. Consequently, Pakistan a State, which was a culmination of a lengthy democratic struggle, was plunged into a military dictatorship followed by a forced arrangement dictated by an Individual (Constitution of 1962) with at best a controlled, if not perverted democracy. Historically established Provinces were done away with and powers of decision making concentrated at the Centre leaving the people with no sense of participation or ownership in the State and its Institutions. This was followed by another military dictatorship, whereby a situation was created which led to the dismemberment of the State with its attending blood-letting in 1971.

79. It is in the shadow of the aforesaid tragic and traumatic events that the chosen representatives of the people gathered together to frame a Constitution. All the unresolved issues which had poisoned the body politic of the Country were confronted and solutions found through

negotiations and consensus. Competing interests and political views were synthesized eventually culminating in the framing of the Constitution of the Islamic Republic of Pakistan, 1973.

80. In the Treatise on Constitutional Limitations, Cooley, defines the Constitution as "the Fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be conferred, and the manner in which it is to be exercised." The Constitution in essence is a social contract amongst the people to politically organize themselves into a State identifying the relationship between the Citizens and the State and the rights retained by the people and guaranteed unto them. It creates and identifies the State Institutions upon which the State sovereignty is distributed and the mode and limitation for the exercise thereof.

81. At the time of enactment of a Constitution, the framers thereof have to answer some fundamental questions relating to the State, its Government and the Institutions. The status

and the rights of its citizens. It needs to be determined whether the country will be a democracy or a dictatorship, whether it will have a Presidential or a Parliamentary Form of Government, and whether it will be a Federation or be a Unitary State. The question of Sovereignty needs to be addressed as well as how such sovereign powers are to be distributed among its fundamental Institutions i.e. the Legislature, the Executive and the Judiciary along with their *inter se* relationship and the extent and manner in which such powers are to be exercised. In Democratic States sovereignty vests in the people and the Institutions are delegates thereof through and in terms of the Constitution which also identifies conditions and limitations of such delegations and the powers retained by the people in the form of rights which are guaranteed and protracted. The answers to the aforesaid questions as reflected in the Constitution and are its prominent Characteristics and Salient Features. All the aforesaid questions are answered in the

Constitution of the Islamic Republic of Pakistan, 1973.

82. A bird's eye view of the Constitution reveals that it is self evident that the Pakistan is a Democracy with the ultimate sovereignty vesting in Almighty Allah and delegated to the people of Pakistan (and not to any individual or group of persons who may seize power by force of arms). It has a Parliamentary Form of Government. The Fundamental Rights are guaranteed to all Citizens, including minorities. There is a Trichotomy of Power with a judiciary with its independence fully secured. Rule of Law, Equality and Social & Economic Justice are embodied in no uncertain terms. The aforesaid are the prominent Characteristics which defines our Constitution.

83. Reference in this behalf may be made to the Statement of Objects and Reasons to the 18th Constitutional Amendment itself, wherein it is stated that:

> "3. The people of Pakistan have relentlessly struggled for democracy and for attaining the ideals of a Federal, Islamic, democratic, parliamentary and

> modem progressive welfare State wherein the rights of citizens are secured, and the Provinces have equitable share in the Federation."

84. If democracy is replaced by dictatorship, Fundamental Rights of the people are suppressed or destroyed, Federalism is replaced by a Unitary Form of Government and Independence of Judiciary is compromised to an extent that it is no longer in a position to exercise its jurisdiction to protect the Fundamental Rights of the people, can it be said that the Country is being run and governed under the Constitution of the Islamic Republic of Pakistan, 1973? This is not a hypothetical question as even after the framing of the 1973 Constitution, it has happened on more than one occasion, including on 5th of July 1977, and the 12th of October, 1999. Democratically elected governments were toppled, the Legislative Power was no longer exercised by the Parliament which was disbanded, the Fundamental Rights of the people destroyed, Federalism in actual practice was replaced by a Unity of Command with all powers concentrated in one hand. The Judiciary

was subjugated, deprived of its jurisdictions and for all intents and purposes restrained from enforcing the Checks and Balances against arbitrary exercise of Executive powers. In such an eventuality to say that the Country was being run in terms of the Constitution would require a Herculean feat of suspension of disbelief. Perhaps it would be more appropriate to say that the Constitution in fact did not exist which fact is usually disguised through use of euphemism of "suspension of the Constitution", the Constitution being held in "abeyance", a "deviation" from the Constitution. Salient Features in essence are the Constitution or at least its soul and substance. If such Salient Features are destroyed what remains is not the Constitution rather its cadaver. It is the Constitution which is to be protected and preserved not its remains.

85. An overview of the Constitutional Jurisprudence of various countries reveals a growing trend and impetus to impose and acknowledge explicit and implicit restrictions on the power of the Parliament to amend the

Constitution. It is noticed that at least 32 countries, including Algeria, Angola, Armenia, Azerbaijan, Bahrain, Bosnia and Herzegovina, Brazil, Cambodia, Congo, Cyprus, Czech Republic, France, Germany, Greece, Haiti, Hong Kong, Iran, Italy, Kuwait, Madagascar, Mauritania, Morocco, Namibia, Nepal, Norway, Portugal, Romania, Rwanda, Switzerland, Thailand, Tunisia and Turkey have incorporated specific restrictions in their Constitutions so as to place certain provisions thereof beyond the pale of the amendatory power of the Parliament. Implied restrictions have been acknowledged and enforced in other countries, including Turkey, India, Bangladesh and Belize. On closer scrutiny, such substantive provisions of the Constitution pertaining to the ideological basis for the creation of the State, the core values which define the people are usually included in such provisions. What is also obvious where countries and people have a bitter and tragic past of oppression, dictatorship, fascism, civil war or ethnic cleansing there is a tendency to say “never again” and the relevant provisions of the

Constitution, in this behalf, are placed outside the power to amend. Similarly, where core values or substantive provisions pertaining to the rights of the people or internal architecture of the Constitution are vulnerable the provisions, in this behalf, also tend to be excluded from the purview of the amendatory power. In the Pakistani context by way of the 1973 Constitution, unresolved Political Issues, which had resulted in discord, disputes and even the dismemberment of the country were dealt with and resolved through consensus. The reopening of such basic settled issues would result in the opening of a Pandora's Box, unleashing political tempests of unparallel fury which may be difficult to control. Furthermore, the principles of Democracy, Independence of Judiciary, Rule of Law and Federalism, were repeatedly trampled upon and continue to be vulnerable and therefore need to be protected, if necessary, even from the Parliament. Let us not forget that Fascism in Nazi Germany was ushered in by the Parliament itself. Such tendencies tend to surface in difficult times or in the event of pressure from anti-democratic

forces and when passion prevails, resulting in hasty reactive and expedient decisions with far-reaching and often disastrous consequence. Pakistan is no exception. Reference in this behalf may be made to strange Resolutions and aborted Amendments by the Parliament.

86. Other countries including United States of America and United Kingdom have had the luxury of longstanding political stability and constitutional continuity with violent turmoil relegated to the distant past. The Institutions have taken root and are firmly settled in their respected spheres. The core values of Democracy and Rule of Law are universally accepted. The Constitutional Jurisprudence in such countries, in the preceding century and a half has evolved without any real sense of vulnerability. Jurists of such countries take for granted the pre-existence of their basic core values, which may be under constant threat in countries like Pakistan, necessitating constant vigilance for

the protection thereof. The opinion of Jurists of such countries may be academically sound and intellectually stimulating but are they really relevant to the harsh reality faced by us in the context of the matter in issue in the *lis* at hand?

87. A Constitution has a wide expanse and scope, and all that is mentioned therein, is not necessarily its prominent Characteristics. It is only the substantive provisions which define the Constitution that can be termed to be the Salient Features of the Constitution.

It needs to be clarified that the implied limitation upon the power of the Parliament to amend the Salient Features of the Constitution does not imply that such Salient Features, are forbidden fruit in respect whereof the Parliament cannot exercise its amendatory powers. What in fact and in law is prohibited, is for the Parliament to repeal or abrogate the Salient Features of the Constitution or substantively alter i.e. to significantly effect its essential nature. Furthermore, it is not the correctness of the

Amendment or its utility, which can be ruled upon by this Court but only its Constitutionality.

88. Before proceeding further, it may be appropriate to dilate upon the concept of the Independence of Judiciary perhaps, the most relevant Salient Feature for adjudication of the *lis* at hand, in the context of our Constitutional dispensation. It is not some meaningless mantra or mere legal philosophical or political motion to be inferred from the Treatises or Text Books but is a pragmatic matter of immense practical importance.

89. We live in an imperfect World rife with competing interests. Crimes are committed and disputes arise between individuals with regard to their civil rights. Such issues need to be resolved justly and in accordance with the law. In the absence of resolution through negotiation or private social intervention, the matter has to be finally decided by a neutral Arbiter, which at the end of day is to be provided by the State in exercise of its Judicial Functions through Courts. It is now well settled that Access to Justice is a basic Fundamental Right for all the Citizens, as has been

repeatedly held by this Court, including in the cases, reported as (1) Saiyyid Abul A'la Maudoodi and other v. The Government of West Pakistan and others (PLD 1964 SC 673), (2) Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) and (3) *Al-Jehad Trust case (supra)*. In the absence of such Forums established by the State to resolve disputes, might will always overpower right. If the Arbiter repository of the Judicial Powers of the State is not neutral, it will loose its functional efficacy and the very purpose of its existence shall be defeated. The Independence of the Judiciary, in pith and substance implies that the Courts, while adjudicating upon the disputes, *inter se* individual parties or between the Citizens and the State, must be able to maintain their neutrality and thereby dispense justice to all manner of people without fear or favour. Such independence is compromised if the Judiciary is subjugated or acts as an instrument for protecting and promoting the claim of one of the parties to the dispute or litigation. In such an eventuality, it is

universally acknowledged and accepted the rights to Access to Justice becomes a more illusion.

90. Furthermore, in our Constitution, the Fundamental Rights have been guaranteed to the citizens, which require protection from encroachment by the Executive and the Legislature. Specific provisions have been inserted in the Constitution to reinforce such protection, including Article 4 prohibiting any action by the Executive depriving any person of his life, liberty and property except in accordance with the law and Article 8 restrains the Legislature from making any law in violation of the Fundamental Rights set forth in the subsequent Articles. Where there is a violation in this behalf by the Executive or the Legislature, the remedy available to an aggrieved person is to approach the Courts for the redressal of his grievance and enforcement of his Fundamental Rights, as is evident from Articles 184 and 199 of the Constitution. However, if the Judiciary is politicized or under the influence of the Executive or the Legislature, it will not be in a position to provide any remedy to such aggrieved

persons, reducing the Fundamental Rights to a mere meaningless ineffective decorative declarations of no practical value. It can be stated without fear or contradiction that in the absence of an Independent Judiciary, the people in fact stand denuded of their Fundamental Rights.

91. Pakistan is a democratic State. In the absence of free, fair and impartial elections, the concept of democracy is blighted beyond recognition. Though no doubt, it is the duty of the Election Commission to ensure the holding of free, fair and impartial elections, yet, election disputes do arise, which need to be adjudicated upon by the Election Tribunals established pursuant to Article 225 of the Constitution and eventually the matter ends up before this Court in Appeal. The Judges of this Court cannot be allowed to be politicized or be members/supporters of any political party or be beholden thereto if they are to resolve such election disputes fairly.

92. Pakistan is a Federation. In case of disputes between two or more Federating Units or between Federating Units and the Federation, the

matter needs to be resolved. If the political negotiations fail, such disputes also ends up before this Court in terms of Article 184(1) and the neutrality of the Court, in this behalf, is of vital importance for the health of the Federation and to avoid such disputes being settled in the streets.

93. In the above circumstances, it can safely be concluded that in the absence of an Independent Judiciary, not only the citizens are deprived of their rights to Access to Justice but also their Fundamental Rights are rendered meaningless. Free and fair elections may not be possible and Federalism may also be prejudiced.

94. The matter has been summed up by this Court in the case, reported as Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others (PLD 1994 SC 105) in the following terms:

> "(a) that every Judge is free to decide matters before him in accordance with the assessment of the facts and his understanding of the law within improper influences, inducements and pressures, direct or indirect, from any quarter to any reasons; and

> (b) that the Judiciary is independent of the Executive and Legislative; and has jurisdiction, directly or by way of review; our all issues of a judicial nature."

95. To achieve the aforesaid purpose, over the ages, based on human experience, a method has evolved i.e. Separation of Judiciary from the Executive and Legislature through the Trichotomy of Powers whereupon our Constitution is also based. This is reflected, *inter alia,* in Article 175. Such Separation of the Powers is not an end in itself but a means to an end of the Independence of the Judiciary.

96. It is settled law that the manner of appointment of the Judges is germane to the Independence of the Judiciary. This Court was confronted with the issue of appointment of Judges, including in the context of Independence of Judiciary, more particularly, with regard to the part to be played by the Judiciary and the Executive in such process. The matter was also examined with reference to the consultative procedure. In the case of *Al-Jehad Trust (Supra)*, this Court *inter alia,* held as follows:

> "7. Our conclusions and directions in nutshell are as under:-
>
> > (i) The words "after consultation" employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for Judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive."

In the aforesaid judgment, Ajmal Mian, J, (as he then was) observed as follows:

> "The object of providing consultation inter alia in Articles 177 and 193 for the appointment of Judges in the Supreme Court and in the High Courts was to accord Constitutional recognition to the practice/convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Federal Court, which was obtaining prior to the independence of India and post independence period, in order to ensure that competent and

capable people of known integrity should be inducted in the superior judiciary which has been assigned very difficult and delicate task of acting as watch dogs for ensuring that all the functionaries of the State act within the limits delineated by the Constitution and also to eliminate political considerations. Mohtarma Benazir Bhutto, as the then Leader of the Opposition, while making a speech on 14-5-1991 on Shari'ah Bill in the National Assembly, had rightly pointed out that the power of appointment of Judges in the superior Courts had direct/nexus with the independence of judiciary. Since the Chief Justice of the High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability and competency of a candidate for judgeship, their recommendations, as pointed out hereinabove, have been consistently accepted during pre-partition days as well as post-partition period in India and Pakistan. I am, therefore, of the view that the words "after consultation" referred to inter alia in Articles 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate for Judgeship in the superior Courts, whereas the Governor of a Province and the

> Federal Government are better equipped to find out about the antecedents of a candidate and to acquire other information as to his character/ conduct. I will not say that anyone of the above consultees/functionaries is less important or inferior to the other. All are important in their respective spheres. The Chief Justice of Pakistan, being Paterfamilias i.e. head of the judiciary, having expertise knowledge about the ability and suitability of a candidate, definitely, his views deserve due deference. The object of the above participatory consultative process should be to arrive at a consensus to select best persons for the Judgeship of a superior Court keeping in view the object enshrined in the Preamble of the Constitution, which is part of the Constitution by virtue of Article 2A thereof, and ordained by our religion Islam to ensure independence of judiciary. Quaid-e-Azam, the Founder of Pakistan, immediately after establishment of Pakistan, on 14-2-1948, while addressing the gathering of Civil Officers of Balochistan, made the following observation which, inter alia included as to the import of discussions and consultations, copy of which is furnished by Mr. Yahya Bakhtiar:--"

97. More than 2000 years ago, one of his pupils, asked Aristotle "why is justice so complex?" He replied "because man is complex". Much water has flown under the bridge since the day of

Aristotle. Society has evolved. The complexity of the relationships personal, commercial and between the citizens and the State have further intensified. Consequently, diverse and complex laws are required. Therefore to administer justice in accordance with law requires a level of expertise and dexterity in its practitioners both Lawyers and Judges.

98. It is in the above background by relying upon the consistent practices, which had evolved into Constitutional Conventions, it was also held in *Al-Jehad Trust case (supra)* that in process of appointment of Judges, the opinion of the Chief Justice of the Court concerned and the Chief Justice of Pakistan have primacy. The Advocates, who are to be considered for appointment, appear before the High Court and the Supreme Court and their legal acumen and expertise as well as their general demeanor and reputation is before the Court and within its knowledge. With regard to the Members of the District Judiciary, their judgments come up for scrutiny before the Court in Appeals and Revisions, hence, their knowledge of law is

also evident to the Court. Their ACRs are also available for examination by the Chief Justices. Furthermore, in view of their own legal experience Chief Justices are better qualified to determine the suitability of the Advocates and the Members of the District Judiciary for appointments as Judges more so than laymen. Therefore, this aspect of the matter was to be within their domain, while the matter of antecedents of the candidates was left to the Governor. The primacy of the Chief Justice has further fortified in the case, reported as *Sind High Court Bar Association (Supra)*.

99. Such was the situation of the law prior to the introduction of Article 175A incorporated through the 18th Constitutional Amendment whereby two new Institutions i.e. the Judicial Commission and the Parliamentary Committee were introduced. Article 175A, as originally enacted, read as follows:

> **"175A.** *Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.*-- (1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Court and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consists of --

(i) Chief Justice of Pakistan; Chairman

(ii) two most senior Judges of the Supreme Court Member

(iii) a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the member Judges, for a term of two years; Member

(iv) Federal Minister for Law and Justice; Member

(v) Attorney-General for Pakistan; and Member

(vi) a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years. Member

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appointed the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:--

(i) Chief Justice of the High Court to which the appointment is being made; Member

(ii) the most senior Judge of that High Court; Member

(iii) Provincial Minister for Law; and Member

(iv) a senior advocate to be nominated by the Provincial Bar Council for Member

a term of two year;

Provided that for appointment of the Chief Justice of a High Court, the most Senior Judge of the Court shall be substituted by a former Chief Justice or former Judge of the Court, to be nominated by the Chief Justice of Pakistan in consultation with two member Judges of the Commission mentioned in clause (2);

Provided further that if for any reason the Chief Justice of High Court is not available, he shall also be substituted in the manner as provided in the foregoing proviso.

(6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:--

(i) Chief Justice of the Islamabad High Court; and — Member

(ii) the most senior Judge of that High Court: — Member

Provided that for initial appointment of the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the proviso to clause (5) shall, *mutatis mutandis*, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme

Court, a High Court or the Federal Shariat Court, as the case may be;

(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:--

(i) four members from the Senate; and

(ii) four members from the National Assembly.

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee may not confirm the nomination by three-fourth majority of its total membership within the said period, in which case the Commission shall send another nomination.

(13) The Committee shall forward the name of the nominee confirmed by it or deemed to have been confirmed to the President for appointment.

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

(15) The Committee may make rules for regulating its procedure."

100. Such provision was challenged through some of the instant Constitutional Petitions and

during the pendency an interim order was passed on 30.9.2010, whereafter, the 19th Constitutional Amendment was passed by the Parliament, as a consequence whereof the constitution of the Judicial Commission was changed so too was the constitution of the Parliamentary Committee. A timeframe was fixed for decision of the Parliamentary Committee, which was required to assign reason in case it did not confirm the nomination by the Judicial Commission. In the event no decision was taken within the prescribed period, it was provided that nominations were deemed to be confirmed.

101. Article 175A as amended by the 19th Constitutional Amendment reads as under:

> **"175A.** (1) There shall be a Judicial Commission of Pakistan hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Court and the Federal Shariat Court, as hereinafter provided.
>
> (2) For appointment of Judges of the Supreme Court, the Commission shall consists of --
>
> (i) Chief Justice of Pakistan; Chairman
>
> (ii) [four] most senior Judges of the Supreme Court Member

(iii)	a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the member Judges, for a term of two years;	Member
(iv)	Federal Minister for Law and Justice;	Member
(v)	Attorney-General for Pakistan; and	Member
(vi)	a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.	Member

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:--

(i)	Chief Justice of the High Court to which the appointment is being made;	Member
(ii)	the most senior Judge of that High Court;	Member
(iii)	Provincial Minister for Law; and	Member
[(iv)	an advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years:	Member

Provided that for appointment of the Chief Justice of a High Court the most Senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

Provided further that if for any reason the Chief Justice of High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission mentioned in paragraph (ii) of clause (2).]

(6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:--

(i) Chief Justice of the Islamabad High Court; and — Member

(ii) the most senior Judge of that High Court: — Member

Provided that for initial appointment of the Chief Justice and the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos, to clause (5) shall, *mutatis mutandis*, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.

(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:--

(i) four members from the Senate; and

(ii) four members from the National Assembly

Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this article shall, *mutatis mutandis*, apply.

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.

(16) The provisions of Article 68 shall not apply to the proceedings of the Committee.

> (17) The Committee may make rules for regulating its procedure."

102. In the above backdrop, the decision of the Judicial Commission with regard to some of the Judges of the Lahore High Court and High Court of Sindh were overruled by the Parliamentary Committee, which act was challenged before this Court and the matter was adjudicated upon vide judgment, reported as Munir Hussain Bhatti, Advocate and another v. Federation of Pakistan and others (PLD 2011 SC 407). In the said judgment, besides holding that such decision of the Parliamentary Committee was justiceable and the Constitution Petition there against maintainable, the provisions of Article 175A of the Constitution were interpreted and, in this behalf, it was observed as follows:

> "57. … The role which they were performing in the previous legal setup, as examined above, is now, logically, to be performed by the Committee. It is, therefore, evident that the purpose the raison d'etre of the Commission and the Committee is the appointment of Judges albeit in accordance with the procedure laid down in Article 175A."

It was further observed as under:

> "58. Given this dispensation and the above referred historical context, the Committee cannot (without eroding judicial, independence) be seen as a superior body sitting in appeal over the recommendations of the Commission with the ability to set aside or reverse the well considered opinion of the members of the Commission. …"

It was also observed as follows:

> "71. … The Committee, however, is not a meaningless or redundant body. It has the ability to add value to the process of making judicial appointments by taking into account information which is different from and may not have been available with the Commission."

It was also noted as under:

> "72. … It cannot be seen as the intention of the Constitution as amended, that the thirteen members of the Commission who amongst them include the five senior-most members of the Judiciary in the country together with a former Judge of this Court and the Chief Justice of the High Court concerned, should be trumped in their views about the competence and suitability of a nominee, by six members of Parliament who, it may be stated with great respect, are not supposed to be equipped with the core ability for evaluating, inter alia, legal acumen and competence."

103. In view of the above, it appears that prior to the introduction of Article 175A, the matter of ascertaining expertise, professional competence, legal acumen and general suitability of a person to be appointed as a Judge was for all intents and purposes in the exclusive domain of the Chief Justices. It was presumed that the Chief Justices concerned would take their respective colleagues into confidence as was and continues to be the practice. This matter has been formulized by making senior Judges a part of the Judicial Commission. It has always been a common practice for the Chief Justices to solicit the opinion from the bar and such practice still continues and this aspect of the matter too has been formalized by adding the representatives of the Bar Councils to the Judicial Commission. The question of expertise, legal acumen and general suitability of a candidate to be appointed as a Judge is within the exclusive domain of the Judicial Commission with the powers of initiation vesting in the Chief Justice concerned. Originally, the question of antecedents of such candidates was with the Executive but this

is no longer wholly true as the Attorney General and the Federal Law Minister and the Provincial Law Minister as the case may be are the Members of the Judicial Commission, therefore, all relevant information, in this behalf, with the Executive is now available to the Judicial Commission. The Parliamentary Committee cannot sit in appeal over the decisions of the Judicial Commission and in case of any disagreement the matter is justiciable by the Court. Be that as it may, the challenge to the constitution of the Judicial Commission has not been pressed at the bar.

104. The litmus test for the Independence of Judiciary *qua* the appointment of the Judges appears to be that the power to initiate and the primacy or decisiveness with regard to the final outcome of the process must vest in the Chief Justices and the Members of the Judiciary. Article 175A as amended by the 19th Amendment and interpreted by this Court, in the case of *Munir Hussain Bhatti (supra)* perhaps with some difficulty passes the test. However, if Article 175A was to be amended or reinterpreted, compromising either of

two limbs of the test mentioned above, it may not be possible to hold that the provisions so amended or interpreted are not in conflict with the Independence of Judiciary, which is a Salient Feature of the Constitution.

105. The provisions of Article 63A have been challenged on the allegation that it restricts a Member of the Parliament from voting in accordance with his conscience and the will of the people of the Constituency that elected him. It is the case of the Petitioners that the Members of the Parliament have been subjugated to the wills and wishes of the party head who may not be a Member of the Parliament or even qualified to be won. Article 63A reads as under:

> "63A. (1) If a member of a Parliamentary Party composed of a single political party in a House-
>
> (a) resigns from membership of his political party or joins another Parliamentary Party; or
>
> (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to-

(i) election of the Prime Minister or the Chief Minister; or

(ii) a vote of confidence or a vote of no-confidence; or

(iii) a Money Bill or a Constitution (Amendment) Bill;

he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned :

Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Explanation.—"Party Head" means any person, by whatever name called, declared as such by the Party.

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.

(4) Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.

(5) Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.

(6) Nothing contained in this Article shall apply to the Chairman or Speaker of a House.

(7) For the purpose of this Article,--

(a) "House" means the National Assembly or the Senate, in relation to the Federation; and a Provincial Assembly in relation to the Province, as the case may be; and

(b) "Presiding Officer" means the Speaker of

> the National Assembly, the Chairman of the Senate or the Speaker of the Provincial Assembly, as the case may be.
>
> (8) Article 63A substituted as aforesaid shall come into effect from the next general elections to be held after the commencement of the Constitution (Eighteenth Amendment) Act, 2010:
>
> Provided that till Article 63A substituted as aforesaid comes into effect the provisions of existing Article 63A shall remain operative."

106. In order to understand its true import it may be necessary to contextualize the said Article. The dictatorship imposed on the 5th of July, 1977, eventually led to an election in 1985. As a transition to democracy the said elections were held on a non-party basis with the obvious purpose of facilitating the formation of a Government to the liking of the President who still retained decisive power. Eventually, on the insistence of the political parties and perhaps the people of Pakistan and pursuant to a judgment of this Court, reported as Mrs. Benazir Bhutto and another v. Federation of Pakistan and another (PLD 1989 SC 66) holding

that the right to form a political party and contest the election on the basis thereof was a Fundamental Right, elections on party basis were reintroduced in Pakistan as is the norm in almost all Democratic countries.

107. Political Parties contest the elections on the basis of their manifestos and in the third world countries, more so, on the strength of the name and charisma of their leader and the trust and confidence that he invokes. It is difficult to determine with respect to each individual constituency as to what percentage of votes have been polled by a winning candidate on the basis of his relationship with the people and what percentage has been received in the name of the party and its leader with which the candidate is affiliated.

108. It is also noticed that prior to the introduction of Article 63A, the Members of the Parliament were induced or coerced into changing loyalties. The Rest Houses in *Changa Manage* came alive as too the Rest Houses and Hotels in Swat. The Members of a Provincial Assembly were

deposited in a Hotel at Islamabad. Instability was the natural result. Sitting Governments were under a constant threat of overthrow. Such a state of affairs also brought the Parliament and the Provincial Assemblies along with their members in great disfavour with the people. It is in the above context, and to suppress the "mischief" as identified above, the members of Parliament imposed upon themselves the restrictions, as enumerated in Article 63A. Such Article has brought stability to the Political System and is *ex facie* conducive to Democracy.

109. A similar anti-defection provision was introduced in India through the 52 Amendment by introducing para 2 of the 10th Schedule, which reads as follows:

> "**2. Disqualification on ground of defection-** (1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House-
>
> if he has voluntarily given up his membership of such political party; or
>
> if he votes or abstains from voting in such House contrary to any

> direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention."

110. A challenge was thrown to the aforesaid, which was rejected by the Supreme Court of Indian in the case, reported as Kihoto Hollohan v. Zachillhu and others [(1992) 1 SCC 309], wherein it was held as follows:

> "The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, *violate the basic structure of the Constitution in that they affect the democratic rights of elected members and, therefore, of the principles of Parliamentary democracy is unsound and is rejected."*

It may be noted that the "basic structure" theory was applicable in full force in India.

111. Article 63A as originally inserted by 14th Constitutional Amendment was also questioned in the *Wukala Mahaz case (supra)* as being violative of the Salient Features of the Constitution, However,

by a majority decision Article 63A was held to be the *intra vires* the Constitution subject to the clarifications mentioned in the said judgment. Nothing has been stated at the bar to persuade us to revisit the said judgment.

112. Through the 18th Constitutional Amendment, Article 63A has only been amended to the extent that the decision of the party as how to vote has been conferred upon the Party Head and the matters in which such instructions will apply now includes an Amendment to the Constitution in addition to Money Bill and vote of confidence or no confidence. Such changes do not effect in substance the import and effect of the Provision with regard to the mischief sought to be suppressed as already held to be valid by this Court.

113. The shifting of the emphasis from the Parliamentary Leader to the Party Head is in consonance with the ground realities of Pakistani Politics which are self-evident and need not be set forth in too much detail. Suffice it to say, a Political Leader whose personal popularity translates into

votes may have out grown the Parliament or be a Member of a Provincial Assembly in case of a regional party or may otherwise choose not to contest the election.

114. Constitutional Amendments are no less important than a Vote of Confidence or a Money Bill for the party that pilots such Amendment, therefore, the inclusion thereof in Article 63A does not upset the scheme of the said provision.

When Democracy in Pakistan is stabilized through continuity, the Parliament can always revisit Article 63A to bring it in confermity with the practice in matured Democratic Countries.

115. The provisions of Article 51 was also called into question to the extent that the election for the seats reserved for the minorities is to be held on the basis of proportional representation on party basis. It was asserted that the minorities should be allowed to directly elect their representatives and in absence thereof rights of minorities are compromised as to the Democracy.

116. There is no denying the fact that the protection and preservation of the rights of the

minorities, both as equal citizens of Pakistan and as minorities is certainly one of the Salient Features of the Constitution. It would be a great tragedy, if in a country whose genesis lay in the grievance of the minority, there is a failure to be sensitive to the rights of the minorities. Through the 8th Constitutional Amendment separate electorate was introduced whereby the minorities could not vote for the Members of the Parliament elected from the General Seat who would be in overwhelming majority and would be an effective part of the Government or the Opposition. The direct relationship between the minority citizens and the Government was disconnected as the Members of the Cabinet and other influential members of the Parliament did not need minority votes in their respective Constituencies, hence, become insensitive to their needs. The minorities became “separate but equal” party to the Democratic Process. An electoral apartheid was put into place. Furthermore, the minority Constituencies became huge spreading over several Districts and in some cases the whole of Pakistan

making them unmanageable and impossible for an effective election campaign without expending huge sums of money. It is in this perspective that the separate electorate system was abolished and the minorities incorporated into the mainstream of Pakistani representatives politics to their advantage. Obviously through a General Election the minorities may not find due representation in the Parliament, therefore, seats are reserved for them to be filled through proportional representation on party basis which is not undemocratic and is in vogue in several countries with a Parliamentary Form of Government. In terms of the provisions under question, the principle of one man one vote is not violated. Any member of the minorities can contest on any general seat of Parliament from any Constituency. There is a joint electorate. Minority Members of the Parliament are included in the Cabinet and form part of the power structure thereby not only serving their Country but also their communities. By no stretch of the imagination can it be said that the provisions of the Constitution, in this behalf,

offend against or compromise Democracy and/or the protection of rights of minorities. Can there be a more efficient mode for ensuring that the minorities are integrated into the political mainstream and the democratic process? Perhaps, but such mode would lie in the domain of the Parliament. As already noted, it is the Constitutionality of the Constitutional Amendment which can be examined by this Court but not its correctness or efficiency.

117. With regard to the withdrawal of the restrictions on the terms of the Prime Minister and the necessity to hold Intra-party Elections by the Political Parties, suffice it to say that both the aforesaid Provisions did not form part of the Constitution, as originally framed thereby diluting their relevance for determining the Salient Features of the Constitution. Even otherwise, in a Parliamentary Form of Government usually no restriction on the number of tenures of the Prime Minister is imposed and the holding of Intra-party Elections is not a *sine-qua-non* for a democratic set up.

118. The question of renaming of the North West Frontier Province (NWFP) as Khyber Pakhtunkhwa (KPK), though raised, was not really pressed. Be that as it may, the renaming of the Province in accordance with the wishes of the people as expressed in a Resolution of the Provincial Assembly in no manner effects the Salient Features of the Constitution.

119. Some other random provisions were also mentioned at the bar but grievance was raised primarily on a subjective opinion rather than on grounds of being *ultra vires* the Constitution.

120. There is no doubt that the legislative power of the State is vested in the Parliament. It is clothed with the authority to make laws and to amend the Constitution subject to limitation mentioned hereinabove. This role of the Parliament is critical, as it is the soul of democracy and essential attribute of the Trichotomy of powers. It has been noticed with regret that the destruction of the Parliament and Democracy through extra-Constitutional measures has been validated by this Court in the past and Dictators held entitled even

to amend the Constitution. Such may be our legal history but not necessarily our Jurisprudence. It is imperative that we distinguish between the two.

121. We may now advert to the 21st Constitutional Amendment Act, 2015, and the Pakistan Army (Amendment) Act, 2015.

By way of the 21st Constitutional Amendment, the following proviso was added to Article 175, which now reads as under:

> **"175.** (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.
>
> *Explanation.*— Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court."
>
> (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.
>
> (3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day:
>
> *"Provided that the provisions of this Article shall have no application to the trial of persons*

under any of 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 using the name of religion or a sect."

122. Furthermore, the Schedule to Article 8 was amended and the Pakistan Army Act, 1952, Pakistan Air Force Act, 1953 and Pakistan Navy Ordinance, 1961, were incorporated therein. By way of the Pakistan Army (Amendment) Act, 2015, the following was incorporated therein:

> (l) in sub-section (1), in clause (d), after sub-clause (ii), the following new sub-clauses, shall be inserted, namely:-
>
> "(iii) claiming or are known to belong to any terrorist group or organization using the name of religion or a sect; and
>
> (a) raise arms or wage war against Pakistan, or attack the Armed Forces of Pakistan or law enforcement agencies, or attack any civil or military installations in Pakistan; or
>
> (b) abduct any person for ransom, or cause death of any person or injury; or
>
> (c) possess, store, fabricate or transport the explosives, fire arms, instruments, articles, suicide jackets; or
>
> (d) use or design vehicles for terrorist acts; or

(e) provide or receive funding from any foreign or local source for the illegal activities under this clause; or

(f) act to over-awe the state or any section of the public or sect or religious minority; or

(g) create terror or insecurity in Pakistan or attempt to commit any of the said acts within or outside Pakistan,

shall be punished under this Act; and

(iv) claiming or are known to belong to any terrorist group or organization using the name of religion or a sect and raise arms or wage war against Pakistan, commit an offence mentioned at serial Nos. (i), (ii), (iii), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xv), (xvi), (xvii) and (xx) in the Schedule to the Protection of Pakistan Act, 2014 (X of 2014):

Provided that any person who is alleged to have abetted, aided or conspired in the commission of any offence falling under sub-clause (iii) or sub-clause (iv) shall be tried under this Act wherever he may have committed that offence:

Provided further that no person accused of an offence falling under sub-clause (iii) or sub-clause (iv) shall be prosecuted without the prior sanction of the Federal Government.

Explanation: In this clause, the expression 'sect' means a sect of religion and does not include any religious or political party

regulated under the Political Parties Order, 2002."

(2) after sub-section (3), the following new sub-sections shall be added, namely:-

"(4) The Federal Government shall have the power to transfer any proceedings in respect of any person who is accused of any offence falling under sub-clause (iii) or sub-clause (iv) of clause (d) of sub-section (1), pending in any court for a trial under this Act.

(5) Any proceedings transferred under sub-section (4) shall be deemed to have been instituted under this Act.

(6) Where a case is transferred under sub-section (4) it shall not be necessary to recall any witness or again record any evidence that may have been recorded.".

3. **Amendment of section 60, Act XXXIX of 1952.-** In the said Act, in section 60, in clause (k), after the word "law" occurring at the end, the words "and any other law for the time being in force", shall be added.

4. ***Overriding effect.-(1)*** The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.

(2) In case there is any conflict between the provisions of this Act and any other law for the time being in force, the provisions of this Act shall prevail to the extent of inconsistency."

123. In essence it was the case of the Petitioners that an attempt has been made to set up a parallel judiciary, not envisaged by the

Constitution, providing for trial of civilians by a Court Martial. Such a course of action not only offends against the Salient Features of the Constitution, including Independence of Judiciary and Fundamental Rights but also the sub-constitutional legislation is even otherwise, *ultra vires* the Constitution.

124. On the other hand, it was the case of the learned Attorney General for Pakistan that the Forums constituted under the Pakistan Army Act, 1952, are acknowledged by the Constitution. The Parliament is authorized to make laws on the subjects identified in the various items of the Federal Legislative List and Item No.1 thereof includes the Defence of Pakistan. In exercise of such powers the Pakistan Army (Amendment) Act, 2015 has been promulgated which does not offend against the provisions of the Constitution. With regards to the enlargement of jurisdiction reference was made to item No.55 of the Federal Legislative List pertaining to jurisdiction of the Courts. It was added that the conferment of jurisdiction upon the Court Martial constituted under the Pakistan Army

Act, so as to try terrorists waging war against Pakistan is consistent with the scheme of the Constitution and does not offend against any of its Salient Features.

125. There can be no cavil with the contention of the Petitioners that our Constitution is based on the Trichotomy of Powers with the Judiciary as an independent entity separate from the Executive, primarily consisting of the Supreme Court of Pakistan, High Courts and other Courts established by law, which are under the supervision and control of the High Courts. Such conclusions have been drawn by this Court by interpreting Articles 175 and 203 in a host of cases, including the cases of (1) Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341) and (2) *Mehram Ali's case (supra)*. There are other Courts and Tribunals which exercise judicial powers of the State and are clearly contemplated in the Constitution, including Federal Shariat Court under Article 203A, Service Tribunals constituted under Article 212 and the Election Tribunals

envisaged by Article 225. Needless to say that a very large number of other Courts and Tribunals are also established by law.

126. It may also be correct to suggest that the Constitution as originally framed envisaged a progressive Separation of the Judiciary from the Executive as was stated in the un-amended Article 175. The timeframe as originally stipulated, in this behalf, was extended through Constitutional Amendment. However, on the expiry of the extended period, the needful was not done necessitating the passing of appropriate directions, in this behalf, by the Court in *Sharaf Faridi's case (supra)*.

127. However, prior to the enactment and enforcement of the Constitution of the Islamic Republic of Pakistan, 1973, the Pakistan Army Act, 1952, was already in force and operational. The said Act of 1952, as originally framed pertained, as its title suggests, to the personnel of Pakistan Army and such other persons as were mentioned therein who were subject to the said Act. Provisions were made for maintaining the discipline in the Army,

including by way of awarding punishments and sentences through Forums referred to as Court Martial, to be constituted under the Act, for offences specified, including some which were also offences under the Pakistan Penal Code. The factum of the existence of such Forums established under the Pakistan Army Act, 1952 including Court Martial and powers exercised by them appears to have been acknowledged and protected by the Constitution in so far as it pertained to the discharge of duties and maintenance of the discipline amongst the Officers and soldiers of the Army, as is obvious from Articles 8(3)(a) and 199(3), the relevant portions thereof are reproduced as under:

> "8(3) The Provisions of this Article shall not apply to-
>
> > (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or"

> "199(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law." (emphasis are supplied)

A perusal of the aforesaid provisions reveals that to the extent the Pakistan Army Act pertains to the discharge of duties by and maintenance of discipline amongst the persons, subject thereto the provisions of the Act have been placed outside the ambit of the restrictions contained in Article 8 for protection and enforcement of Fundamental Rights and an attempt has been made to exclude the Constitutional jurisdiction of the High Courts in respect of any "action taken" under the said Act. The constitution of and the conferment of jurisdiction upon the Courts, Tribunals, and other Forums with adjudicatory powers is provided either by the Constitution itself or by any law. The Court Martial are constituted and established under the

Pakistan Army Act, 1952, and jurisdiction thereupon is also conferred by the said Act. Their existence and validity is acknowledged and accepted by the Constitution in so far as they deal with the members of the Armed Forces or other persons subject to the said Act. This has not been disputed before us.

128. Subsequently, Amendments were incorporated in the Pakistan Army Act so as to extend its application to civilians for trial by Court Martial for offences specified. The matter came up before this Court in *Brig. (Retd) F.B. Ali's case (supra)* where the accused tried by Court Martial were at that point of time civilians having ceased to be Officers of the Pakistan Army. The question of the validity of the trial of civilians by a Court Martial and *vires* of the amending law extending the ambit of the Pakistan Army Act to include such civilians were brought under scrutiny. This Court held as follows:

> "… The position in our country is, however, different. It seems that if the Army Act is a valid piece of legislation, then it does permit the trial of civilians, in certain

circumstances, by a military Court even in times of Peace.

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"Now it has been contended that since the offence of seducing or attempting to seduce a person subject to the Army Act from his duty or allegiance to Government is already an offence under section 131 of the Penal Code, triable by the ordinary Criminal Courts, this is in substance and in reality an amendment of the Criminal Procedure Code."

.....
.....

.....
.....

"It does, therefore, appear from these decisions that the superior Courts are debarred from questioning the validity of a law only on the ground of the lack of competency of the Legislature but it is unnecessary in this case to go into this matter in any greater detail, since the view that I have taken is that the impugned Ordinances are within the exclusive legislative competence of the Central Legislature and fall directly within items 1, 48 and 49 of the Third Schedule." (emphasis are supplied)

The trial of civilians under the Pakistan Army Act in the circumstances of the case was held to be valid.

129. In 1998, the Army was called "in aid of civil power" in the Province of Sindh whereafter an Ordinance i.e. Ordinance No.XII of 1998 was issued contemplating trial of civilians by the Military Courts. The *vires* of the said Ordinance were challenged and the matter was adjudicated upon vide judgment, reported as *Sh. Liaquat Hussain's case (supra)* and the Ordinance was struck down. It was held by this Court that when the Army was called "in aid of civil power", it not only acts under the direction of the Federal Government that too "subject to law" as is specifically mentioned in Article 245(1). Furthermore, in pursuance of the aforesaid provisions at best the Armed Forces may exercise the Executive or Police powers but the civil authorities are not supplanted. It was also held that in such an eventuality it is not contemplated that the established Judicial System will be substituted by the Military Courts. Other aspects of

the law, as laid down by the said judgments, shall be dealt with separately.

130. The dictum laid down in the aforesaid judgment to the extent mentioned above may not be applicable *stricto sensu* in the instant case, as the Armed Forces have not been called "in aid of civil power" in terms of Article 245(1). Before proceeding further, it may be appropriate, at this juncture, to have an overview of the provisions of Article 245, which are reproduced as under:

> "245.(1) The Armed Forces shall, under the directions of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.
>
> (2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.
>
> (3) A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245:
>
> Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on

> which the Armed Forces start acting in aid of civil power.
>
> (4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting." (emphasis are supplied)

131. When the matter came up before this Court in *Brig. (Retd) F.B. Ali's case (supra)* as in the instant case Armed Forces had not been called "in aid of civil power". In the above perspective, while holding the trials of civilians by the Court Martial, as valid, this Court also held as indicated and reproduced hereinabove that such legislation was competent under the Constitution.

132. In *Sh. Liaquat Hussain's case (supra)* while interpreting *Brig. (Retd) F.B. Ali's case (supra)* this Court, *inter alia*, observed as follows:

> "(i) That even, a civilian who is made subject to the Army Act, can be tried by the Military Courts under the said Act, provided that the offence of which such person is charged with has nexus with the Armed Forces or Defence of Pakistan.
>
> (ii) That the two accused in the above case were picked up on the

> basis of valid classification founded on a rational basis namely, those who seduce or attempt to seduce a member of the Armed Forces from his allegiance or his duty, and that there was no possibility of anyone picking and choosing a particular person so accused for trial in one manner and leaving others to be tried under the general laws by reason of amendment introduced by clause (d) of subsection (1) of section 2 of the Army Act; and
>
> (iii) That the trial under the Army Act for the persons liable to be tried is not violative of any of the principles of fair trial." (emphasis are supplied)

Furthermore, it was also held as under:

> "... therefore, any law which makes a civilian triable for a civil offence, which has no nexus with the Armed Forces or defence of the country, by a forum which does not qualify as a Court in terms of the law enunciated particularly in Mehram Ali's case (supra) will be violative of Articles 9, 25, 175 and 203 of the Constitution." (emphasis are supplied)

This Court also observed as follows:

> "The above contention is not tenable as convening of Military Courts for trial of civilians for civil offences having no nexus with the Armed Forces or defence of Pakistan cannot be treated as an act incidental and ancillary under clause (1) of Article 245 of the Constitution. It may again be observed that the scope of clause

> (1) of Article 245 is to call the Armed Forces to act in aid of the civil power. The scope of the above aid to civil power has been discussed hereinabove in detail. It may again be observed that the above aid to the civil power is to be rendered by the Army as a coercive apparatus to suppress the acts of terrorism inter alia by apprehending offenders and by patrolling on the roads/streets, where there is civil disorder or disturbances of the magnitude which the civil power is unable to control.
>
> In my view the power to legislate the impugned Ordinance for establishing/ convening Military Courts cannot be spelt out from clause (1) of Article 245 nor it can be derived from Entry No. 1 read with Entry No. 59 of Part I of the Fourth Schedule contained in the Federal Legislative List relied upon by the learned Attorney-General. …"
>
> (emphasis are supplied)

133. Item No.1 of the Federal Legislative List reads as follows:

> "1. The defence of the Federation or any part thereof in peace or war; the military, naval and air forces of the Federation and any other armed forces raised or maintained by the Federation; any armed forces which are not forces of the Federation but are attached to or operating with any of the Armed Forces of the Federation including civil Armed Forces; Federal Intelligence Bureau;

> preventive detention for reasons of State connected with defence, external affairs, or the security of Pakistan or any part thereof; persons subjected to such detention; industries declared by Federal law to be necessary for the purpose of defence or for the prosecution of war:"

Article 70 of the Constitution empowers the Parliament to legislate on all matters enumerated in the Federal Legislative List. Item 1 of the said List reproduced hereinabove clearly includes the Defence of Pakistan and the Armed Forces. The Pakistan Army Act, 1952 is obviously covered by the said Item, as *ex facie* it deals with the Defence of Pakistan and the Armed Forces and includes the trial of persons subject to that Act by the Forums established thereunder i.e. Court Martial. Where any Legislative Measure purports to include the trial of Civilians not otherwise subject to Pakistan Army Act by the Forums thereunder by Amendment or new legislation, it needs to be examined whether the Parliament was competent under Item 1 of the Federal Legislative List to do so. In *Brig. (Retd) F. B Ali's case (supra)* and *Sh. Liaqat Hussain's case (supra)*, it has been held by

this Court that if the offence has a direct nexus with the Defence of Pakistan or the Armed Forces then such Legislative Measure would come within the ambit of Item 1 of the Federal Legislative List and would have been competently and validly made by the Parliament. Obviously, as long as, such law does not otherwise offend against any other provision of the Constitution. Such is the scheme of the Constitution. The real matter in issue boils down as to whether the 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015, has a direct nexus with the Armed Forces or the Defence of Pakistan. If the answer is in the negative then the Amendment in the Constitution would be opposed to the scheme of the Constitution and its Salient Features while the Pakistan Army (Amendment) Act, 2015, would be *ultra vires* the Constitution.

134. Article 148(3) enjoins the Federation to defend the Provinces against external aggression and internal disorder. To carry out this duty the ultimate instrument available with the Federation is the Armed Forces. The manner of use of such

Armed Forces by the Federation can be gathered from the provisions of Article 245. The legislative power, if so required, is to be exercised in terms of Item No.1 of the Federal Legislative List.

135. Article 245 when examined in the context of the other provisions of the Constitution and as interpreted by this Court in the cases of (1) *Brig. (Retd) F.B. Ali' case (supra)* and (2) *Sh. Liaquat Hussain's case (supra)* with reference to the trial of civilians by the Court Martial, the scheme of the Constitution can be deciphered. Originally in the Constitution of the Islamic Republic of Pakistan, 1973, on its commencing day, the entire Article 245 was limited to Article 245(1) as it exists today. The remaining sub-articles have been added through subsequent Constitutional Amendments. A perusal of Article 245(1) reveals that the Armed Forces of Pakistan, to achieve the ends mentioned therein i.e. the Defence of Pakistan shall act on the directions of the Federal Government. Broadly speaking two sets of eventualities have been catered for in the said Article. First, the event of "external aggression" or "threat of war" and the

second eventuality to "act in aid of civil power". *Ex facie* the two sets of eventualities, referred to above, are separate and distinct and sub-articles 3 and 4 pertain to the second eventuality of the Armed Forces "acting in the aid of civil power", as is obvious from the plain language thereof and consequently, not relatable to situation involving "external aggression" or a "threat of war".

136. In case the Armed Forces upon the direction of the Federal Government are required to "act in aid of civil power" the legal implications are rather obvious in view of the ratio of the case, reported as *Sh. Liaquat Hussain (supra)*. The Armed Forces would act to assist the civil power but cannot replace it. Their role would be primarily with regard to supporting and invigorating the executive functions, more particular, pertaining to law enforcement and the police power. The Armed Forces cannot supplant the entire civil power. More particularly, this applies to the judicial power of the State, which is exercised through the functioning of the Courts under an Independent Judiciary. In other words the Armed Forces may

quell disturbance and apprehend offenders who will be brought before the regular Courts for trial. The Armed Forces may not be authorized to constitute their own courts for trial as long as the regular courts are functioning in the area where the Armed Forces have been called in to "act in aid of civil power". The natural corollary thereof is that the civilians, not otherwise subject of the Pakistan Army Act, are not to be tried by Military Courts or Court Martial. Such is the law laid down in *Sh. Liaquat Hussain's case (supra)*. Such dictum as stated therein is only applicable when the Armed Forces have called "in aid of civil power".

137. In the event of an external aggression or the threat of war, the aforesaid restrictions and limitations *per se* may not be applicable, in view of the text of Article 245, as interpreted by this Court in the case, reported as *Sh. Liaquat Hussain's case (supra)*.

138. The situations with regard to an external aggression against Pakistan may not present much difficulty specially with regard to the actual theatre of war as substantial body of case law is available

spelling out the jurisprudence on the subject which need not to be gone into as the same is not relevant for the adjudication of the *lis* at hand.

139. Article 245 is not limited, in this behalf, only to External Aggression or the Armed Forces acting "in aid of civil power". The phrase "threat of war" used therein is not superfluous and must be attributed proper meaning and effect. It obviously includes a situation where external aggression is threatened and appears to be imminent but actual hostilities have not commenced.

140. There is yet another eventuality, where the law and order situation degenerates beyond mere civil disorder and rioting to insurrection, mutiny or open armed rebellion against the State whereby territories are lost to the miscreants and the Institutions of the State no longer exist in such areas. In such an eventuality, a duty is cast under Article 148(3) upon the Federal Government to defend the Federation, the Province and every part thereof. Appropriate directions, in this behalf, can only be given in terms of Article 245. Mere acting in aid of civil power may not be sufficient, adequate

or efficacious in such a situation. The provisions of Article 245 with regard to acting in aid of civil power with its restrictions and conditionalties may not be applicable. In the circumstances, unless a situation is held to be covered by the phrase "threat of war" the Federal Government may be helpless to make its Defence Power of the State and unable to fulfill its obligations in terms of Article 148(3). The nature of war changes with armed conflicts within a State; these can lead to a warlike situation necessitating appropriate responses. To borrow the words from the Australian Jurisdiction of Dixon, J. noted as under:

> "... No distinction can be drawn between defence against external attack and defence against internal attack, which is more insidious than direct external attack and in some respects, because it is often secret, more difficult to combat...."

141. The Constitution must be interpreted so as to keep up with the changing times, as has been consistently held by this Court including the judgment reported as Sardar Farooq Ahmed Khan

Leghari and others v. Federation of Pakistan and others (PLD 1999 SC 57), wherein it was observed as under:

> "... I might have opted for the former view if I were to overlook two important aspects, firstly that a Constitution is an organic document designed and intended to cater the needs for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirements of ever changing society...".

A contemporaneous interpretation of "threat of war" would include such a state of affairs and all actions taken by the Armed Forces to counter the threat of such armed rebellion within the country would obviously be for the Defence of the State and the offences committed by such armed insurgent acting as enmity of the State would have a direct nexus with the Defence of Pakistan.

142. In the context of the law as already laid down by this Court in *Brig. (Retd) F.B. Ali's case (supra)* and *Sh. Liaquat Hussain's case (supra)* civilians cannot be tried by Court Martial or other Military Courts, in the eventuality, the Armed Forces are called "in aid of civil power" but where the Armed Forces are directed to deal with "external aggression" or "threat of war" such civilians can be tried where the offence in question has a direct nexus with the Armed Forces or the Defence of Pakistan, as is obvious from the extracts from the above judgments, reproduced herein above.

143. In the above circumstances, it is required to be determined whether the gravity of the current situation and the intensity of the armed conflict, warrants its description as a "threat of war" permitting trial of civilians by Court Martial. In this behalf, the learned Attorney General for Pakistan made available Factual Data and on the basis thereof contended that since 2002 more than sixteen thousand incidents of terrorists attacks have occurred which include attacks on the most

sensitive of defence installations, including the GHQ, Rawalpindi and Air Bases at Kamra in the vicinity of Islamabad and at Karachi. Civilians Airports have also been attacked. Mosques, *Imambargah*s, Churches and other places of worship have been subject to attacks and bomb blasts. Public transport have been ambushed and after identifying the passengers on the basis of sect or religion killed in cold blood. So much so schools have not been spared and small children massacred. At various points of time, control of State on the territories have been periodically lost., as in the case of Swat and prior to the commencement of the military operation launched about one year ago, parts of North Waziristan, Khyber and other Tribal Agencies, which were in the total control of the armed enemies of the State where the flag of Pakistan no longer flew nor its Institution functioned. Since the year 2002, more than 56,000 Pakistan's have been killed or wounded, including both civilians and Members of the Law Enforcement Agencies. It was further contended, that the nerve center of the armed

enemies of Pakistan may be located in the territory held by them but their tentacles are spread all over Pakistan in the garb of abettors and facilitators where at attacks are launched and from where funding is received. It was further contended that the persons involved in the armed conflict against the State not only include foreigners but there are also indications of foreign funding and instigation. To counter the situation, large scale military operations were required to be undertaken and are being currently conducted involving not only the Pakistan Army but also the Pakistan Air Force. The learned Attorney General also maintained that the armed persons waging war against Pakistan are well organized and well trained with declared foreign affiliations and the coordination and intensity of their aggression has created a situation, the gravity whereof cannot be squeezed into the narrow confines of a state of affairs where mere acting “in aid of civil power” by the Armed Forces would suffice. It is in the above backdrop, in order to deal with the current situation, an additional tool to counter the situation has been

provided by way of the questioned Amendments in the Constitution and the Pakistan Army Act.

144. The contentions raised by the learned Attorney General for Pakistan appear to be quite compelling. Some of the facts brought to the notice of this Court are already in the public domain. We are not persuaded to hold that the gravity of the situation is such that can be met by merely directing the Armed Forces to "act in aid of civil power". We appear to be currently confronted with a warlike situation and consequently the Federation is duty bound by the Constitution to Defend Pakistan. In the circumstances, the Federation must act in accordance with the first part of Article 245(1), by categorizing the current situation as a threat of war requiring extraordinary measures in terms of use of the Armed Forces in accordance with Article 245. On the basis of the information available to it, a value judgment has been made in this behalf by the Federal Government i.e. the Executive by directing the Armed Forces in terms of Article 245 to deal with the terrorists. The Parliament (Legislature) too has

made a judgment call by enacting the 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015.

145. We have examined the provisions of the Pakistan Army (Amendment) Act, 2015, in this behalf. There is a specific reference that the offence must be committed by a person known or claiming to be a member of a terrorist group or organization, using the name of religion or sect, who in furtherance of his terrorist design wages war against Pakistan or commits any other offence mentioned therein. It is the activities of such terrorists that have created the warlike situation against the State necessitating its defence by the Armed Forces. Thus, the offences committed by said terrorists appear to have direct nexus with the Defence of Pakistan. Consequently, the Parliament had the legislative competence to take appropriate legislative measure to enable the Federation to fulfill its obligation to act in Defence of the State of Pakistan to provide for the trial and punishment of offences which have a direct nexus with the Defence of Pakistan committed by civilians by

Court Martial under the Pakistan Army Act, 1952. Such legislative measure appears to be in accordance with the Constitution in view of the law laid down by this Court in the cases, reported as (1) *Brig. (Retd) F.B. Ali's (supra)* and (2) *Sh. Liaquat Hussain's (supra)* in this behalf.

146. Article 245 creates an exception to a normal situation where the Armed Forces either remain in their barracks or at the national borders. Article 245 can be invoked in an extraordinary situation but only as a temporary measure. Such a measure neither contemplates nor provides a permanent solution. In the instant case i.e. the 21st Constitutional Amendment as well as Pakistan Army (Amendment) Act, 2015, both contain sunset clauses being only effective for a period of two years.

147. The Petitioners also contended that discretion has been conferred upon the Executive to "pick and choose" as to which cases are to be sent or transferred for trial by the Court Martial, while other cases shall be tried by the ordinary courts e.g. Anti-Terrorism Courts thereby offending

against Article 25. At this juncture, we need to examine whether the provisions of the Pakistan Army (Amendment) Act, 2015, can be tested on the touchstone of Fundamental Rights, as it is the case of the Respondents that upon the incorporation through the Amendment, the Pakistan Army Act in the Schedule referred to in Article 8, the Fundamental Rights are not attracted. This assertion has been contested by the Petitioners on the following basis:

> *(a)* that no new law can be added to the Schedule of Article 8 which in its application and scope is limited to the laws originally mentioned or at best as on the eve of the 21st Amendment;
>
> *(b)* that regardless of the effort in this behalf by the Parliament, the Pakistan Army (Amendment) Act, 2015, in law, has not been incorporated into the Schedule to Article 8, as the Amendment to the Constitution preceded the Amendment of the Pakistan Army Act consequently, the Pakistan Army Act, 1952, unamended by the Pakistan Army (Amendment) Act, 2015, alone stood incorporated in the Schedule. In this behalf, it was pointed

out that though the 21st Constitutional Amendment Act, 2015, and the Pakistan Army (Amendment) Act, 2015, are of the same day but the former is identified as Act No.1 and the later as Act No.2.

(c) that alternatively such addition to the Schedule to Article 8 is accepted such an Amendment as has been done offends against the Salient Features and scheme of the Constitution.

148. With regard to issue raised in *(a)* above, reference needs to be made to the relevant provision i.e. Article 8 sub-article 3 as originally framed, which read as follows:

> "8. (3) The provisions of this Article shall not apply to-
>
> > *(a)* any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them ; or
> >
> > *(b)* any of the laws specified in the First Schedule as in force immediately before the commencing day ;
> >
> > and no such law or any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter."

The above-said Article was amended by the First Constitutional Amendment Act, 1974, whereby the following phrase was incorporated in Article 8(3)(b):

> "*or as amended by any of the laws specified in that Schedule;".*

By the 4th Constitutional Amendment Act, the following clause (ii) was added to Article 8(3)(b):

> "(ii) other laws specified in Part I of the First Schedule;".

By virtue of 5th Constitutional Amendment Act, the Schedule to Article 8 was amended and further laws including Regulations were added thereto.

149. Article 8(3)(b) now reads as follows:

> "8. (3) The Provisions of this Article shall not apply to-
>
> (b) any of the –
>
> (i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule ;
>
> (ii) other laws specified in Part I of the First Schedule;

150. The First, Fourth and Fifth Constitutional Amendments have not been challenged and the *vires* thereof are not the subject matter of the *lis* before us. On close and logical examination of the plain words of Article 8(3)(b) reveals that it caters for three separate categories of laws, firstly laws that were originally mentioned in the Schedule as they stood on the date when the Constitution was enforced. It is settled law that the phrase "as in force" relates to the point of time when the relevant statues becomes law as on the commencing day of the Constitution in 1973. The second category pertains to subsequent amendments in the laws already mentioned in the Schedule, which were effected after the incorporation of such laws in the Schedule. Such Amending Acts to the laws are not automatically protected until these Amending Laws are added to the Schedule through a Constitutional Amendment separately mentioning such Amending Acts. The intention of the Legislature is apparent that every Amendment in the laws mentioned in the Schedule after its incorporation therein must be separately considered and through a conscious

decision by the Parliament be granted immunity from challenge under Article 8 by Amending the Constitution. The third category is laws, which were neither mentioned originally in the Schedule nor are Amendments thereof but are separate and distinct laws that may be added in the Schedule by Amending the Constitution. This is the true import and the intention behind Article 8(3)(b)(ii). Such interpretation is not only logical, supported by the text but also actually reflects the obvious intention of the Legislature. To construe Article 8(3)(b)(ii) as added by 4th Constitutional Amendment in any other manner by relying on some unclear and obscure grammatical rules would offend against the principle of logical interpretation and more importantly make the said Article 8(3)(b)(ii) redundant and meaningless. As laws specified in the Schedule on the commencing day are already covered by Article 8(3)(b)(i) and, therefore, Article 8(3)(b)(ii) cannot yet again be confined to the same laws. It may be appropriate to heed the warning of Pollack C.B. issued a hundred and fifty years ago that “Grammatical and philological disputes (in fact

all that belongs to this history of language) are as obscure and lead to as many doubts and contentions as any question of law." [Waugh v. Middleton (1853) 8 Ex 352, 356]. The purpose of the exercise of interpretation of legislative enactments is primarily to discover the intention of the Legislature and venturing into the fringes of the intricate maze of obscure rules of grammar is not advisable as obscurantism and Statutory construction do not go hand in hand.

151. It is an ancient and consistently applied principle of Interpretation of Statutes that where "object and intention of statute is clear it must not be reduced to a nullity by the draftsman is unskillfulness or ignorance" (The Interpretation of Statutes 7th Edition by Sir Peter Mexwer). Redundancy or surplusage is normally not easily attributed to sub-constitutional legislation let alone the Constitution, as is being canvassed. It has been consistently so held by this Court, including in the case of East and West Steamship Co. v. Queensland Insurance Co. (PLD 1963 SC 663), wherein this Court observed as under:

> "... But it is not permissible for us whilst interpreting a statute to hold that any part thereof or any word therein is surplusage. Every word has to be taken into account and a meaning given to it. ..."

In the case of Muhammadi Steamship Co. Ltd v. The Commissioner or Income Tax (Central) Karachi (PLD 1966 SC 828), this Court held as under:

> "..... But since it is a well established rule of interpretation of statutes that no words in a statute are to be treated as surplusage or redundant we cannot ignore these words."

In the case of Syed Masroor Ahsan and others v. Ardeshir Cowasjee and others (PLD 1998 SC 823), it is observed as under:

> "I, after referring to the case-law of the English, Indian and Pakistani jurisdictions, concluded as follows:
>
> > "13. We are inclined to hold that we cannot attribute any redundancy to any provision of the Constitution or any part thereof. The provisions of the Constitution are to be construed as to give effect to each and every word thereof. ..."

In this case, it has also observed that:

> "37. It may be observed that one of the settled principles of construction of provisions of a Constitution/statute is that they are to be construed in a manner which may give effect to each and every word of the same and which may harmonize the working of the same and which may achieve the object underlined in the relevant provisions. ..."

152. In the aforesaid circumstances, there can be no manner of doubt that the Parliament on the strength of Article 8(3)(b)(ii) can add new laws to the Schedule but only through the process of Amending the Constitution.

153. Adverting now to the second limb of the arguments that the Pakistan Army Act, 1952, may have been incorporated in Schedule I of Article 8 of the Constitution but without the Pakistan Army (Amendment) Act, 2015. The sole basis of such contention is that the Constitutional Amendment is mentioned as Act No.1 of 2015, while the sub-Constitutional Amendment is noted as Act No.2 of 2015. The learned Attorney General has placed on record the proceedings of the National Assembly and the Senate in this behalf, which reveal that in the National Assembly and the Senate respectively,

both the Amendments were debated together. debated together and incidentally the Pakistan Army (Amendment) Act, 2015, was passed first followed by the 21st Constitutional Amendment Act. Both enactments become law by virtue of Article 75(3) when granted the assent by the President. It is a matter of record that such assent was granted to both the Pakistan Army (Amendment) Act, 2015, and 21st Constitutional Amendments Act, 2015, on the same day i.e. 7th of January, 2015. There is nothing on the record to show as to which of the two Amending Acts were formally assented to first by the President.

154. The question as to the point of time when a Central Enactment comes into force is catered for by the General Clauses Act, 1897. Section 5 sub-section 3, therefore, reads as follows:

> "5. (3) Unless the contrary is expressed, a (Central Act) or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement."

155. In this behalf, reference can be made to the judgment of this Court, reported as Khalid M.

Ishaque, Ex-Advocate-General, Lahore v. The Hon'ble Chief Justice and the Judges of the High Court of West Pakistan, Lahore (PLD 1966 SC 628), wherein it was held that:

> "... section 5(3) of the General Clauses Act, 1897, which provides that unless the contrary be expressed, a Central Act shall be construed as "coming into operation immediately on the expiration of the day preceding its commencement." Thus, if the commencement be declared to take effect on a particular day, say the 6th January 1964 the Act would be deemed to come into force immediately after the stroke of midnight of the 5th January 1964. Equally, if the Act were expressed to come into effect on the granting of assent thereto, then if that assent was given on the 6th January, 1964, ...".

156. Reference was made to some unlikely hypothetical situation in an effort to show that the applicability of Section 5(3) *ibid* as to the point of time a central Act came into force may result in awkwardness or injustice. The provisions of the General Clauses Act have been enacted to ensure certainty and clarity and the purpose of Section 5(3) thereof is to avoid the abundantly of a wild goose chase of tracking down clerks and their files

so as to determine as to what point of time each law came into effect.

Laws more particularly those in the nature of the General Clauses Act tend to deal with situations that are frequent and generally occur as is obvious from the ancient maxim AD EA QU AE FREQUENTIUS ACCIDUNT JURA ADAPTANTUR (2 *Inst.* 137.)—*The laws are adapted to those cases which more frequently occur.*

157. Rules of construction cater for and deal with the rare accidental, unforeseen and unusual events. The principles in this behalf are enunciated in the maxim CESSANTE RATIONE LEGIS CESSAT IPSA LEX. *(Co. Litt. 70 b.)— Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself*. Such is ancient and settled law. There is no need to re-invent the wheel.

158. Thus by operation of law the Pakistan Army (Amendment) Act, 2015, became effective on the midnight of 6th and 7th of January, 2015, as a consequence whereof the Amendments mentioned therein stood incorporated in and formed part of the Pakistan Army Act, 1952. If the 21st

Constitutional Amendment Act did not come into effect at the time when the assent was given thereto by the President i.e. later in the day but also on the midnight of 6th and 7th January of 2015, the Pakistan Army Act, 1952, was incorporated into the Schedule along with the Amendments effected by the Pakistan Army (Amendment) Act, 2015.

159. The number given to Acts of Parliament and the number mentioned to Notifications are both ministerial acts, which certainly are not performed by the President of Pakistan but by some minor officials later. If the contentions of the Petitioners are accepted then the Constitution, Amendments thereto, Laws passed and Amendments thereto and the Parliament itself would become hostage to the whims of some nameless and faceless clerk in the bureaucracy That would make a mockery of the law.

160. There is yet another aspect of the matter. By virtue of Article 8(3)(a), the Pakistan Army Act, 1952, as it stood prior to the Amendment, was already excluded from the operation of Article 8,

reproduced above. From a plain reading of the aforesaid provision, it is clear and obvious that laws relating to the Armed Forces and for the maintenance of discipline thereof are clearly and unequivocally referred to as being immune from the rigors of Article 8 and from their validity being scrutinized against the touchstone of Fundamental Rights. Such laws would obviously include the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953 and Pakistan Navy Ordinance, 1961. If the contentions of the learned counsel are accepted that unamended in Pakistan Army Act, 1952, only has been incorporated in the Schedule despite the fact that for all intents and purposes it was already immune from the operation of the said Article the result would be that such portion of the 21st Constitutional Amendment Act is a redundancy and the entire exercise, in this behalf, is an absurdity. There is a great body of precedent law as well as opinion as expressed in the classical and accepted Treatises on the subject that the law requires that absurdity should not be attributed to the Legislature.

In Maxwell's Interpretation of Statutes the rule is thus stated on p. 229, 1953 Edition, which reads as under:

> "Where the language of the statute in its meaning and grammatical constructions, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structures of the sentence." (emphasis are supplied)

In the case of Khalid Qureshi and 5 others v. United Bank Limited II Chundrigar Road, Karachi (2001 SCMR 103), this Court observed as under:

> "... It is pertinent to mention here that "the initial presumption is that an absurdity is not intended by the law-maker. (PLD 1964 Dacca 756, PLD 1962 Lah. 878). In case of doubt as to the intention of Legislature, an interpretation which leads to manifest absurdity should, if possible, be avoided. (PLD 1964 Lah. 101 + PLD 1966 Azad J&K 38). ..." (emphasis are supplied)

In the case of Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1089), this Court held as under:

> "29. It is a cardinal principle of construction that the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning unless that leads to some absurdity. ... " (emphasis are supplied)

In the case of Federation of Pakistan through Secretary M/o Petroleum and Natural Resources and another v. Durrani Ceramics and others (2014 SCMR 1630), this Court observed as under:

> "29. ... such construction is permissible if it reflects the true intention of the Legislature and if to hold otherwise would render particular words in the statute either meaningless or lead to absurdity. ..." (emphasis are supplied)

161. The intention of the Parliament is clearly visible. By virtue of Article 8(3)(a) the Pakistan Army Act, 1952, and for that matter the Pakistan Air Force Act, 1953 and Pakistan Navy Ordinance, 1961, already stood protected and exempted from the application of Article 8 *inter alia* to the extent that they deal with maintenance of discipline among the members of Armed Forces and for the proper discharge of their duties. As a consequence

of the Pakistan Army (Amendment) Act, 2015, matters other than those pertaining to discipline amongst and discharge of duties by the members of the Armed Forces were included in the ambit of the Pakistan Army Act, hence, in order to protect such amendments also from the rigors of Article 8, it was necessary to place Pakistan Army Act, 1952, (as amended) in the Schedule. Such was the clear and obvious intention of the Lawmakers which must be given effect to. It would neither be proper nor lawful to nullify such intention by attributing absurdity to the Parliament and redundancy to the 21st Constitutional Amendment.

162. Thus, there can be no hesitation in holding that the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, has been validly and effectively incorporated in the Schedule to the Constitution as was the clear intention of the Legislature.

163. During the course of proceedings before this Court some misgivings were expressed with regard to the procedure adopted by a Court Martial. The process and procedure followed by the

Forums, established under the Pakistan Army Act, have come up for scrutiny before this Court and found to be satisfactory and consistent with the recognized principles of criminal justice. In *Brig. (Retd) F.B. Ali's case (supra)* the procedure to be followed for trials under the Pakistan Army Act was dilated upon in great length specially in the concurring opinion of Yaqoob Ali, J. (as he then was) and found to be in conformity with the generally accepted and recognized principles of criminal justice. A similar view was also expressed by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632). The provisions of the Pakistan Army Act were scrutinized by the Federal Shariat Court in the case, reported as *Col. (R) Muhammad Akram (supra)* and generally passed muster. The procedure which was found acceptable for officers and men of the Pakistan Army can hardly be termed as unacceptable for trial of terrorists, who acts as enemies of the State.

164. The question of discrimination has been raised by the Petitioners. In this behalf, reference may be made to the judgment of this Court, reported as *Brig. (Retd) F.B. Ali and another (Supra)*, wherein it was held as follows:

> "Equal protection of the laws does not mean that every citizen, no matter what his condition, must be treated in the same manner. The phrase `equal protection' of the laws means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or the class of persons. …"

It was also held:

> "… To justify the validity of a classification, it must be shown that it is based on reasonable distinctions or that it is on reasonable basis and rests on a real or substantial difference of distinction. …"

It was further observed:

> "… Thus, in the field of criminal justice, a classification may well be made on the basis of the heinousness of the crime committed or the necessity of preventing certain anti-social effects of a particular crime. Changes in procedure may equally well be effected on the ground of the security of the

> State, maintenance of public order, removal of corruption from amongst public servants or for meeting an emergency.".

and also observed that:

> "The principle is well recognized that a State may classify persons and, objects for the purpose of legislation and make laws applicable only to persons or objects within a class. …"

In the case of I. A. Shirwani and others v. Government of Pakistan through Secretary Finance Division, Islamabad and others (1991 SCMR 1041), this Court held as follows

> "… that in order to make a classification reasonable, it should be based--
>
> > (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
> >
> > b) that the differentia must have rational nexus to the object sought to be achieved by such classification."

The aforesaid view has been reiterated in the numerous cases including (1) Jahanghir Sarwar and others v. Lahore High Court and another (2011

SCMR 363), (2) Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 SC 44), (3) All Pakistan Newspapers Society and others v. Federation of Pakistan and others (PLD 2012 SC 1) (4) Dr. Shahnaz Wajid v. Federation of Pakistan through Secretary Establishment Division, Government of Pakistan (2012 PLC(CS) 1052), (5) Regarding Pensionary Benefits of the Judges of Superior Courts from the date of their respective retirements irrespective of their length of service as such Judges (PLD 2013 SC 829) (6) Secretary Economic Affairs Division, Islamabad v. Anwarulhaq Ahmed and others (2013 SCMR 1687).

165. The cases that can be tried under the Pakistan Army Act have been clearly identified in terms of offences enumerated therein when committed by a terrorist known or claiming to be a member of a group or organization or in the name of a religion or a sect. This is an ascertainable and clearly defined criteria based on an intelligible differentia and constitute a valid classification.

166. Section 4 of Pakistan Army (Amendment)

Act, 2015, clearly states that the provisions thereof shall have effect notwithstanding any law for the time being in force and in case of any conflict the provisions of the said Act shall prevail. It is also clear that no new offence has been created only a new forum for trial has been provided for. As a pure question of law even if the offences in question or incorporated in two separate Statutes or provisions providing for trials by two separate Forums the matter can be referred to for trial to any of the two Forums by virtue of Section 25 of the General Clauses Act, 1897. Be that as it may, the provisions of Pakistan Army Act, 1952, as amended by Pakistan Army (Amendment) Act, 2015, has been incorporated in the Schedule referred to in Article 8 therefore, its provision cannot be invalidated for offending against Fundamental Rights, including Article 25. Similarly, Article 10A also cannot be pressed into service to challenge the provisions of Pakistan Army Act, 1952 as amended. Incidentally the Ordinance invalidated in *Sh. Liaquat Hussain's case (supra)* was not incorporated in the Schedule to Article 8.

167. During the course of proceedings, the learned Attorney General for Pakistan attempted to indicate that the selection and the transfer of case for trial by the Court Martial and the eventual orders passed and sentence awarded may be beyond the powers of Judicial Review of the High Courts and this Court. In this behalf, reference was made to the bar of jurisdiction contained in Article 199(3) of the Constitution. We are afraid that such is contrary to the settled law of the land as repeatedly annunciated by this Court.

168. In the case of *Brig. (Retd.) F.B. Ali's case (supra),* this Court observed as under:

> "... However wide the connotation of these words may be they cannot possibly act as a bar where the action impugned is itself without jurisdiction or coram-non-judice or has been taken mala fide as held by this Court in State v. Ziaur Rahman. (2) On the other hand if the action is with jurisdiction and bona fide then I am prepared to concede that the bar will be operative in respect of almost anything if it is in relation to a person who is even only for the time being subject to a law relating to the Armed Force. ..." (emphasis are supplied)

In the case of Mrs. Shahida Zahir Abbas and 4 others v. President of Pakistan and others (PLD 1996 SC 632), this Court observed as under:

> "It is quite clear from the above-quoted passage that the bar contained in Article 199(3) of the Constitution on the powers of the High Court is not absolute in nature. At least in respect of three categories of cases, namely, where the impugned action is mala fide, or without jurisdiction or coram non judice the Bar of Article 199(3) is not applicable." (emphasis are supplied)

In the case of Ex.Lt. Col. Anwar Aziz (PA-7122) v. Federation of Pakistan through Secretary, Ministry of Defence, Rawalpindi and 2 others (PLD 2001 SC 549), this Court held as under:

> "9. By now it is well-settled principle of law that the High Court under Article 199(3) of the Constitution can examine the cases falling within three categories, namely, where impugned order/judgment, is mala fide; or without jurisdiction or coram non judice." (emphasis are supplied)

In the case of Federation of Pakistan and others v. Raja Muhammad Ishaque Qamar and

another (PLD 2007 SC 498), this Court held as under:

> "... that the bar contained in Article 199(3) of the Constitution on the powers of the High Court is not absolute in nature, at least in respect of three categories of cases where impugned judgment is mala fide, or without, jurisdiction or coram non judice to which bar of Article 199(3) of the Constitution is not applicable." (emphasis are supplied)

In the case of Ghulam Abbas Niazi v. Federation of Pakistan and others (PLD 2009 SC 866), this Court also held as follows:

> "9. The view afore-said was re-affirmed by a full Bench judgment in Mrs. Shahida Zahir Abbasi v. President of Pakistan PLD 1996 SC 632(e) and Mst. Tahira Almas v. Islamic Republic of Pakistan PLD 2002 SC 830(a). This brings us to the only conclusion, having attained the force of law of the land, that the bar under Article 199(3) of the Constitution is not attracted to a case, where the authority involved has acted without jurisdiction, mala fide and coram non judice. Having so determined, we would now advert to the facts and circumstances of the present case in order to see if the trial and conviction of the appellants by Field General Court Martial was without jurisdiction, coram non judice and mala fide."

(emphasis are supplied)

In the case of Federation of Pakistan through Secretary Defence and others v. Abdul Basit (2012 SCMR 1229), this Court observed as follows:

> "8. The question as to whether the High Court was competent to take cognizance of the matter in view of the bar contained in Article 199(3) of the Constitution has been dealt with by this Court in Civil Appeals Nos.1274 and 1275 of 2005 (Federation of Pakistan and others v. Raja Muhammad Ishaque Qamar), wherein it has been held that notwithstanding the bar contained in Article 199(3) of the Constitution, where any action has been found to be without jurisdiction or coram non judice or mala fide, extraordinary jurisdiction of the High Court under Article 199 could competently be invoked by an aggrieved person. The respondents in the above-referred case have challenged the action of the appellants, inter alia, on the ground that para-5 of the circular/notification dated 13-12-1992 of the Air Headquarters was overlooked while removing the respondents from service. The High Court found the said impugned action of the appellants to be unfair and unjust and identical plea was raised before this Court that the High Court was in error in entertaining the petitions in view of the bar contained in Article 199(3). This Court in its judgment referred to

> hereinabove has held that the High Court had rightly entertained the petitions. The non obstante clause has to be strictly construed. If an action of the authority is in colourful exercise of power and or is tainted with malice, non obstante clause will not come in the way of the High Court to entertain such a petition. The non obstante clause does not provide blanket cover to the appellants and is subject to judicial review if the action on the part of the appellants is coram non judice, without jurisdiction or mala fide. …" (emphasis are supplied)

In the case of Rana Muhammad Naveed and another v. Federation of Pakistan through Secretary M/o Defence (2013 SCMR 596), this Court held as under:

> "9. Yes, Article 199(3) of the Constitution prohibits the High Court from making an order in relation to a person who is a member of Armed Forces of Pakistan or who is for the time being subject to any law relating to any of those forces or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law but not when acts, actions or proceedings which suffer from defect of jurisdiction and are thus coram non judice. The cases of "Federation of Pakistan and another v. Malik Ghulam Mustafa Khar" (PLD 1989 SC 26),

> "Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid" (1993 SCMR 1171) and "Ghulam Abbas Niazi v. Federation of Pakistan and others" (PLD 2009 SC 866) may well be referred to in this behalf. ..." (emphasis are supplied)

In the case of Ex.PJO-162510 Risaldar Ghulam Abbas v. Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Rawalpindi and others (PLJ 2013 SC 876), this Court observed as follows:

> "5. There is no doubt that (as) per settled Law where any action or order of any authority relating to the Armed Forces of Pakistan, which is either coram-non-judice, malafide, or without jurisdiction, the same can be challenged before the High Court and the bar contained Article 199(3) of the Constitution would cease to operate. As much has been held in a long line of cases such as Brig (R) FB Ali and another vs. The State (PLD 1975 SC 506), Federation of Pakistan and another vs. Malik Ghulam Mustafa Khar (PLD 1989 SC 26), Shahida Zahir Abbasi and 4 others vs. President of Pakistan and others (PLD 1996 SC 632), Sardar Farooq Ahmed Khan Laghari and others vs. Federation of Pakistan and others (PLD 1999 SC 57) and Mushtaq Ahmed vs. Secretary Ministry of Defence

> (PLD 2007 SC 405)." (emphasis are supplied)

169. Reference in this behalf may also be made to the judgment of this Court in the case, reported as The State v. Zia-ur-Rahman and others (PLD 1973 SC 49)**,** wherein this Court, observed as follows:

> "It will thus be seen that, so far as this Court is concerned, it has consistently held the view that a mala fide act stands in the same position as an act done without jurisdiction, because, no Legislature when granting a power to do an act can possibly contemplate the perpetration of injustice by permitting the doing of that act mala fide. …" (emphasis are supplied)

In the case of Federation of Pakistan and another v. Malik Ghulam Mustafa Khar (PLD 1989 SC 26), this Court also held as follows:

> "During the Martial Law when the fundamental rights stood suspended, Article 4 furnished the only guarantee or assurance to the citizens that no action detrimental to the life, liberty, body, reputation or property of any person would be taken except in accordance with law- Acts actions or proceedings which suffered from excess or lack of jurisdiction or were coram non

> judice or mala fide (be it malice in fact or in law) could hardly be treated as those in accordance with law. …" (emphasis are supplied)

170. This Court has also followed a similar view in the judgments, reported as (1) Karamat Ali v. State (PLJ 1976 SC 341), (2) Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid (1993 SCMR 1171), (3) Mst. Tahira Alams and another v. Islamic Republic of Pakistan through Secretary, Ministry of Interior, Islamabad and another (PLD 2002 SC 830), (4) Begum Syed Azra Masood v. Begum Noshaba Moeen and others (2007 SCMR 914) (5), Syed Rashid Ali and others v. Pakistan Telecommunication Company Ltd and others (2008 SCMR 314) and (6) Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61).

171. In view of the above, there can be no manner of doubt that it is a settled law that any order passed or sentence awarded by a Court

Martial or other Forums under the Pakistan Army Act, 1952, included as amended by the Pakistan Army (Amendment) Act, 2015, is subject to the Judicial Review both by the High Courts and this Court, *inter alia,* on the ground of *coram-non-judice*, without jurisdiction or suffering from *mala fides* including malice in law. This would also hold true for any decision selecting or transferring a case for trial before a Court Martial. Furthermore, such decision requires the exercise of discretion by the Executive Authority, which must necessarily be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment, as provided by Section 24A of the General Clauses Act, 1897, which is reproduced hereunder for ease of reference:

> "**24A. Exercise of power under enactments**.—(1) Where by or under any enactment a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advertisement of the purposes of the enactment.
>
> (2) The authority, office or person making any order or issuing any direction under the

> powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be for issuing the direction and shall provide a copy of the order or as the case may be, the direction to the person affected prejudicially."

172. Adverting now to the contention of the Petitioners that the Pakistan Army (Amendment) Act, 2015, is *ultra vires* the Constitution inasmuch as it contemplates the exercise of Judicial Power by an Executive Authority and further the Forum (Court Martial) invested with such jurisdiction is not under the control and supervision of the High Court, as is the requirement of Articles 175 and 203 of the Constitution. Undoubtedly, the Constitution of the Islamic Republic of Pakistan, 1973, by virtue of Article 175 enjoins the exercise of Judicial Power by the Supreme Court, High Courts and such other Courts, established by Law and by virtue of Article 203 such other Courts must necessarily be within the control and supervision of the High Courts. In addition thereto the other Courts and the Tribunals, which can exercise the Judicial Power, are specified in the

Constitution (Federal Shariat Court, Service Tribunals and Election Tribunals) or as may be established by law. The Judicial Power cannot be exercised by the Executive, which was required to be separated from the Judiciary and such exercise by and large has been carried out. Such is the law, as consistently laid down by this Court, including the cases of *Azizullah Memon (supra)* and *Mehram Ali (supra).* It is not even the case of the Respondents that the officers presiding over the Court Martial are not from the Executive or that their appointments are to be effected in consultation with the High Court concerned, a natural attribute of supervision and control. The similar argument found favour with this Court in *Sh. Liaqat Hussain's case (supra)* where the law i.e. the Ordinance No.XII of 1998, which provided by legislation through reference for trial of offences mentioned therein by the Forums under the Pakistan Army Act, 1952, was held to be *ultra vires*. However, the legal situation has undergone a decisive change by incorporation of the proviso to Article 175 through the 21st Constitutional

Amendment. At the very outset, it may be noticed that the proviso is applicable to the said Article and not to any sub-Article or clause thereof. An exception has been created with regard to the exercise of Judicial Power by a Forum (Court Martial) other than a Court or Tribunal contemplated under Article 175 and thereof by necessary implication under Article 203. Similarly, an exception has also been created to the general principle laid down under Article 175 regarding the prohibition of the exercise of Judicial Power by an Executive Authority inasmuch as, it has specifically excluded the trial of persons, who claim to be, or are known, to belong to any terrorist group or organization using the name of religion or a sect from the application of Article 175. In this view of the matter, the provisions of the Pakistan Army (Amendment) Act, 2015, cannot be invalidated for being inconsistent with Article 175 or that it contemplates the exercise of Judicial Power by an Executive Authority.

173. Having identified and circumscribed the effect of the Pakistan Army (Amendment) Act, 2015

as a consequence of the 21st Constitutional Amendment in this behalf, it may now be appropriate to examine whether such action of amending the Constitution offends against the Salient Features thereof. That as noted above, the implied limitation upon the Parliament *qua* the amendment of the Constitution with regard to the Salient Features thereof does not place such Salient Features entirely out of reach of the amendatory powers of the Parliament, which may exercise such powers in respect of such Salient Features but cannot abrogate, repeal or substantively alter i.e. significantly effect the essential nature of the same. The 21st Constitutional Amendment, no doubt, pertains to the Salient Features i.e. the Fundamental Rights and the Independence of Judiciary. What is required to be adjudicated upon is as to whether the same has been substantively altered?

174. The Pakistan Army Act, 1952, as it existed prior to the enactment of 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015, alongwith, Pakistan Air

Force Act, 1953 and Pakistan Navy Ordinance, 1961, were already excluded from the requirements of conforming with the Fundamental Rights by virtue of Article 8(3)(a). Through the 21st Constitutional Amendment, in fact, the amendments made through the Pakistan Army (Amendment) Act, 2015, have also been excluded from such scrutiny. The amended provisions temporarily extend the protection conferred upon the Pakistan Army Act, 1952, to include the trial of Terrorists waging war against Pakistan. The Fundamental Rights of the overwhelming majority of the people of Pakistan, including those accused of criminal offences remains unaffected. A temporary measure targeting a very small specified clearly ascertainable class of accused has been brought into the net to be tried under the Pakistan Army Act in accordance with procedure which has been held by this Court to be consistent with recognized principles of Criminal Justice. Even otherwise, the imperative to act fairly and justly as reinforced by Section 24A of the General Clauses Act, 1897, is applicable. Neither the selection and

the transfer of cases nor the eventual order or sentence are immune from the sanctity of Judicial Review by the High Courts and this Court. In the circumstances, it is difficult to hold that the essential nature of the Salient Features of Fundamental Rights as applicable in the Country has been repealed, abrogated or substantively altered.

175. However, it may be clarified that if more laws are added to the Schedule to Article 8, each such addition would need to be scrutinized so as to ensure that the Fundamental Rights are not substantively altered. A quantitative change can always result in a qualitative change bringing the matter within the prohibition of the implied restriction upon the power to amend the Constitution.

176. Similarly, with regard to the proviso to Article 175, it may be noted that the vast expanse of the Judicial Power of the State in terms of Article 175 remains unaffected. As noted above, a small clearly ascertainable class of offences and persons are to be tried by Forums under the

Pakistan Army Act. Such Forums are established by Law and pre-exist and their creation has Constitutional recognition. The selection of cases for trial by Court Martial and the eventual decisions passed and sentences awarded therein are subject to Judicial Review, as has been held hereinabove. Consequently, the Independence of Judiciary through Separation of Powers as a Salient Feature does not appear to have been significantly affected in respect of its essential nature so as to entail the penalty of invalidation, especially in view of the temporary nature of the amendment.

177. However, the trials of civilians by Court Martial are an exception and can never be the rule. Amplification of the jurisdiction of the Forums under the Pakistan Army Act, in this behalf, may step out of the bounds of Constitutionality.

178. The response of the State appears to be proportionate and targeted focusing on terrorists known or claiming to be members of a group waging war against Pakistan in the name of

religion or sect, rather than looking towards Article 232, which would have adversely impacted the Fundamental Rights to a large expanse of the population and seriously curtailed the jurisdiction of the Courts.

179. During the course of arguments, some reference was made to the Public International Law and International commitments made by the Pakistan. It is for the Federal Government to ensure that the course of action undertaken by them does not offend against the Public International Law or any International Commitment made by the State, which may have adverse repercussions for Pakistan.

180. In view of the aforesaid, it is held that:

(a) The Constitution contains a scheme reflecting its Salient Features which define the Constitution. Such Salient Features are obvious and self evident upon a harmonious and wholistic interpretation of the Constitution. In an effort to discover such Salient Features material outside the Constitution cannot be safely relied upon.

(b) The Salient Features as are ascertainable from the

Constitution including Democracy, Parliamentary Form of Government and Independence of the Judiciary.

(c) The amendatory powers of the Parliament are subject to implied limitations. The Parliament, in view of Articles 238 and 239 is vested with the power to amend the Constitution as long as the Salient Features of the Constitution are not repealed, abrogated or substantively altered.

(d) This Court is vested with the jurisdiction to interpret the Constitution in order to ascertain and identify its defining Salient Features. It is equally vested with jurisdiction to examine the *vires* of any Constitutional Amendment so as to determine whether any of the Salient Features of the Constitution has been repealed, abrogated or substantively altered as a consequence thereof.

(e) Article 175A as inserted by the 18th Constitutional Amendment, in view of the provisions of the 19th Constitutional Amendment and the dictum laid down by this Court in the case, reported as Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 308 and PLD 2011 SC 407) do not offend against the Salient Features of the Constitution. The other questioned provisions thereof are also not *ultra vires* the Constitution.

(f) The 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015

accumulatively provide, a temporary measure for the trial of terrorists accused of offences including waging war against Pakistan by a forum already constituted under the law and consistent with a recognized procedure already available for and applicable to personnel of the Pakistan Army. The enlargement of the jurisdiction of such forum is subject to due compliance with an ascertainable criteria constituting a valid classification having nexus with the defence of Pakistan and does not abrogate, repeal, or substantively alter the Salient Features of the Constitution.

The provisions of the 21st Constitutional Amendment as such are *intra vires* the Constitution.

The provisions of the Pakistan Army (Amendment) Act, 2015, are not *ultra vires* the Constitution.

(g) The decision to select, refer or transfer the case of any accused person for trial under the Pakistan Army Act, 1952, as Amended is subject to Judicial Review both by the High Courts and by this Court *inter alia* on the grounds of *coram-non-judice*, being without jurisdiction or suffering from mala fides including malice in law.

(h) Any order passed, decision taken or sentence awarded under the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, are also subject to Judicial Review by the High Courts and this Court, *inter*

alia, on the grounds of being *coram-non-judice*, without jurisdiction or suffering from mala fides including malice in law.

181. In view of the above, all the instant Constitution Petitions are liable to be dismissed in the above terms.

Sd/-
Anwar Zaheer Jamali

Sd/-
Sarmad Jalal Osmany

Sd/-
Amir Hani Muslim

Sd/-
Gulzar Ahmed

Sd/-
Sh. Azmat Saeed

Sd/-
Mushir Alam

Sd/-
Umar Ata Bandial

Sd/-
Maqbool Baqar

Mian Saqib Nisar, j.-

(1) I have had the pleasure and privilege of going through the opinion recorded by the Hon'ble Chief Justice of Pakistan to which I subscribe in principle but because of the great importance of the constitutional issues that have arisen, have decided to express in my own words my opinion on the same. I also had the benefit of reading the proposed judgment authored by my brother Sh. Azmat Saeed, J. In due deference to his views, I am not persuaded that this Court has the jurisdiction to interfere and examine the vires of an Amendment made in the Constitution on the touchstone(s) laid down in the said judgment. I will confine myself to a consideration of the most fundamental issues involved, including in particular the doctrine of the "basic structure", as developed by the Indian Supreme Court. This doctrine is now well entrenched in the constitutional law of that country. It is on such basis that the Indian Supreme Court has asserted, and exercised, a jurisdiction to review amendments to the Indian Constitution, and to strike down any amendment that sought to alter or amend the "basic structure" of that Constitution in a manner that offended judicial

sensibilities. This Court has considered this doctrine in the past, but has always so far refused to incorporate it into the constitutional law of Pakistan. We have, in these petitions, been invited yet again to adopt the doctrine. For the reasons herein after set out, for my part, I would refuse this invitation.

(2) It would only unnecessarily burden the record for me to reproduce, even in summary form, the submissions that have been made by the learned counsel who have appeared before us, both for the petitioners as well as the respondents. The submissions have been fully noted in the judgment of the Hon'ble Chief Justice.

(3) Notwithstanding that the questions raised in the context of the doctrine of "basic structure" are difficult, complex and interesting, they are certainly not novel. As noted, the doctrine has been considered by this Court in several judgments in the

past. In its essence, the question that the doctrine purports to address is simply this: is an amendment of the Constitution amenable to judicial review? In my view, the real point in issue in such cases is always, where lies the constituent power of the State (for that is the power by which the Constitution is amended): with an unelected judiciary, although certainly acting with the utmost good faith and in the national interest, or with the chosen representatives of the people, even though they may not always come up to the expectations of the public? I would respectfully answer: with the latter rather than the former.

(4) As is well known, and is indeed trite law, the legality of ordinary legislation is tested on the anvil of the Constitution. If the legislation is found to violate any provision of the Constitution (e.g., is contrary to fundamental rights), then the law is struck down as being *ultra vires*. The reason is simple: ordinary legislation is subordinate to the Constitution, and depends on the latter for its existence, either

because (if it is "existing law") the Constitution has mandated that it will continue to have legal force and effect (see Article 268), or (if it is a law made after the commencing day) it has been made by an organ created by or under the Constitution. If there is a conflict between the Constitution and ordinary legislation, then it is obvious that it is the former that must prevail. What however, is the basis for challenging an amendment to the Constitution itself? What, as it were, is the anvil, if any, on which the legality of the amendment can be tested? To this, there can be either one out of two answers. The anvil can be something that transcends the Constitution itself, i.e., something which is on a higher legal pedestal than the Constitution. Legally speaking, this is generally regarded as impossible. *The Constitution is the legal source from which all else flows including, specifically, the powers of the judiciary: if no sanctity attaches to the Constitution, there is no such thing as an independent judiciary*. (I leave to one side the past mistakes made by the Court in this regard stemming from the fundamentally flawed so-called doctrine of state necessity and other similar theories, and the blind alleys down which, unfortunately, the law has previously repeatedly stumbled.)

(5) The second possible answer is that there is something in the Constitution itself which is, constitutionally speaking, immutable and thus cannot be altered, and it is this argument which was urged by learned counsel appearing on behalf of the Petitioners. The argument was framed in different forms: reference was made to the "basic features" or "basic structure" of the Constitution, or to its "salient features", or to the Objectives Resolution, as embodied in the preamble to the Constitution and given substantive effect by Article 2-A. In substance however, the point was the same: the Constitution had certain core features or characteristics which were fixed and unalterable. In other words, there are, according to the learned counsel for the Petitioners, certain aspects of the Constitution that are so fundamental and basic that they constitute the very fabric of the Constitution. To attempt to alter or remove these features, or to tamper with them, is to tear into the very heart of the Constitution, so

that what would be left behind would not be the Constitution, but something else altogether. These features or aspects could not, therefore, be touched by any amendment. This then, was the proposed anvil: if the amendment sought to alter or tamper with, or was contrary to, the "basic structure" or "salient features" of the Constitution, then it was invalid. And, it was further submitted, and this is the heart of the matter, that this was something that was amenable to judicial review, i.e., it was for the courts to determine whether the impugned amendment had breached the "basic structure" or the "salient features" of the Constitution. In other words, if the learned counsel for the Petitioners are correct, this critically important issue, which is determinative of the nature of the Constitution and the mode in which the people of Pakistan are to be governed, is, in effect, *outside the framework of democracy*. It was something which was not conceived of by the framers of the Constitution. It is not something for the people of Pakistan to determine through their elected representatives but by the judiciary, which, in the final analysis, is a body of appointees *irrespective of the question as to who makes the appointments.* I must bluntly state what is at stake here: if this proposition is true, then truly the theoretical foundations of democracy in Pakistan are called into question. The importance of this question cannot, therefore, be over-emphasized.

(6) The question before the Court can therefore be reformulated as follows: should the Court accept that an amendment to the Constitution can be judicially reviewed on the basis of the "basic features" or "basic structure" or "salient features" doctrine? *(note: on the touchstone of objective resolution, the preamble to the Constitution, Article 2A thereto, the tricotomy of power, as per the scheme of the Constitution, and/or the law enunciated by this Court or any other variant in this context)* And if so, can or ought Article 175-A and the substituted Article 63-A, and the deletion of the provision relating to intra-party elections from Article 17, all as brought about by the 18th Amendment, be nullified on the basis of such a doctrine? Similarly, can the changes introduced by the 21st Amendment be re-examined, and if necessary, be struck down in part or whole?

(7) Of course, the doctrine put forward by learned counsel for the Petitioners is not something new. As noted above, it is a part of the constitutional law of India. The "basic features" doctrine has been propounded at length and applied by the Indian Supreme Court in a number of cases, including in particular, the foundational case of *Kesavananda Bharati* v *State of Kerala* AIR 1973 SC 1461. This case was decided by the slenderest of majorities, 7:6, so that, in effect, one Judge's view was decisive of this critically important constitutional issue. The Government of India indeed made an unsuccessful attempt to have the matter reviewed. A review bench was constituted and the matter taken up but was not allowed to continue till fruition. Thus the judgment remains intact. All subsequent decisions of the Indian Supreme

Court, re-affirming and (as will be seen) expanding the doctrine were given by benches comprising of a lesser number of Judges (usually not more than 5) who were bound by the previous decision of the 13-member bench, leading to the somewhat paradoxical result that one Judge's opinion (which incidentally, as will be seen later, differed in almost all important respects with the judgments of the other six judges in the majority) has reshaped the constitutional map of India in a decisive manner. This simple fact should make us think very hard before venturing down that thorny path.

(8) Up to now the "basic structure" doctrine has not found favor with this Court. In more than a few cases, the Court was invited to invalidate amendments to the Constitution on this basis. In the past, such invitations were firmly rejected. The entire case law was extensively reviewed by this Court in *Pakistan Lawyers' Forum and others* v *Federation of Pakistan and others* PLD 2005 SC 719, where the 17th Amendment to the Constitution was under challenge. The petitions were unanimously dismissed, and I will have occasion, later in this judgment, to cite the relevant observations of the Court from that decision. At this point, it is sufficient to note that the case law goes back to the early seventies, i.e., is virtually co-extensive

with the Constitution itself. Thus, this Court had, for a period of several decades, resolutely set its face against accepting any doctrine or basis on which an amendment to the Constitution could be subjected to judicial review.

(9) Before proceeding further, it would be convenient to refer to Part XI of the Constitution, which provides for its amendment. This Part comprises of only two Articles. Article 238 states that the Constitution may be amended by Act of Parliament. The manner in which this may be done is set forth in Article 239. In its original form, this Article read as follows:

> "(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 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 of that Province passed by the votes of not less than two-thirds of the total membership of that Assembly."

(10) Two points may be made with regard to the original form of Article 239. Firstly, it was relatively easier to amend the Constitution in terms thereof, since although a bill amending the Constitution required a two-thirds majority of the total membership of the National Assembly, it only required a simple majority of the total membership of the Senate. Secondly, the Article did not expressly provide that a constitutional amendment could not be challenged in court, nor did it expressly assert that the power of the legislature to amend the Constitution was without limitation.

(11) Article 239 was substituted by General Zia-ul-Haq by means of Presidential Order 14 of 1985 (with effect from 02.03.1985). However, this substitution was swiftly discarded, and by means of the Constitution (Second Amendment) Order, 1985 (P.O. 20 of 1985), Article 239 was substituted (with effect from 17.03.1985) yet again, and took its present shape, which is as under:

> "(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 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."

(12) Article 239 now provides that a bill to amend the Constitution must be passed by both Houses of Parliament by a two-thirds majority of the total membership of each House. Clause (5) expressly bars the jurisdiction of the courts with regard to constitutional amendments, and clause (6) clarifies that the power of Parliament to amend the Constitution is without limitation. Article 239, as it stands today, was ratified by the 8th Amendment (which was upheld in *Mahmood Khan Achakzai* v *Federation of Pakistan* PLD 1997 SC 426), and has not been called in question since then, nor have any of its provisions been specifically challenged by the Petitioners in the present Petitions.

(13) It may be noted that much of the case law whereby this Court (and the High Courts) refused to countenance any judicial review of an amendment to the Constitution relates to the period when Article 239 stood in its original form, i.e., prior to the 1985 substitution. In such leading cases as *The State* v *Zia-ur-Rahman* PLD 1973 SC 49, *Federation of Pakistan* v *Saeed Ahmed Khan and others* PLD 1974 SC 151, *Islamic Republic of Pakistan* v *Abdul Wali Khan* PLD 1976 SC 57 and *Federation of Pakistan* v *United Sugar Mills Ltd*. PLD 1977 SC 397 this Court repeatedly held that it did not have the power to strike down any provision of the Constitution, including any amendment made therein on any basis, whether that be the "national aspirations" of the people, or Kelsen's often misunderstood theory of the *Grundnorm* or the Objectives Resolution or any higher ethical notions or philosophical concepts of law or on the basis of the "basic structure". The High Courts were equally emphatic on the point. In *Dewan Textile Mills Ltd.* v *Federation* PLD 1976 Kar 1368 (expressly approved by this Court in the *Pakistan Lawyers' Forum* case), the Sindh High Court dismissed petitions challenging the 4th Amendment to the Constitution. The High Court correctly noted that under the Constitution, both the legislative and the constituent powers of the State were to be exercised by the legislature, but that there was a qualitative difference when the legislature was exercising ordinary legislative power, and when it was exercising constituent power to amend the Constitution. The High Court observed as follows:

> "If then, it is permissible under Article 239 to amend the Constitution, the question then is whether there are any implied restrictions that can be spelled out from the Constitution itself.
>
> It would be at once noticed that the provisions for amendment of the Constitution has been incorporated in a separately enacted Part of Constitution exclusively reserved for this purpose, under the heading "Amendment of the Constitution". This Part consists of only two Articles 238 and 239, whereas the former takes care of the exclusiveness from any other mode by which the power contained in this Part can be exercised, the latter Article provides for the manner in which Act of Parliament to amend the Constitution is to be passed and its patent effect, namely, that "the Constitution shall stand amended in accordance with the term thereof".
>
> It is in this basic distinction that an Act of Parliament passed in exercise of the powers contained in Part XI of the Constitution that it differs from any other Act of Parliament which is passed in exercise of powers to enact law on the topics enumerated in the legislative lists contained in the Fourth Schedule of

> the Constitution or embodied specifically in certain provisions of the Constitution. It is also by this basic distinction that difference lies between constitutional law and ordinary law. An ordinary law, when questioned must be justified by reference to the higher law i.e. the Constitution; but in the case of a Constitution, its validity is, generally speaking, inherent and lies within itself….
>
> Once it is realised that a Constitution differs from law, in that a Constitution is always valid, whereas the law is valid only if it is in conformity with the Constitution and that body which makes the ordinary law is not sovereign, but it derives its power from the Constitution; it becomes obvious that an amendment to the Constitution has same validity as the Constitution itself, although the question whether the amendment has been made in the manner and form and even the power conferred by the Constitution is always justiciable. Just as an ordinary law derives its validity from its conformity with the Constitution, so also an amendment of the Constitution derives its validity from the Constitution.
>
> When a legislative body is also the sovereign Constitution-making body, naturally the distinction in the Constitution and an ordinary law becomes conceptual, and in fact disappears, as the body has both the Constituent power of the sovereign as well as the legislative power. If, therefore, the power to amend is to be found within Part XI and not the other parts of the Constitution, as the fact really is then it stands to reason to hold that constituent power of amendment of the Constitution is distinct from a legislative power.
>
> The distinction between legislative power and constituent power is vital in a rigid or controlled Constitution, because it is that distinction which brings in the doctrine that a law ultra vires of the Constitution is void, since the Constitution, a touch-stone or validity and no provision of the Constitution can be ultra vires.
>
> In the distinction contained in Article 239 that "the Bill shall become the Act of the Parliament and the Constitution shall stand amended in accordance with the terms thereof", therefore, lies the vital distinction which makes that Act of Parliament different from any other Act of Parliament passed in exercise of powers contained in the rest portion of the Constitution. The distinction lies in the criterion of validity. The validity of an ordinary law, as said earlier, can be questioned and when questioned, it must be justified by reference to a higher law. The Legislatures constituted under each Constitution have the power to enact laws under the Authority granted by the Constitution in parts other than Part XI. The power to enact laws carries with it the power to amend or repeal them. But these powers of Legislature do not include any power to amend the Constitution. When Parliament is engaged in the amending process of the Constitution, it is not legislating. It is exercising a particular Power which is *sui generis*. Thus an amendment of the Constitution under Article 239 is Constituent law, and not an ordinary legislative product. Therefore, a power to amend the Constitution is different from the power to amend ordinary law.
>
> As soon as an amendment is made in the Constitution by virtue of the power exercised by the Parliament under Part XI of the Constitution, the amendment prevails over the Article or Articles amended. The nature of this power itself, therefore, connotes that it is the "Constituent power", a definite formal process by which the Constitution is amended."

(14) It is pertinent to note that the foregoing cases were decided when Article 239 did not contain any express bar regarding the jurisdiction of the courts. Nonetheless, the firm view was that amendments to the Constitution were not justiciable. If

therefore an amendment to the Constitution could not be subjected to judicial review when there was no express bar, how can it be so reviewed today, when clause (5) does contain such a bar? Therefore, unless clause (5) itself is declared invalid, it presents a barrier to the invalidation by the courts of any amendment of the Constitution. *As noted above, clause (5) of Article 239 has not been challenged by the Petitioners*.

(15) As noted by the Sindh High Court in the *Dewan Textile* case, while amending the Constitution, the legislature is exercising a constituent power, and not a mere legislative power. The check on the latter power is of course the Constitution itself, which limits and controls both its scope and extent and the manner in which it is to be exercised. If a dispute arises whether the legislative power has been exceeded, the matter comes to the courts because in any system based on the rule of law, disputes are (and should be) resolved before a judicial forum. And the reason why courts have the "final say" in the matter is because there must be some finality to all disputes. In this context, it would be useful to remind ourselves of the well known words of Justice Robert Jackson in his concurring opinion in *Brown* v *Allen* 344 US 443 (1953) when he said of the US Supreme Court that "There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final".

(16) When the legislature is exercising the constituent power under Article 239 however, the position is quite different. The Constitution does not contain any express limit on the exercise of the constituent power. Indeed, Article 239 expressly clarifies in clause (6) that there is no limitation to this power. And unlike the situation when ordinary legislative power is exercised (and the matter is made justiciable under specific provisions of the Constitution, i.e., Articles 184(3) and

199), the exercise of constituent power is expressly made non-justiciable by clause (5) of Article 239. Indeed, even without clause (5), as noted above, the courts of Pakistan had come to the same conclusion. Despite this, learned counsel for the Petitioners contend that the "basic features" doctrine (by whatever name called) places certain inherent limitations on the exercise of the constituent power, which limitations are implied in Article 239, and it is for the courts to determine whether those limitations have been breached or exceeded by Parliament. It is therefore necessary to examine the "basic features" doctrine in some detail, in order to properly understand its basis and scope, and the consequences that flow from it. It is also necessary to analyze the Pakistan variant of the "basic features" doctrine, i.e., the "salient features" theory, since the Court has in the past rejected the former while espousing the latter, at least for some period of time, prior to decisively rejecting it also in the *Pakistan Lawyers' Forum* case in 2005. It is only then that it will be possible to determine whether this is a doctrine that should now be adopted as part of our jurisprudence.

(17) The Indian Supreme Court developed the doctrine of basic structure against the background of its own constitutional history. It will be recollected that the Indian Constitution was framed as far back as 1949 and the framers of the Constitution were men who had been engaged in the freedom struggle. Prior to the framing of the Indian Constitution an Objectives Resolution was passed in the year 1947. Since the framers of the Indian Constitution had been appointed by the leaders of the freedom movement, it is understandable that their status would be such as would command great respect within the country. Dr. Ambedkar was the chairman of the Drafting Committee and thus the principal draftsman. *The Constitution, in its original form, has a special sanctity in Indian constitutional law*.

(18) The position in Pakistan could not be more different. The present Constitution was framed in 1973, the country having already gone through two previous constitutions, namely the 1956 Constitution and the 1962 Constitution. The 1973

Constitution reflected the views, not of the founders of Pakistan, but of the then current generation of political leaders. It was framed by a parliament the majority of which consisted of members of a particular party who had been elected on a manifestly and openly *socialist* manifesto. This is a point of some importance. It will be recollected that the original impulse for freedom and independence was postulated on a completely different foundation, namely, the vision articulated by the Quaid-e-Azam that the Muslims of the subcontinent were, in every meaningful sense, a nation and were entitled to form and create a nation state. Historically speaking, therefore, Islam was the *raison d'etre* for the creation of the Islamic Republic of Pakistan. However, the fact is that the parties which contested the election immediately prior to the framing of the 1973 Constitution on a specifically religious platform, by and large, singularly failed to obtain a sizeable presence in parliament. This again is a historical fact.

(19) I now turn to the all important question, namely, what, if anything, is the basic structure of the 1973 Constitution? This question is framed on the hypothesis that the concept of basic structure is a meaningful concept, and can be applied in relation to a constitution. The question as to whether the phrase "basic structure" is to be used in a descriptive sense, or a prescriptive sense, is kept aside for a moment although it is one of seminal importance. I will consider and address it in due course. The question is, in either eventuality, what is the underlying structure of the 1973 Constitution? The importance of this question arises inasmuch as it is not meaningfully possible to discuss the juristic concept of "basic structure" in a vacuum. It has to be contextualized against the circumstances giving rise to its birth.

(20) When we examine the Constitution, as originally drafted, we find both the religious principle as well as the socialist ideology reflected in it. Article 2 of the Constitution, which states that Islam is to be the state religion, is immediately followed by Article 3, which states that "the State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle from

each according to his ability, to each according to his work." Article 3, therefore, is reflective of the socialist origins of the Constitution. The principle, "from each according to his ability, to each according to his work" is of course a foundational principle of Marxism–Leninism. (In fact this language has been copied out from Article 12 of the Constitution of the USSR (as it then was), which is of course based on the writings of Karl Marx.) The concept of 'exploitation' has a technical meaning as used in Karl Marx's theoretical work on economics. It refers not to any or every form of exploitation but that form of exploitation which the capitalist class engages in against the interest of the working class. The interesting question which arises of course is how Articles 2 and 3 are to be reconciled because *both* are cardinal principles on the basis of the doctrine of the "basic structure" of the Constitution. Clearly there is a fundamental dichotomy here. Marxism rigidly rejects *all* forms of religion since they reflect patience and suffering as cardinal virtues while espousing a violent and revolutionary struggle by the working class (in the vanguard of which is to be the communist party) which is to overthrow the bourgeoisie and the capitalist class. In a famous Marxist saying, religion has been described as the opiate of the masses. However, the uncomfortable fact remains that if we are to proceed on the basis of the doctrine of the basic structure both Islam and Marxism Leninism are very much present right at the inception of the Constitution. The dilemma is made more acute when we come to the question of the law itself. The following passage from *Dias on Jurisprudence* brings out the essential point with great clarity (pg. 457) (emphasis supplied):

> "The reason why neither Marx nor Engels elaborated a theory of law should now be obvious. Law, in their view, was an instrument of domination, to be done away with, not developed and elaborated. Although they regarded Law as reflecting economic conditions, it would not be fair to suggest that they thereby deprived it of all its creative force. It can play, and has played, a creative part, but always conditioned by its economic substrate. In the proletarian dictatorship law should be a means to an end, namely, to prepare the way for the classless society. It is thus an instrument of government policy. Reverence of the law for its own sake is a "bourgeois fetish". Since law is but a means to an end, it should on no account hamper the work of the proletarian state. There should be no division between "public" and "private" law, because (a) law being an Instrument of domination, only the proletarian government will dominate and there is thus only governmental law. *Nor will*

> *there be any such thing as the separation of powers. Judicial independence, too, as traditionally understood must go*. Judges are instruments of policy and must give effect to this, to which end they have to be strongly indoctrinated before they can be fit for office. Thus, in the early days of the proletarian dictatorship in Russia the only written law consisted of the decrees of the Soviet government. It was laid down in the Statute of the People's Court, November 30, 1918, Article 122, that if there was no law, "socialist consciousness of justice" had to be relied on. In criminal cases severer penalties were to be inflicted on enemies of the regime than on those who interfered with their fellow citizens from purely personal motives. It was left originally to the judge to decide whether a given act was prejudicial to the regime or was purely personal in character. Finally, although it would not be true to aver that individuals should enjoy no liberties other than those expressly conferred upon them, there has to be nevertheless a strict regulation of these, especially in regard to property, according to governmental policy."

(21) If therefore we are to take the basic structure doctrine seriously, and apply it to the Constitution in relation to Articles 2 and 3 what will remain of the concept of independence of the judiciary? Mr. Khalid Anwer, appearing on behalf of the Federal Government, described this as an uneasy marriage of convenience. If so, it seems bound to end in a divorce. Irreconcilables can neither be married, nor yoked together indefinitely. One or the other most inevitably yield, sooner or later. But where does this leave the "basic structure" doctrine? Hanging in mid air perhaps?

(22) If one proceeds further with the enquiry into the structure of the Constitution, we find that immediately after the introductory Part-I there is Part-II which deals with fundamental rights and principles of policy. Fundamental rights, as envisaged in the original Constitution, are, unfortunately in at least one sense, the least fundamental part of the Constitution since, unlike other articles of the Constitution they can be suspended by the President under the emergency provisions set out in Part-X. The question which primarily concerns us is whether the fundamental rights, as contained in the original Constitution, are superior or inherently better than those which are presently in the text after the passage of half a century? For purposes of analytical convenience I will term the original fundamental rights the "basic structure fundamental rights". There can be little doubt as to the answer to this query. *Their scope and ambit has been qualitatively improved with the passage of time*.

(23) Article 10A of the Constitution was introduced by the 18th Amendment and is

indubitably one of the most important of the fundamental rights. It is one of the lynchpins on which the structure of human rights rests. It lays down, both in relation to determination of civil rights and obligations as well as criminal charges that a person shall be entitled not merely to a fair trial but also to "due process". The concept of due process of law is of course one of the seminal concepts of law which appears in the 5th Amendment to US Constitution and traces its origins back to the Magna Carta (1215).

(24) Another major improvement was introduced by means of a substitution of Article 17. The said Article, it will be recollected, confers upon citizens the right to form and be members of political parties. However, faced with the harsh reality that a political party could be banned by the Government, the 18th Amendment brought about a radical change by prescribing that if the Federal Government were to declare, in terms of any law, that a political party was operating in a manner prejudicial to the sovereignty or integrity of Pakistan then it was mandated, within a span of 15 days of such a declaration, to refer the matter to the Supreme Court and the decision of the court on a reference would be final. This was a very important safeguard for the freedom and functioning of political parties without which no democratic system can operate effectively.

(25) Another important fundamental right was conferred on citizens in terms of article 19A which conferred the right to access to information in all matters of public importance. This was followed by the introduction of Article 25A by means of the 18th Amendment in terms whereof the state was obligated to provide free and compulsory education to all children from the ages of 5 to 16 years. Both these fundamental rights are of great importance.

(26) It can be seen therefore that the fundamental rights as originally envisaged by the Constitution have been greatly improved for the benefit of the people of Pakistan. If there is to be a choice between the basic structure fundamental rights and those existing today, there can be no doubt as to which would be preferable.

(27) Proceeding further with the enquiry into the basic structure of the original Constitution one can turn to the thorny issue of legal safeguards for the electoral process. As is well known the critical test for a functional democracy arises at the time of elections. Without fair and free elections there can be no democracy. This is an issue that has bedeviled the history of Pakistan and repeatedly erupted from time to time. Complaints that elections have, in part or in whole, been rigged, still resound in the country. Leaving the political dimensions of the matter aside, there can be no denial of the fact that the mechanism for holding elections has been greatly enhanced and improved with the passage of time. This topic is covered by Part VIII of the Constitution. A striking lacuna existed in the original structure of the Constitution, namely, that the Election Commission did not exist as a permanent body. It had to be created from time to time as an ad hoc body in terms of Article 218 at the time of elections - only the post of Chief Election Commissioner was a permanent appointment. However, even there, the Chief Election Commissioner, who was and is a pivotal figure, was to be appointed by the President in his sole discretion. This necessarily implied that since the President would decide the matter on the basis of the advice of the Prime Minister, there was great scope for possible appointments being made in a partisan manner. Both questions were addressed by an amendment to Article 213 of the Constitution. The said amendment, which was effected by the 18th Amendment, made it mandatory for the leader of the opposition to be included in the appointment process. This was done by requiring the Prime Minister to forward three names for appointment of Chief Election Commissioner to a parliamentary committee but only after consultation with the leader of the opposition. Furthermore, the parliamentary committee was to be constituted by 50% members of the treasury benches and 50% from opposition benches. It can be seen that this was a major step towards transparency, fairness and objectivity in relation to the electoral process.

(28) The other great imponderable in relation to the holding of fair and free elections was the fact that in terms of the original structure of the Constitution the

incumbent government would be in the saddle at the time the elections were held and thus have unrivaled opportunities to try and influence the electoral process. This problem was resolved by providing for the appointment of a caretaker government under Article 224A in terms of which both the Prime Minister and leader of the opposition were to be involved in the process of appointment of a caretaker prime minister. Once again the mechanism involved names of nominees being forwarded to a committee constituted by the Speaker of the National Assembly having equal representation from the treasury as well as the opposition benches. *The so called basic structure has once again been radically remodeled and replaced by a far superior structure*.

(29) When one turns to examine the legislative process one finds, once again, that significant improvements have been made. By way of illustration reference may be made to Article 89 of the Constitution which conferred on the President the power of making and promulgating an Ordinance at any time when the National Assembly was not in session. The 18th Amendment has now altered clause (1) to provide that an Ordinance can only be promulgated if both Houses of Parliament are not in session. As is obvious, the ordinance making power is a clear cut usurpation of legislative power by the Executive. Clause (2) of Article 89 provided that an Ordinance promulgated under this Article would have the same force and effect as an Act of Parliament subject to the caveat that it would stand repealed on the expiration of a specified number of days from its promulgation or, if before the expiration of that period, a resolution disapproving it was passed by either House of Parliament (or, in certain cases, the Assembly). There was no restriction imposed on the President to repeatedly re-promulgate Ordinances which had expired on the expiration of the prescribed period. There were cases in which Ordinances were renewed repeatedly, including in some cases as many as a dozen times or thereabout. This lacuna was also addressed by the addition of an explicit provision stating that only one extension was possible.

(30) The mechanism for the removal of a Prime Minister from office by passing a resolution of no confidence against him, as set out in the original Constitution, was seriously defective. Article 96 originally provided that a resolution for a vote of no confidence could not be passed against the Prime Minister by the National Assembly, *and could not be even moved* unless, by the same resolution, the name of another member of Assembly was put forward as a successor. In other words, it became mandatory for the opposition parties to agree, in advance, on another prime minister before they could even move a resolution for a vote of no confidence against a sitting prime minister. Obviously there ought not to be any linkage between these two steps. If a prime minister has lost the confidence of the House, universal parliamentary practice indicates that he should resign forthwith. The second step of his replacement is essentially an independent although consequential step. Once the original prime minister has lost a vote of no confidence the opposition parties are then entitled to consult each other and eventually arrive at an agreement as to his successor.

(31) Yet another strikingly unusual provision relating to the office of the Prime Minister in the original Constitution was the complete subordination of the office of the President to him which was carried to such an extent that in terms of Article 48 even the signature of the President was not valid unless and until it was counter signed by the Prime Minister, which is hardly becoming the status of a head of state. This too was subsequently repealed. This surely was a unique provision in the parliamentary history of any country. Not surprisingly it gave rise to criticism that the Constitution, in its original form, contemplated not a parliamentary form of government but a prime ministerial form of government. So, was the basic structure of the Constitution parliamentary or prime ministerial? Surely, an interesting conundrum!

(32) Coming to the judiciary, it may noted that Article 175 of the Constitution by means of clause (2) thereof specifically states that no court shall have any jurisdiction save as is, or may be, conferred on it by the Constitution or by any law.

In other words the totality of judicial power has *not* been conferred on the judiciary. *This was a conscious decision by the framers of the 1973 Constitution*. At that point of time there was no shortage of other constitutions in the world which explicitly conferred the totality of judicial power on the judiciary. The most striking example of course is that of the US Constitution. Under Article I all legislative power is rested in Congress. Article II similarly confers executive powers on the President. Article III, section 1 states as under:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

(33) The US Constitution in fact reflects the doctrine of separation of powers, or the trichotomy of powers, in its strictest and purest form. This model was followed in the Australian Constitution which was enacted in 1900, and section 71 thereof confers judicial power on the High Court of Australia (which is, of course, now the equivalent of the Supreme Court). Section 71 reads as follows:

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

(34) As against the above structure the Constitution of Pakistan, in its original form, is very clear that it reflects a conscious decision *not* to confer the totality of judicial power on the judiciary. This is made further clear by numerous provisions which exclude the jurisdiction of the High Court or the Supreme Court. Similarly, the entirety of the legislative power has not been conferred on Parliament as is brought out by the earlier reference hereinabove to the powers of the President to promulgate Ordinances. Needless to say the concept of an ordinance as such is unknown to the United States Constitution. Although the spirit of the separation of powers inheres in the Constitution of Pakistan there can be little doubt that a rigid demarcation has not

been prescribed therein. For example, in relation to the judiciary, when we refer to Article 212 of the Constitution, which still retains its original shape, it will be seen that it contemplates one or more administrative courts or tribunals which are authorized to exercise exclusive jurisdiction. Thus an enclave has been carved out in which the constitutional courts have a highly restricted role. It reads as under:

> **212 Administrative Courts and Tribunals.**
>
> (1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of
>
> (a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters;
>
> (b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or
>
> (c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.
>
> (2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal other than an appeal pending before the Supreme Court, shall abate on such establishment:
>
> Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-Shoora (Parliament) by law extends the provisions to such a Court or Tribunal.
>
> (3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal.

Clause (2) of Article 212 expressly excludes the jurisdiction of the superior courts to grant injunctions, or make any order or entertain any proceedings in relation to a matter to which the jurisdiction of an administrative court and tribunal extends. Although clause (3) provides for an appeal, not to the High Court but to the Supreme Court, against a judgment of an administrative court or tribunal that right has been

severely hemmed in by prescribing the prior satisfaction of the Supreme Court that the case involves a substantial question of law of public importance when granting leave to appeal. In other words, although it may be a first appeal it is still not an appeal as of right. Thus the mere fact that a decision of an administrative court or tribunal may be demonstratively incorrect on the merits still does not confer on the aggrieved party a right of appeal. The question on which an appeal may be heard is contingent on two prior findings: firstly, that it is not a question of fact, and secondly, that it is a question of public importance.

(35) After this review of what would be indubitably regarded as some of the basic features of the Constitution as originally brought into force, and the many salutary changes that have been brought about therein since 1973, I turn to an analysis of the conceptual underpinnings and framework (such as they are) of the "basic structure" doctrine. The first point to note in this regard, and this is of crucial importance, is that a phrase such as "basic features" or "basic structure" or "salient features" is normally used in a purely descriptive sense, *and this is the sense in which this Court has hitherto used and understood it*. (That is of course, the sense in which I have, in the foregoing paras, described certain important features of the Constitution as originally brought into effect and the changes made thereafter.) Even ordinary legislation can have some "basic structure" or "salient features". For example, the "salient features" of the Contract Act, 1872 or the Companies Ordinance, 1984 or the Income Tax Ordinance, 2001 can be readily identified by any seasoned legal practitioner. In the same manner, every constitution has a "basic structure" or "salient features" which can be readily identified. Is the constitution written or unwritten? Does it establish a unitary state or a federation? Is it a democracy or some other form of polity? Does it have a presidential form of government or a parliamentary democracy? These questions can of course, be multiplied, but the basic point is that this is merely a description of what the state of the constitution is at the time when it is being described. What, for example, are the "basic features" of the British constitution? Firstly, it is an unwritten constitution and secondly, the Queen-

in-Parliament is sovereign. A famous observation about the power of the British Parliament, which has been repeated often down the ages, is that Parliament can do anything "but make a woman a man, and a man a woman". But does this mean that the English courts have accepted or apply a doctrine akin to the "basic features" doctrine? Obviously, and certainly, not. The mere fact that the British constitution has certain "basic features" does not, therefore, mean that those features are unalterable. That would be a complete *non-sequitur*. They can certainly be altered. In fact, not merely can they be altered, but they can be altered by a simple majority vote of Parliament. Indeed, the accession of the United Kingdom to the European Union (sanctified by the European Communities Act, 1972), the passage of the Human Rights Act in 1998, the devolution of legislative powers to the Scottish Parliament and the Welsh and the Northern Ireland Assemblies (the latter under the Good Friday Agreement) and even the creation of the UK Supreme Court have already altered them. This process of change may or may not be reversible as is amply demonstrated by recent political, democratic and social developments in the United Kingdom. Thus, the process of devolution is in many ways accelerating and, given, e.g., the recent (and apparently continuing) attempts by Scotland to secede (or gain independence) from the United Kingdom, may well be politically and democratically irreversible although from a strictly legal perspective this may not be impossible. On the other hand the United Kingdom's accession to the European Union may well be reversed if the people, exercising their sovereign power through the referendum promised by the present British Government, so decide. For present purposes, what is of importance is that these changes, which are obviously and self-evidently of constitutional importance have altered and may continue to alter the "basic structure" of the British constitution and, from the narrowly legal perspective, have been and will be brought about by ordinary Acts of the British Parliament. Thus, in the descriptive sense, the British constitution has for the last several years been in a state of change, if not flux, and this may well remain true in the years ahead.

(36) The Indian Supreme Court on the other hand has used the phrase "basic features" or "basic structure" in an entirely different sense, namely in a *prescriptive* sense of establishing what is a legally enforceable rule of constitutional law. The rule is essentially negative, in that it purports to place a limitation on the power of the Indian Parliament to amend the Indian Constitution. In other words, it does not require any body or organ to do something, but places a boundary beyond which Parliament cannot go. And since the rule is legally enforceable, it sets the courts (and in particular, the Supreme Court) as the guardians of the boundary. However, the consequences of the "basic features" doctrine go far beyond this. As will be seen, in the Indian jurisprudence, the rule actually goes much further in that the Indian Supreme Court is not simply the guardian of the boundary but is also its architect, its developer, its builder and its enforcer, and as its case law shows, it has been progressively pushing the boundary inwards, i.e., limiting the scope of Parliament's amending power. *In brief, the Indian Supreme Court modifies the language of the Indian Constitution from time to time or at any time, then re-interprets it and finally enforces or executes it while the directly elected representatives of the people play the role of helpless observers*. This is of course a completely unprecedented display of "judicial" power – power in its most naked form. Not merely unchecked, but *uncheckable*, since there are no means of checking it known to the laws of any civilized system of jurisprudence. This is a malady for which there is no remedy and an ailment for which there is no cure short of a complete uprooting of the judicial and democratic system. If all members of Parliament were to agree in unison with each other that a constitutional amendment was required in the national interest, it could be struck down, in part or in whole, by a handful of appointed judicial officers in the exercise of their own discretion. A power so vast, so all embracing, can hardly be conceived by any democratic system of governance resting on the basic principle of checks and balances. The Indian Supreme Court, while purporting to act in furtherance of the principles of separation of powers, has signally failed to address the question: what is the check on the exercise of this power on the Court itself?

Where is the balance? This is a power, moreover, which has most certainly not been consciously conferred by the framers of the Indian Constitution on the Supreme Court, but which has been "inferred" by that Court to have been conferred on it, and every endeavor by the Indian legislature, which has theoretically ostensibly "conferred" the power on it by using any form of language in the plainest of words, is simply disregarded or overruled. If we were to introduce such a doctrine into Pakistan would not critics be entitled to speculate whether the nation has changed a military autocracy for a judicial autocracy, with but a brief interval for an improperly functioning democracy.

(37) The crucial question is this: on what basis does one move from mere description to legal prescription? How does a simple description of "what is" assume prescriptive force as a rule of law of "what must always be"? This is the conundrum that lies at the heart of the "basic features" doctrine and to this, in my respectful view, there is no convincing answer forthcoming, either in the Indian jurisprudence, or in the submissions made before the Court by learned counsel for the Petitioners. It also needs to be emphasized that the Indian Supreme Court has never been able to agree on an authoritative decision as to what exactly are the "basic features". Originally, the discussion focused on fundamental rights and this consideration had commenced even prior to the *Kesavananda Bharati* case, in (e.g.) *L.C. Golak Nath and others* v *State of Punjab and others* AIR 1967 SC 1643, which was also decided by a bare majority of one (6:5). Since then, there has been a fluid and open ended discussion of what is to be included in the "basic features" doctrine. But surely, if a constitution has certain immutable and unalterable "basic features", they should be readily and clearly discoverable. They should not be hidden from plain view. They should be clearly visible even from a distance. (One does not need to be a geologist to realize that the basic features of the Himalayas are that they constitute a range of mountains with the highest peaks in the world.) Why then should the "basic features" of the Indian constitution be shrouded in such deep mystery that even the Supreme

Court of that country cannot identify them once and for all? These are questions that I will revert to in the subsequent paras of this judgment.

(38) Before moving forward with the analysis of the "basic features" doctrine, two aspects of how that doctrine has developed in Indian constitutional law must be briefly examined. As noted above, the foundational case in India is *Kesavananda Bharati* v *State of Kerala* AIR 1973 SC 1461. Shortly after this decision, democracy in India faced its gravest challenge and threat. On 12.06.1975, the Allahabad High Court nullified (for electoral malpractice) the election of Mrs. Indira Gandhi in the 1971 general elections. Reacting to this annulment, which would have led to Mrs. Gandhi losing her seat, and thus office as prime minister, the Indian Parliament (or, rather, the Congress Party, which had won a landslide victory in 1971 and controlled the necessary majorities in the Indian and state parliaments) passed (on 07.08.1975) the 39th Amendment to the Indian Constitution. This amendment voided the decision of the Allahabad High Court and placed the matter of the prime minister's election (and, as a fig leaf, that of certain other dignitaries) beyond the scope of judicial review. It is to be noted that Mrs. Gandhi did challenge the High Court decision before the Indian Supreme Court, but was only granted a conditional stay by the latter court on 24.06.1975: she was allowed to remain a member of Parliament, but was barred from participating in Lok Sabha proceedings. This could, in effect, have had very far reaching consequences. This judicial verdict triggered the worst constitutional crisis in the history of India and almost destroyed Indian democracy. The very next day, 25.06.1975, emergency was declared in India, and then the 39th Amendment pushed through Parliament. There was thus a grave and immediate danger that democracy in India was slipping into an autocracy. The validity of the 39th Amendment obviously came up for consideration when the Indian Supreme Court heard Mrs. Gandhi's appeal (*Indira Nehru Gandhi* v *Raj Narain* AIR 1975 SC 2299). The Supreme Court declared the amendment unconstitutional as being violative of the "basic features" of the Indian Constitution. It was held that

democracy required free and fair elections, which was not possible if the election of the prime minister was placed beyond judicial review. *However, crucially it left Mrs. Gandhi in the saddle*. On the merits the decision was in her favor—which was for her the vital factor—although it is by no means clear that she had not resorted to electoral malpractices. Clearly the Supreme Court had stared into the abyss and realized that prudence was the better part of valor. If she had been granted an unconditional stay right at the beginning perhaps the entire crisis might never have occurred. Left unanswered by the Court was the question that if on the merits the Prime Minister had so strong a case what was the need for all the theatrics? (It may be noted that the 39th Amendment was subsequently formally done away with by the 44th Amendment.)

(39) It is important to pause and reflect for a moment on what had happened. Whatever may be (as I respectfully conclude later in this judgment) the intellectual frailties of the "basic features" doctrine, it has at least this much to its credit: it was wielded as a shield with the utmost prudence so as not to antagonize a hugely popular and powerful sitting prime minister. The situation in Pakistan cannot possibly be more different. This Court has (and this must be stated openly and frankly if there is at all to be any atonement for past mistakes) on the one hand recognized a power in a military dictator to single handedly amend the Constitution in his absolute discretion, but on the other hand, today is being asked to cut down the amending power of the democratically elected representatives (i.e., Parliament), vested in them by the express provisions of the Constitution. One need only refer to *Zafar Ali Shah and others vs. Parvez Musharraf Chief Executive of Pakistan and others* PLD 2000 SC 869/2000 SCMR 1137 for this undeniable fact, however unpalatable it may now appear. The matter is, effectively, being stood on its head. What a military dictator (answerable to no one but himself) can do, an elected Parliament (answerable and accountable to the people) cannot. Does this help or advance the cause of democracy? Are parliamentary institutions strengthened or

weakened? And, in any case, is democracy in Pakistan under threat today, the way it was in India in 1975? What exactly is it that requires being shielded, and from whom?

(40) The second aspect regarding the Indian jurisprudence that needs to be examined is the 42nd Amendment of the Indian Constitution. By means of this Amendment, the Indian Parliament amended Article 368 of the Indian Constitution (which relates to the amending power) by adding two clauses, (4) and (5), thereto. These clauses were as follows:

> "(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, 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."

(41) As is clear, these clauses are *pari materia* with clauses (5) and (6) of Article 239. The validity of the aforesaid clauses was challenged before the Indian Supreme Court in *Minerva Mills Ltd.* v *Union of India* AIR 1980 SC 1789, a decision of a 5-member bench (which was therefore bound by the decision in *Kesavananda Bharati*). It was held that the said clauses were invalid. The limited nature of the amending power of the Indian Parliament, declared to be such on the basis of the "basic features" doctrine, was itself declared to be a basic feature of the Indian Constitution on the basis of circular reasoning. Why is the basic structure theory part of the basic structure? Because it is part of the basic structure. On this basis, clause (5) was held invalid. Clause (4) was invalidated on the ground that the power of judicial review was also part of the "basic features" doctrine, since that doctrine called for a "controlled" constitution and without the courts having an (untrammeled) power of judicial review, the constitution would supposedly become "uncontrolled",

and the balance among the three organs of the state would become unbalanced.

(42) With the utmost respect, the reasoning of the Indian Supreme Court in the *Minerva Mills* case seems to be a remarkable case of pulling oneself up by one's bootstraps. Obviously, if clauses (4) and (5) of Article 368 had not been done away with that would, in effect, have sounded the death knell for the "basic features" doctrine. And the only basis that the Indian Supreme Court had for invalidating clauses (4) and (5) was the "basic features" doctrine itself. Be that as it may, and whatever may be the position in Indian constitutional law, for present purposes, it is important to note that neither of clauses (5) and (6) of Article 239 has been challenged by the Petitioners. Thus, even if the "basic features" doctrine were now to be regarded as part of our constitutional law, its actual application and enforceability would at once run up against the hurdle of clause (6) of Article 239. In the Indian context, it was at least arguably the case that when the "basic features" doctrine was first enunciated (in the *Kesvavanda Bharati* case), Article 368 of the Indian Constitution did not have any provision equivalent to the subsequently added clause (5). Thus, a way no matter how frail was at least theoretically open for the Indian Supreme Court to adopt the line of reasoning taken by it in the *Minerva Mills* case, regardless of whatever, with the utmost respect, may be the somewhat doubtful persuasiveness of such reasoning. In our case however, as already noted above, this Court has repeatedly repudiated the power to strike down any provision of the Constitution, including an amendment, even when Article 239 did not have any equivalent to the present clause (6). *It is also trite law that an implied provision cannot be read in if it is inconsistent with an express provision.* The "basic features" doctrine, even at its broadest, is, and can only be, an implied limitation of the amending power. How then can such an implied limitation be read into Article 239 in the face of the express provision to the contrary contained in clause (6), especially when (i) the existence of any such limitation has been expressly denied by this Court even when there was no clause (6), and (ii) clause (6) itself is not challenged or

invalidated? And furthermore, on what basis could clause (6) be invalidated in the context of our Constitution and the principles of our constitutional law? Surely, this by itself constitutes an insurmountable hurdle in the way of the Petitioners' contention for adopting or enunciating a "basic features" doctrine or its equivalent.

(43) Reverting to the analysis of the "basic features" doctrine, it is obvious that the starting point for any such doctrine must always, and necessarily, be descriptive. The basic features of the constitution must first be identified. It is only once the "basic features" have been described that they can be declared to be prescriptive, i.e., held to form the basis for a legally enforceable rule of law. One would ordinarily assume that it would be a simple enough exercise to describe the "basic features" of a constitution. It is of course possible that two reasonable persons may disagree as to whether a particular feature ought, or ought not, to be regarded as a "basic" feature. *However, it would be regarded as somewhat more than strange if it were held that the "basic features" of a constitution could never be fully described, but had to be decided on a case by case basis by a court of law. Yet, amazingly, that is precisely the position in Indian jurisprudence*. The *Kesavananda Bharati* case was heard by 13 Judges (and, as noted above, decided only by a bare majority of 7:6) and different Judges listed different features which they regarded as being "basic" to the Indian Constitution. But it was held that in any case, any such listing was merely illustrative, and not exhaustive. The Indian Supreme Court reserved to itself the right to determine, on a case by case basis and from time to time, whether any other features were to be regarded as "basic", and indeed, its case law shows a steady increase in the number of such features. Thus, the right to move the Supreme Court for enforcement of fundamental rights (*Shri Kumar Padma Prasad* v *Union of India* AIR 1992 SC 1213), the independence of the judiciary (*Supreme Court Advocates on Record Association* v *Union of India* AIR 1994 SC 268), secularism (*R.C. Poudyal* v *Union of India and others* [1994] Supp. 1 SCC 324), and the democratic structure and principle of free and fair elections (*Shri Kihota Hollohan* v *Zachilhu and others*

AIR 1993 SC 412) have all gradually been held to be "basic features" of the Indian Constitution. The result has of course been that the scope of the amending power of the Indian Parliament has been correspondingly and progressively reduced, and becomes increasingly marginalized and irrelevant. Indeed, it has been noted in an Indian treatise on the subject (*Need to Amend a Constitution and Doctrine of Basic Features* by Dr. Ashok Dhamija (2007)) that the effect of the jurisprudence of the Indian Supreme Court is as though Article 368 of the Indian Constitution has been re-written with the addition of a new clause (6) (pg. 341):

> "Notwithstanding anything in this Constitution (including this article), no basic feature of this Constitution can be amended so as to damage or destroy it.
> *Explanation*: The question whether a particular provision is a basic feature of this Constitution shall be decided in each individual case by the Supreme Court and the decision of the Supreme Court thereupon shall be final."

(44) With the utmost respect, I am unable to accept a prescriptive rule of such a nature. It is wholly unprecedented in the jurisprudence of any other country. Countries which have had solidly entrenched democracies for centuries *and in which no one has ever claimed that there is no independence of the judiciary* are complete strangers to such a doctrine. It would certainly be highly paradoxical if the conclusion arrived at is that true independence of the judiciary exists only in the sub-continent because it is only these countries which have embraced a "basic features" doctrine. Surely such a startling conclusion calls for the closest possible examination of the doctrine. We know as a matter of historical fact that democracy has always been a highly endangered species in Pakistan. It has often fallen to the ground under assaults launched by anti-democratic forces waving the banner of "basic" democracy or "true" democracy. These assaults have in the past been made by military dictators. But it should never be forgotten that the forces of authoritarianism need not always be in uniform. Democracy, more than anything else, is a cast of mind, a respect for the opinions and decisions of a plurality of ordinary citizens, i.e., those not wielding official power. Its enemies have been numerous over the centuries. The opponents of an open society, over the years, include intellectuals of high repute including

philosophers of the first order such as Plato. It is therefore important that the matter should be kept in historical perspective while deciding this vitally important case. If the courts arrogate to themselves the power to specify what are, from time to time, to be regarded as the "basic features" of a constitution, and deny that such features can be definitively ascertained by the elected representative of the public, or everyone else for that matter, then the "basic features" cease to be something that are, or can be, *objectively* determined. To put it bluntly, the prescriptive rule is then simply tantamount to this: the rule is what the judiciary, from time to time, says it is, subject to any changes that may be introduced by it at a subsequent stage. But with the utmost respect, any such rule cannot, and ought not, to be regarded as a fundamental and decisive rule of law, and this is especially so when the rule is one which is of the highest constitutional significance. It is of fundamental importance to keep in mind that the question here *cannot* be of judicial discretion being exercised (which, as everyone knows, is always supposed to be exercised judiciously and in relation to an objective reality). The courts do *not*, and ought not to, have any discretion as to what are the "basic features" of a constitution. The "basic features" are what they are, since they are, by definition, built into the constitution. They are not to be subsequently incorporated by means of later changes of *opinion*. (The basic structure of a building lies in its foundation and not in any changes which may be made to it from time to time.) The "basic features" exist, and must exist, independently of any judicial determination. Yet, the prescriptive rule framed by the Indian Supreme Court reverses this position. A feature is "basic" *only* because, and when, the Supreme Court says that it is a "basic feature", and not before or otherwise. It is respectfully submitted that this is not, and cannot be regarded as, an objectively determined, or determinable, constitutional principle and nor is it to be found in any authoritative jurisprudential treatise.

(45) A prescriptive rule of the foregoing nature also has a necessary corollary. If the "basic features" of the constitution cannot be definitively and exhaustively

determined, and can be added to the list from time to time, then it follows that, in principle, a "feature" can be removed from the list as well. There is, in principle, nothing that would, or could, prevent the court from declaring at a future time that a given feature of the constitution is no longer to be regarded as "basic". All courts, including supreme courts, reverse themselves from time to time, and when constitutional principles are involved, the time can be measured in decades. Legal ideas and theories come into and go out of fashion, and what is of fundamental importance to one generation may not be that important (or even important at all) to the next. If one set of judges is satisfied that a feature of the constitution ought to be regarded as "basic", a differently constituted court may in the future take a different view. There is no reason, in principle, why in respect of any particular part of the "basic structure", the court may not, in future, reverse itself. Thus, over time the "basic structure" or "basic features" of the constitution may grow and shrink as features are added to, or removed from, the list. It thus becomes a highly elastic concept—rather like a rubber band, which can either be stretched or contracted. In my respectful view, this is hardly consistent with the idea of the Constitution having "basic features" or a "basic structure", which constitute its fixed and unalterable core, and which are (as it were) surrounded by less fundamental principles or provisions which may undergo changes, large or small, over time, even to the extent of being removed from the Constitution altogether. There is thus, in principle, nothing *other than the say so of the courts* that would preserve *any* feature of the Constitution as being basic to it. A feature placed on the list today by judicial determination may be likewise removed from the list tomorrow, and once so removed, may be removed altogether from the Constitution in the exercise of the amending power. The Constitution thus ceases to be the platform, or framework, within which the country functions, but akin to a theme park in which rides are added from time to time.

(46) In addition to the foregoing, there is another consequence of the "basic

features" doctrine that must be kept in mind. If there is a "basic features" doctrine, then any feature determined to be "basic" would be immutable. From this, it should necessarily follow that *none* of the organs of the state, *including the judiciary,* may alter any feature declared to be "basic". Yet that is patently not the case. The judicial branch has altered, and continues to alter, the content of the "basic features". Take the example of the present petitions. These have all been filed under Article 184(3), invoking the original jurisdiction conferred on this Court by the Constitution. But that jurisdiction can only be invoked if there is any violation of the fundamental rights conferred by Chapter 1 of Part II of the Constitution. The fundamental right alleged to be under threat in the present case is the right of access to justice. It is submitted by the Petitioners that this right can have meaning only if there is an independent judiciary, and it is the independence of the judiciary that is alleged to be under threat by the newly added Article 175A. For the jurisdictional purposes of Article 184(3), it must be shown that the right of access to justice is a fundamental right, and that, that right is being violated. Now, the right of access to justice, as an independent fundamental right, is nowhere to be found in Chapter 1 of Part II. *It is entirely a right of this Court's own making and it is accepted as such.* Yet, fundamental rights are part of the "basic features" doctrine and are supposedly unalterable by any organ of the state. Notwithstanding that, this Court has altered the content of a "basic feature" of the Constitution. Thus, it would follow in a similar manner that the Court can, in exercise of its power of interpreting and applying the Constitution, bring about fundamental changes in, or alterations to, other features declared to be "basic". Where then, does this leave the structure of the Constitution? Can anyone be certain what it is, or will be? A time honored complaint against uncertainty in the law is that the law should not vary with the length of the Lord Chancellor's foot. Is this uncertainty now to infect the supposedly "basic" and unalterable structure of the Constitution itself? What remains of the principle of the sanctity of the Constitution?

(47) A hypothetical reply to the above is that the recognition (or creation) of a fundamental right such as access to justice does not conflict with the "basic features" doctrine because, while it certainly alters the content of the "basic features", it does not damage or destroy any of the other "basic features". In other words, so the reply would go, what the "basic features" doctrine prohibits are only undesirable changes, which adversely affect a "basic feature"; it does not disallow alterations which are desirable. An obvious example of a desirable (and therefore permissible) change would be the inclusion of Article 19A (right to information) to the list of fundamental rights by the 18th Amendment. An alleged example of an undesirable (and hence impermissible) change could be the deletion of the requirement of intra-party elections from Article 17. I would respectfully respond with a question: who is to determine what changes to the "basic features" are undesirable, and what are the desirable changes? The obvious answer is: the courts, with the Supreme Court having the final say in the matter. The result would be that any change brought about to the "basic features" by the legislature, even while acting unanimously, in the exercise of the amending power would be subject to challenge before the judiciary. *The judiciary, on the other hand, would have an untrammeled power in this regard,* since by definition, a change or alteration made to the "basic features" by the judicial branch would have to be deemed as desirable. Thus, the most basic and foundational of all rights, which lies at the heart of democracy, namely the power to determine how and by whom, and in what manner, a state is to be governed, which vests with the people, and is to be exercised through their *elected* (and not appointed) representatives, will have been fatally eroded. Whatever the people choose to do through their elected representatives would, as it were, require an NOC from the judiciary, but whatever the judicial branch may do, would be *beyond all scrutiny*. This is obviously a somewhat surprising definition of democracy and is certainly unknown to countries which have enjoyed the blessings of democracy and an independent judiciary for centuries. I would again respectfully draw attention to the point made by Justice Robert Jackson.

(48) The foregoing analysis is not merely a theoretical consideration, but has serious practical consequences, as is shown (e.g.) by the tussle between the Indian Parliament and the Indian Supreme Court over Article 368 of the Indian Constitution. If the courts arrogate to themselves the right of not merely determining what features are to be regarded as "basic", but also the right to alter the content of the "basic features" from time to time or at any time, the stage may, I fear, be set for a possible confrontation between the legislative and judicial branches. A simple example will illustrate the point. Suppose the legislature alters a provision that is regarded as part of the "basic features" of the Constitution and a challenge to this change fails because the courts conclude that the change or alteration is acceptable or desirable. Suppose that subsequently, the legislature wishes to remove the change from the Constitution, i.e., restore the relevant provision to its original form. Would this be possible? Would not the courts disallow the subsequent attempt to restore the original position as an impermissible alteration of a "basic" feature? To put the matter in concrete terms, can the legislature, having inserted Article 19A into the Constitution, subsequently remove it by an amendment? Is this not a patent flaw in the doctrine? Or, to take another example, suppose the courts, in the exercise of judicial power, alter a "basic feature" of the Constitution. Suppose the legislature attempts to amend the Constitution in a manner that impinges on this alteration. Would the courts permit this? Would not the courts, in effect, be saying to the legislature: anything we do is desirable and beyond your control, but anything that you do is always subject to our determination and certification as to whether it is desirable or undesirable? You may be the elected representatives of the people, we may be only appointees, but it is we, not you, who will decide what is to stay and what is to be removed from the Constitution. The question arises, why is it that we oppose autocracy, whether in the shape of a military dictatorship or otherwise? Is it not because unelected persons claim to be wiser than ordinary people and hence more entitled to exercise supreme power?

(49) As will be seen from the foregoing, the "basic features" doctrine is not merely the creation of the courts; it is entirely at the courts' mercy. The courts would not simply be the guardians of a principle that binds all organs of the state. They would become the sole and final arbiters of a rule that applies to all, *save them*. They alone are above the law. The power to amend the Constitution, i.e., the constituent power, would be entirely under their control, exercisable only on their say so. Their power and right to mould and shape the Constitution (which they only possess within their limited scope of judicial review) would balloon into an untrammeled and unquestionable right to control the constituent power in its entirety. I would, with the utmost respect, deny that the courts can, or should, have such power, no matter how well intentioned individual judges may be, or how well versed they are in the law. *Rather than preserving or protecting the balance between the organs of the state, a "basic features" doctrine actually unbalances the constitution*. And it is a particularly insidious doctrine, because it lulls the judicial branch into believing that all that the judges are doing is living up to their oath to "preserve, protect and defend the Constitution". Surely this oath *presupposes* that the Constitution is an independent document which has to be preserved and protected, and not one which will be made up or modified by courts from time to time, or at any time, in their sole discretion. However, on this view, the oath virtually becomes "to preserve, protect and defend the Constitution, as amended from time to time or at any time by judicial fiat". The point, it must be stressed, is not whether the view of the courts is right or wrong—it is more basic than that, and is this: who has the right to amend the Constitution, the elected representatives of the people, or the appointed judges? Does this approach not entail a fundamental encroachment on the underlying principles of democracy? The ultimate power should flow not from the pens of judicial appointees, but from the elected representatives of the people of Pakistan. And what if these elected representatives betray the trust that the people of Pakistan have reposed in them? Should they not be removed or reviled? Yes indeed, but by the

people of Pakistan through the democratic process. The favorite contention of military autocrats in Pakistan over more than fifty years has been that the elected representatives are corrupt and incompetent and hence cannot be trusted. I confess it has not impressed me. If the elected representatives do fail on this score (and that is often true, not merely in Pakistan but also in societies regarded as more advanced or mature), that is most emphatically not an argument which justifies a dilution of the democratic principle. A constitutional principle should not depend on its validity on the caliber of any given parliament. We have been led to the brink of the precipice too often in the past to accept such a contention at this late date. It is important to remember that the principle of independence of judiciary is to be found, and found only, in democratic polities. It is not found in monarchies, oligarchies, communist states or dictatorial states. *It is vitally important to realize that strengthening democracy strengthens judicial independence.* These two concepts are not antithetical—rather their confluence creates new synergies.

(50) A necessary consequence of the "basic features" doctrine is that the word "amend" (and any cognate expression) used in the article of the Constitution relating to the amending power must have an artificially narrow and restricted meaning. This is so because the doctrine is an implied limitation on the amending power. As already noted above, clause (6) of Article 239 expressly states that there is no limitation to the amending power of Parliament, and this is an insuperable obstacle in implying any limitation on the amending power. Even if I leave this point aside for the moment, and focus simply on what the doctrine postulates regarding the word "amend", there are, in my view, a number of difficulties to which there are no ready answers available. Firstly, it is clear that the narrow meaning that the "basic features" doctrine ascribes to the word "amend" necessarily involves circular reasoning, as is demonstrated by the following:

> The word "amend" as used in the amending article of the Constitution has a narrow and restricted meaning.

Why?

Because the power to amend is of a limited nature.

Why?

Because the word "amend" as used in the amending article of the Constitution has a narrow and restricted meaning.

Even if the reasoning is reversed, the result is still circular:

The amending power is of a limited nature.

Why?

Because the word "amend" as used in the amending article of the Constitution has a narrow and restricted meaning.

Why?

Because the amending power is of a limited nature.

So what comes first, the narrow and restricted meaning of the word "amend" or the limited nature of the amending power?

(51) The second problem is that the word "amend" must simultaneously bear two distinct meanings under the "basic features" doctrine. When used in relation to a provision that is not a "basic feature", it means what it says, namely, that the power can be used to change that provision of the constitution in any manner, whether by way of addition, variation or even repeal. However, when used in relation to a "basic feature", it can only mean a change that does not tamper with, or damage or destroy it. It is clear that this approach flies in the face of settled principles of interpretation. It is quite possible that a word used in the Constitution has, on its proper interpretation, a wider or broader meaning than the apparent one, or a narrower or more restricted meaning than the apparent one. But such an interpretation must be applied consistently.

(52) Before proceeding further, I would like to pause in order to take a closer look at the judgments of the Indian Supreme Court on the "basic structure" doctrine. Of

course, many of those judgments have already been alluded to above. The law laid down therein has been set out and, in respect of some cases, a brief description has also been given of the circumstances in which the judgments were delivered and the consequences emanating from the same. The conceptual weaknesses that in my view, with respect, undermine the Indian decisions have been highlighted. The closer look that I propose to take will no doubt come at the expense of some repetition, as to some extent I will have to traverse ground already crossed. It is nonetheless trouble worth taking since, with the utmost respect, the frailties of the reasoning and conceptual thinking underlying the doctrine as propounded and developed by the Indian Supreme Court cannot otherwise be fully appreciated. I would only add that my views on the "basic structure" doctrine are of course by now abundantly clear, and it should be clearly understood that I certainly do not carry out the exercise now proposed with any intent of "showing up" the Indian Supreme Court. Indian decisions, like those of the English and UK courts, are of course frequently cited before us and we welcome the assistance that is rendered by the judicial developments that take place in those jurisdictions (and of course, in other common law jurisdictions around the world).

(53) I start with *Shankari Prasad Singh Deo and others v. Union of India and others* AIR 1951 SC 458. The Indian Constitution came into force on 26.01.1950; by the next year the question of the extent of the Parliament's power to amend the Constitution was already before the Supreme Court. The background to the case was the challenge to the land reforms initiated by the Congress government led by Nehru, which had a professedly socialist tilt. The government's land reform agenda was under threat of disruption as it was challenged as being violative of fundamental rights, and in at least some High Courts such challenges were sustained. Parliament sought to put the matter beyond judicial reach through the 1st Amendment to the Constitution (which came into effect on 18.06.1951). It is interesting to note that the statement of objects and reasons that accompanied the Bill expressly stated that the need for the same arose because "[d]uring the last fifteen months of the working of

the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights". The statement referred to the fundamental rights that were so causing difficulty, and as presently relevant, stated, one suspects somewhat disingenuously: "The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up".

(54) The 1st Amendment sought to deal with the "obstacles" presented by judicial pronouncements by inserting two new Articles, 31A and 31B, in the chapter relating to fundamental rights, and also placed the land reform legislation in the 9th Schedule to the Indian Constitution, which itself was added by means of this Amendment. This schedule was for purposes similar to the First Schedule of our Constitution, i.e., sought to place certain laws beyond challenge on the basis of fundamental rights. It was in these circumstances that the 1st Amendment was challenged before the Indian Supreme Court. The basis of the attack was that Article 13 (which is similar to our Article 8) prohibited the making of any "law" in derogation of fundamental rights, and the 1st Amendment was such a law. The Indian Supreme Court had no hesitation in unanimously dismissing the challenge. It was held that there was a clear distinction between ordinary legislation in the exercise of the legislative powers conferred on Parliament, and constitutional amendments, which was an exercise of constituent power. The "law" referred to in Article 13 meant only the former and not the latter. Since there was no express limitation in the Indian Constitution on the exercise of constituent (i.e., amending) power, this meant, effectively, that the Court held such power to be unfettered.

(55) The next case that requires consideration is *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845. At issue was the 17th Amendment, which came into effect on 20.06.1964. To some extent, this was simply *Sankari Prasad* redux. Parliament made

certain changes to Article 31A and placed yet more laws relating to land reforms in the Ninth Schedule. The petitioners prayed that the Supreme Court reconsider its decision in *Sankari Prasad.* This was on the ground, inter alia, that the effect of the 17th Amendment would be to curtail the powers of the High Court under Article 226 (the equivalent of our Article 199), inasmuch as the laws placed in the 9th Schedule could not be challenged. The amendment ought therefore to have complied with the proviso to Article 368, which when engaged required that the proposed constitutional amendment be ratified by the legislatures of at least one-half of the States. I may explain that at that time the structure of Article 368 was slightly different from that subsequently adopted. A constitutional amendment needed to be passed by Parliament (of course, by the special majorities as therein specified). The proviso listed certain specific parts and articles of the Constitution, and if the amendment was in relation to any such matter, then the amendment had also to be ratified as just noted. Article 226 came within the scope of the proviso, and its requirements were not followed in the passing of the 17th Amendment. (These requirements are still to be found in the Indian Constitution. Article 368 has been amended in other ways.) The Supreme Court unanimously dismissed the challenge to the 17th Amendment. It was held that the nature of the changes made through the 17th Amendment did not engage or require resort to the proviso. The power to amend the Constitution was reiterated as being plenary and inclusive, if necessary, also of the power to amend the fundamental rights. *Sankari Prasad* was therefore affirmed and followed. (I may note that *Sajjan Singh* was decided by a Bench comprising of five Judges, and the views just noted were those expressed by a majority of three, in a judgment authored by the Chief Justice. The other two judges wrote their own judgments and each expressly agreed with the Chief Justice. However, there are also certain observations in the two judgments that suggest that those learned Judges may not have fully accepted the foregoing views.)

(56) This brings me to *L.C. Golak Nath v. State of Punjab* AIR 1967 SC 1643. The stage was still set by land reform legislation. Certain amendments were made in the

relevant legislation in this regard in the States of Punjab and Mysore. These amendments were challenged on the basis of violating fundamental rights. However, the laws were already in the Ninth Schedule and therefore, on the face of it, beyond judicial reach. The petitioners challenged not merely the amendments in the laws but also the 1st, 4th and 17th Amendments. This therefore required the Supreme Court to reconsider both *Shankari Prasad* and *Sajjan Singh*. An eleven member Bench was constituted (apparently the largest Bench to sit up till that time in the Indian Supreme Court). By a bare majority (6:5), the challenge was upheld. *Shankari Prasad* and *Sajjan Singh* were overruled. It was held that a constitutional amendment was "law" within the meaning of Article 13 and hence, if it sought to curtail, abridge or otherwise affect any fundamental rights, could be struck down on the anvil of that Article. However, rather interestingly, no relief was, as such, given. The effect was that in the end the petitions were dismissed. To reach the foregoing conclusions and yet deny relief the majority (who spoke through the Chief Justice) invoked the doctrine of prospective overruling. Subba Roa, CJ., observed as follows:

> "52. We have arrived at two conclusions, namely, (1) The Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights; and (2) this is a fit case to invoke and apply the doctrine of prospective overruling. What then is the effect of our conclusion on the instant case? Having regard to the history of the amendments, their impact on the social and economic affairs of our country and the chaotic situation that may be brought about by the sudden withdrawal at this stage of the amendments from the Constitution, we think that considerable judicial restraint is called for. We, therefore, declare that our decisions will not affect the validity of the Constitution (Seventeenth Amendment) Act, 1964, or other amendments made to the Constitution taking away or abridging the fundamental rights. We further declare that in future the Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights. In this case we do not propose to express our opinion on the question of the scope of the amendability of the provisions of the Constitution other than the fundamental rights, as it does not arise for consideration before us. Nor are we called upon to express our opinion on the question regarding the scope of the amendability of Part III of the Constitution otherwise than by taking away or abridging the fundamental rights. We will not also indicate our view one way or other whether any of the Acts questioned can be sustained under the provisions of the Constitution without the aid of Arts. 31-A, 31-B and the 9th Schedule.
> 53. The aforesaid discussion leads to the following results:
> (1) The power of the Parliament to amend the Constitution is derived from Arts. 245, 246 and 248 of the Constitution [which, broadly, correspond to Articles 141 and 142 of our Constitution and provide for the respective

> legislative competences of the Parliament and the Provincial Assemblies] and not from Art. 368 thereof which only deals with procedure. Amendment is a legislative process.
> (2) Amendment is 'law' within the meaning of Art. 13 of the Constitution [which corresponds to Article 8 of our Constitution] and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.
> (3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.
> (4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.
> (5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.
> (6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, The Punjab Security of Land Tenures Act X of 1953, and the Mysore Land Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Arts.13, 14 or 31 of the Constitution."

(57) As is clear from the foregoing, the majority concluded that Article 368 only dealt with the *procedure* of amendment, and not the *power* to amend itself. Where then was such power to be found? The answer given was that such power was to be found in Articles 245, 246 and 248. As noted, these correspond to Articles 141 and 142 of our Constitution, which relate to the legislative lists. (Unlike our Constitution, the Indian Constitution vests the "residuary" legislative powers in Parliament.) In other words, the power to amend the Constitution was no more than or different from the ordinary law making competence of Parliament. *And since the legislative lists given in the Seventh Schedule to the Indian Constitution (which corresponds to the Fourth Schedule of ours) did not contain an entry containing the power to amend the Constitution, that meant that such power had to be searched out in the "residuary" powers of legislation!*

(58) I can, with the utmost respect, only express astonishment at the reasoning deployed by the learned Chief Justice. Not merely was the well established (and entirely proper) distinction between constituent power and legislative power obliterated, the amending power was reduced to a constitutional afterthought, to be found only in the obscure recesses of the "residuary" power. What a "demotion"! It appeared, on this reasoning, that while the framers of the Indian Constitution, who

included some of the finest legal luminaries of the subcontinent, had had the common sense to elaborately set out the *procedure* for amending the Constitution by means of Article 368, they consciously did not confer the *power* to amend the Constitution. A bare perusal of Article 368 (as it stood at the relevant time) makes obvious what an extraordinary finding this was:

> "**368. Procedure for the amendment of the Constitution**. 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 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:
> Provided that if such amendment seeks to make any change in—
> (*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 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."

It will be well to recall that the legislative lists used in the Indian Constitution are taken from, and largely faithfully follow, the (equally detailed) legislative lists to be found in the 7th Schedule to the Government of India Act, 1935 ("GOIA"). (The 1956 Constitution had followed the same pattern: see its Fifth Schedule.) Now, s.104 of the GOIA, which dealt with residuary powers, had provided that the Governor-General (acting in his discretion) could empower either the Federal legislature or the Provincial legislatures in respect of a "residuary" matter. *As is obvious, any such "residuary" power could not have included the power to amend the GOIA.* The reason is that it was an Act of the Imperial (i.e., British) Parliament. It alone could amend the constitution granted to India. Any such power was beyond the competence of the Indian legislatures, unless of course expressly granted by the Imperial Parliament itself. (By way of comparison, one may recall the situation in Canada and Australia, both of whose constitutions were also Acts of the Imperial Parliament. When their last ties from the UK were being cut, in 1982 and 1986 respectively,

separate Acts had to be passed by the UK Parliament.) Thus, an amending power could never, ever have been found in the "residuary" provision (s.104) of GOIA. The framers of the Indian Constitution adopted and took over the same legislative scheme. However, it was not they but only the Indian Supreme Court that, almost serendipitously, discovered the amending power lurking there in *Golak Nath*. Article 248 of the Indian Constitution has departed from the scheme of s.104 of GOIA only to the extent that the "residuary" powers are expressly vested in Parliament alone. One wonders what the majority in *Golak Nath* would have done if, perchance, the framers had, like our Constitution, placed the "residuary" powers with the States? Could the logic of the reasoning used by the learned Chief Justice then have been sustained? In my respectful view, the reasoning is fragile, to say the least, and perhaps for that reason did not survive the next case that I must consider. The first serious attempt to curtail the powers of Parliament and enhance those of the Supreme Court thus was recognized by the Court itself subsequently as being fatally flawed.

(59) That case is *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461, the leviathan (in more ways than one, and not least by way of length) in the series of Indian cases with which we have been concerned while hearing these petitions. However, before I take up the case itself, certain facts by way of background must be set out. *Golak Nath* was clearly unpalatable to the Indian Parliament. It seriously threatened and jeopardized the (Congress) government's ongoing legislative agenda, of a determinedly socialist bent, in a number of ways. Indeed, such legislation and other measures were immediately, and successfully, challenged. The snap general elections called by Mrs. Indira Gandhi in 1971 had the supremacy of Parliament at the forefront of the election campaign. The Congress party was returned with a two-thirds majority and swiftly set about trying to undo the effect of *Golak Nath*. Two constitutional amendments, the 24th and the 25th, which came into effect on 05.11.1971 and 20.04.1972 respectively, are relevant for present purposes. The 24th Amendment was direct solely towards the amending power. A new clause was inserted in Article 13, which expressly stated that nothing therein would apply to an

amendment made to the Constitution pursuant to Article 368. The latter Article itself was amended in the following manner: (a) the marginal heading (i.e., title), which hitherto had read "Procedure for amendment of the Constitution" was substituted to become "Power of Parliament to amend the Constitution and procedure therefor"; (b) the existing Article was renumbered as clause (2) and a new clause (1) was added, which read as follows:

> "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."

Finally, (c) the insertion made in Article 13 was duplicated inasmuch as a new clause (3) was added, which also stated that nothing in Article 13 was to apply to an amendment made in terms of Article 368. The 25th Amendment made a substitution in Article 31 (which related to compulsory acquisition of property) and sought to place the question of the adequacy of the compensation beyond legal challenge. It also added a new Article 31C. This stated that any law made in terms of a policy directive under Article 39 (equivalent to the policy directives of our Constitution) could not be declared as violative of the fundamental rights enshrined in Articles 14, 19 and 31. It is this Article that set the stage for the next constitutional battle and, as shall be seen, for further battles yet to come.

(60) The 24th and the 25th Amendments were challenged in the Supreme Court in *Kesavananda Bharati*, as also the 26th and the 29th Amendments. The latter two came into effect on 28.12.1971 and 09.06.1972 respectively. The 26th Amendment was, as per the statement of reasons and objects, concerned with the abolition of the "privy purses and special privileges" of the rulers of the former Princely States on the ground that the same were "incompatible with an egalitarian social order". A new Article 363A was inserted in the Constitution, which sought to "terminate expressly the recognition already granted to such Rulers and to abolish privy purses and extinguish all rights, liabilities and obligations in respect of privy purses". (I may note that an earlier attempt to achieve this result by executive fiat had failed; the

Supreme Court in the *Privy Purses* case AIR 1971 SC 530 had ordered the Rulers were "entitled to all their pre-existing rights and privileges including [the] right to privy purses".) The 29th Amendment was concerned with ensuring that certain land reform legislation undertaken in Kerala, being amendments to laws that were already in the 9th Schedule, was expressly beyond challenge. The amending Acts were also added to the 9th Schedule.

(61) I have already considered aspects of *Kesavananda Bharati* in the earlier part of this judgment and, with the utmost respect, have found the views of the majority (at least as generally understood) to be wanting. However, since the decision is the genesis of the "basic structure" doctrine, it will not be inappropriate to revisit those points and also to dilate upon other aspects of the judgment. *Kesavananda Bharati* was decided by the largest of Benches (13 learned Judges) but the slenderest of margins (7:6). This was not just a bare majority: twelve of the learned Judges were firmly arrayed, six each, on either side of the divide. It was the last learned Judge (Khanna, J.) whose decision was crucial. He was, in other words, the "swing" vote (to borrow a term from US constitutional parlance). It is therefore of some importance to establish what exactly was it that Khanna, J. decided. But before that, one may look at the broader picture.

(62) By a majority, the Supreme Court overruled *Golak Nath*. The conclusion arrived at in that judgment, that a constitutional amendment was "law" within the meaning of Article 13 and therefore could be set aside if found to be in violation, abridgement or curtailment of fundamental rights, was swept away. At the same time, the change brought about by the 24th Amendment, whereby the new clause (1) was inserted into Article 368, was accepted as now placing the amending power itself in that Article. So, the impact of the strange (if I may respectfully put it so) reasoning adopted in *Golak Nath*, that the amending power lay in the "residuary" legislative powers of Parliament, was rendered ineffective. But the overruling of *Golak Nath* did not result, as would otherwise have been expected, in a revival of the

law laid down in *Shankari Prasad* and *Sajjan Singh*. It will be recalled those cases had been concerned with the question whether an amendment to the Constitution that affected fundamental rights could be judicially reviewed and struck down, on the anvil of Article 13. In those cases the scope of the limitation sought to be placed on the amending power was narrowly claimed, i.e., limited only to whether there was a conflict with Article 13. Now, the majority stated the limitation on the amending power more broadly, and much more diffusely by resort to a newly conceived theory of interpretation. It was that the amending power could not be exercised in a manner that sought to violate, curtail, alter or abridge the "basic structure" of the Constitution.

(63) In one sense there was no need to reach this conclusion. It is usually overlooked that all the constitutional amendments challenged in *Kesavananda Bharati* were in fact upheld, save one aspect of the 25th Amendment and that too only in a minor sense. It will be recalled that the 25th Amendment had inserted a new Article 31C into the Constitution. This was as follows (emphasis supplied):

> "Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy*:
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

(64) The six learned Judges who constituted part of the majority struck down Article 31C in its entirety. The six learned Judges in the minority upheld the Article in its entirety save that they read down the portion highlighted, and held that the validity of the declaration was not beyond judicial review. Thus, everything turned on Khanna, J., who upheld Article 31C but struck down the portion highlighted. *Now, before the Supreme Court it was expressly conceded by the respondents (i.e., the government) that the validity of the declaration could be judicially reviewed.*

With this concession the entire controversy could have been instantly resolved: the constitutional amendments under challenge would have been upheld and the latter portion of Article 31C would have been treated exactly as this Court has treated non-obstante clauses over the years. The highly controversial basic structure theory would never have been born. That however, did not happen with the result that, with respect, we have been left to grapple with several hundred pages of the judgments handed down in order to try and resolve what is the legal status of the "basic structure" doctrine.

(65) I have already, in the earlier part of this judgment, commented on the fact that even the six learned judges who were part of the majority were unable to agree on what were the "basic features" of the Indian Constitution and have respectfully commented on the adverse consequences of this lack of coherence or unanimity for the doctrine said to have been collectively propounded by them. I would now like to refer to the judgments to give a flavor of the divergence and diversity of opinions that were expressed by the learned Judges, both in the majority and in the minority. I start with the judgment of the learned Chief Justice. Sikri, CJ who observed as follows (para 214):

> "In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble."

He also said (at para 183) that "it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities." The learned Chief Justice also noted (para 293):

> "It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state."

However, he also stated that reasonable restrictions could be imposed on the fundamental rights (para 297), that they were not available to non-citizens and applied only in limited form to the armed forces.

(66) Shelat and Grover, JJ., were of the view (see para 549) that Parts III (relating

to fundamental rights) and IV (relating to directives of policy) of the Constitution "essentially form a basic element of the Constitution without which its identity will completely change." The learned Judges also observed (para 552) that the "preservation of the rights of minorities was a condition on which minorities entered into the federation and the foundation upon which the whole structure was subsequently erected." They also emphasized the "dignity of the individual" as secured through the various fundamental rights and the directives of policy. (The dignity of man is not of course expressly a fundamental right in the Indian Constitution unlike our Article 14.) Reddy, J. also expressed himself strongly in respect of fundamental rights and the directives of policy. The learned Judge observed as follows:

> "But do the fundamental rights in Part III and Directive Principles in Part IV constitute the essential element of the basic structure of our Constitution in that the Constitution will be the Constitution without them? In other words, if Parts III and IV or either of them are totally abrogated, can it be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the preamble remains the same? In the sense as I understand the sovereign democratic republic, it cannot: without either fundamental rights or directive principles, what can such a government be if it does not ensure political, economic, or social justice?" [para 1171]
>
> "This pivotal feature of the Fundamental Rights [namely that there is always a constitutional remedy available for their breach] demonstrates that this basic structure cannot be damaged or destroyed. When a remedy cannot be abrogated, it should follow that the fundamental rights cannot be abrogated for the reason that the existence of a remedy would be meaningless without the rights." [para 1173]
>
> "[T]hough the power of amendment under Art. 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity." [para 1174]

(67) I pause here to respectfully make a comment. The directives of policy even in India are admittedly "not enforceable by any court", although they are to be regarded as "fundamental in the governance of the country" (Article 37 of the Indian Constitution). That article also provides that "it shall be the duty of the State to apply these principles in making laws". Nonetheless, it has always been recognized even in Indian jurisprudence that the directives are not enforceable as such and any alleged breach thereof will not invalidate any law. Now, the question that arises is this: why

should the policy directives of such a nature be regarded as part of the "basic structure" of the Constitution? Putting the matter rather bluntly, they constitute pious wishes, and a pious wish is just that. Of course, the learned Judges in *Kesavananda Bharati* have sought to elevate the policy directives as the foundational aspirations underpinning the Indian Constitution. However, even if they be such, the aspirations can be defeated by the State through the simple expedient of not giving them practical effect. And as far as aspirations are concerned, in any functional democracy the electoral promises made by parties vying for power are far more potent and immediate, and they normally have nothing to do as such with the policy directives. The electorate may well punish a party in power for failing to live up to its promises made at election time; it will rarely, if ever, punish it at election time for failing to give effect to the policy directives, the existence of which most of it is not even aware. With the utmost respect, the inclusion of policy directives in the "basic structure" of a constitution highlights a central point made earlier in the judgment, that this expression should only be used in a descriptive and not a prescriptive sense.

(68) Returning to *Kesavananda Bharati*, Hedge and Mukherjea, JJ. observed (at para 682) that there was no power in Parliament to "abrogate" or "emasculate" fundamental rights. (Now is it not obvious that these are highly emotive terms? Parliament can "amend" or "repeal", but it is only military dictators who reject the entire constitution. So, why use these terms?) They had also earlier observed (at para 650) that they were unable to accept the proposition that the fundamental rights could not be abridged. Indeed, they observed that since the policy directives could "shape" fundamental rights, the latter could *not* be regarded as "natural, inalienable, primordial rights which are beyond the reach of the amendment of the Constitution" (para 677). This was a point made by Ray, J. (para 955), who was in the minority, when he denied (see para 947) that the fundamental rights were the same as natural rights or that they could not be abridged or taken away. Matthew J., also in the minority, put the point even more strongly:

> "Restrictions, abridgment; curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and its values. And, if Parliament, in its capacity as the Amending Body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the Court cannot adjudge the Constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant. Judicial review of a Constitutional amendment for the reason that it gives priority value to the moral claims embodied in Part IV over the Fundamental Rights embodied in Part III is impermissible. Taking for granted, that by and large the Fundamental Rights are the extensions, permutations and combinations of natural rights in the sense explained in this judgment, it does not follow that there is any inherent limitation by virtue of their origin or character in their being taken away or abridged for the common good. [para 1728]

He further observed: "In the light of what I have said, I do not think that there were any express or implied limitations upon the power of Parliament to amend the Fundamental Rights in such a way as to destroy or damage even the core or essence of the rights" [para 1729].

(69) Chandrachud, J., who was also in the minority, observed that an amendment to the Constitution did not become void because of any abridgement of fundamental rights and notwithstanding the "special place of importance" of such rights, that was not by itself sufficient to justify a conclusion that they were beyond the reach of the amending power (para 2089). He also observed (para 2096): "It is difficult to accept the argument that inherent limitations should be read into the amending power on the ground that Fundamental Rights are natural rights which inhere in every man."

(70) As the foregoing survey indicates, the Judges who constituted the majority and the minority respectively were firmly divided in their views. The division was stark and clear. The judgment of the "swing" Judge, Khanna, J. therefore assumed crucial importance. His views are the views of the Court since the other 12 Judges were split up equally, six for and six against. What is critically important, as will be

seen later, is that the subsequent development of the basic structure doctrine by the Indian Supreme Court is clearly violative of most of the views of the learned Judge, although all the subsequent cases were decided by Benches that were smaller and were bound by the judgment of the Court in *Kesavananda Bharati*. Khanna, J. himself, as will also be seen below, in a later case "clarified" his judgment to try and expand the scope of the doctrine. A "clarification" of course does not justify a contradiction, and Khanna, J. was as much bound by his own formulation as any other Judge since his earlier views were embedded in a 13-member Bench decision.

(71) But for now, I look at what the learned Judge said in *Kesavananda Bharati* itself. He observed (emphasis supplied):

> "It is not, in my opinion, a correct approach to assume that if Parliament is held entitled to amend Part III of the Constitution so as to take away or abridge fundamental rights, it would automatically or necessarily result in the abrogation of all fundamental rights…What we are concerned with is as to whether on the true construction of Article 368, the Parliament has or has not the power to amend the Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer, in my opinion, should be in the affirmative, as long as the basic structure of the Constitution is retained" [para 1432]
>
> "Distinction has been made on behalf of the petitioners between a fundamental right and the essence, also described as core, of that fundamental right. It is urged that even though the Parliament in compliance with Article 368 has the right to amend the fundamental right to property, it has no right to abridge or take away the essence of that right. *In my opinion, this differentiation between fundamental right and the essence or core of that fundamental right is an over-refinement which is not permissible and cannot stand judicial scrutiny*. If there is a power to abridge or take away a fundamental right, the said power cannot be curtailed by invoking the theory that though a fundamental right can be abridged or taken away, the essence or core of that fundamental right cannot be abridged or taken away. *The essence or core of a fundamental right must in the nature of things be its integral part and cannot claim a status or protection different from and higher than that of the fundamental right of which it is supposed to be the essence or core. There is also no objective standard to determine as to what is the core of a fundamental right and what distinguishes it from the periphery*. The absence of such a standard is bound to introduce uncertainty in a matter of so vital an importance as the amendment of the Constitution. I am, therefore, unable to accept the argument, that even if a fundamental right be held to be amendable, the core or essence of that right should be held to be immune from the amendatory process. [para 1475]
>
> I am also of the view that the *power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights*. The basic dignity of man does not depend upon the codification of the fundamental rights nor is

> such codification a prerequisite for a dignified way of living. … It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgement or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life. [para 1480]
> I am, therefore, of the opinion that the majority view in the Golak Nath's case that Parliament did not have the power to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights cannot be accepted to be correct. Fundamental rights contained in Part III of our Constitution can, in my opinion, be abridged or taken away in compliance with the procedure prescribed by Article 368, as long the basic structure of the Constitution remains unaffected" [para 1519]

(72) I will revert to Khanna, J.'s views later. For the time being it may be noted that the views of the other Judges, both in the majority and in the minority, were unambiguously opposed to each other: the majority Judges found both fundamental rights and policy directives as part of the unalterable "basic structure" of the Constitution while the minority did not. Khanna, J. traversed his own path: fundamental rights could be abridged or even taken away, as long as the basic structure of the Constitution remained unaffected. He categorically, and in my view rightly, rejected the vague, amorphous and untenable metaphysical concept of an unamendable "essence" of a fundamental right, *although despite this*, it was subsequently resurrected by smaller Benches of the Supreme Court. Is there such a thing as an essence of a fundamental right which cannot be amended while the fundamental right itself can? And how is such an "essence" to be discerned? Is there any legal method for this which exists? In my respectful view, the observation that fundamental rights can be abridged or curtailed as long as the "essence" of the rights or the basic structure remains unaffected carries no discernible meaning. In and of itself this would not be any issue. Every Judge ought to be excused an occasional lapse into a manner of expression that is less than clear. The difficulty however is that Khanna, J. was the "swing" vote. What he said and how he said it tilted *Kesavananda Bharati*, one way or the other. The matter would further complicated by the existence of a highly controversial "statement" that was signed by nine Judges, which was issued at the same time but separately. As I will show below, this "statement" has often been taken to reflect what it is that *Kesavananda Bharati* has supposedly decided. How this "statement" came to be signed is a story in itself. It is

set out in an article written by a former Solicitor General of India, Mr. T.R. Andhyarujina, which appeared in *The Hindu* newspaper on 21.05.2007. The article was based on a lecture given by the author to the Supreme Court Bar Association. The occasion was the thirty-fourth anniversary of *Kesavananda Bharati*. This is how the Mr. Andhyarujina put it (emphasis supplied):

> "The case was essentially a political fight in a court of law with a political background. It was conducted under continuous and intense pressure the likes of which it is hoped will never be seen again. One author has described the atmosphere of the court as "poisonous." A judge on the bench later spoke about the "unusual happenings" in the case. If the several "unusual happenings" in the case are related in detail, they will make one doubt if the decision in the case was truly a judicial one expected from judges with detachment from the results of the controversy before them.
>
> On April 24, 1973, the eleven separate judgments were delivered by nine judges; collectively these ran into more than 1000 printed pages. Six judges Chief Justice S.M. Sikri and Justices J.M. Shelat, K.S. Hegde, P. Jaganmohan Reddy, A.N. Grover, and S. Mukherjea were of the opinion that Parliament's power was limited because of implied and inherent limitations in the Constitution, including those in fundamental rights. Six other judges Justices A.N. Ray, D.G. Palekar, K.K. Mathew, S.N. Dwivedi, M.H. Beg, and Y.V. Chandrachud were of the opinion that there were no limitations at all on Parliament's power to amend the Constitution. But one judge Justice H.R. Khanna took neither side. He held that Parliament had the full power of amending the Constitution; but because it had the power only "to amend," it must leave "the basic structure or framework of the Constitution" intact. *It was a hopelessly divided verdict after all the labour and contest of five months. No majority, no minority, nobody could say what was the verdict*.
>
> How was it then said that the Court by a majority held that Parliament had no power to amend the basic structure of the Constitution? Thereby hangs a tale not generally known. Immediately after the eleven judges finished reading their judgments, Chief Justice Sikri, in whose opinion Parliament's power was limited by inherent and implied limitations, passed on a hastily prepared paper called a "View of the Majority" for signatures by the thirteen judges on the bench. One of the conclusions in the "View of the Majority" was that "Parliament did not have the power to amend the basic structure or framework of the Constitution." This was lifted from one of the conclusions in the judgment of Justice H.R. Khanna. *Nine judges signed the statement in court. Four others refused to sign it*.
>
> By any reading of the eleven judgments, this conclusion could not have been the view of the majority. It was only the view of one judge Justice H.R. Khanna. Some judges had no time to read all the eleven judgments as they were prepared under great constraints of time owing to the retirement of the Chief Justice the next day. Justice Chandrachud confessed that he had a chance hurriedly to read four draft judgments of his colleagues. No conference was called of all judges for finding out the majority view. The one conference called by the Chief Justice excluded those judges who were of the opinion that there were no limitations on the amending powers. Nor was the conclusion debated in court, as it ought to have been. *The Chief Justice's action has been*

> *described by some as an act of statesmanship. Others believe it was a manoeuvre to create a majority that did not exist*."

I may note that Mr. Andhyarujina subsequently wrote a book on the subject: *Kesavananda Bharati Case-The untold story of struggle for supremacy by Supreme Court and Parliament* (2011). (See also Mr. Andhyarujina's article titled "The untold story of how *Kesavananda Bharati* and the Basic Structure Doctrine survived an attempt to reverse them by the Supreme Court", which appeared in the SCC Journal at (2009) 9 SCC (J) J-33, and a copy of which was placed before us by Mr. Khalid Anwer.)

(73) The summary or "view of the majority" itself was in the following terms (see AIR 1973 SC at pg. 1642, Editor's Note) (emphasis supplied):

> "The view by the majority in these writ petitions is as follows:-
> 1. Golak Nath's case is overruled;
> 2. *Article 368 does not enable Parliament to alter the basic structure or frame-work of the Constitution*;
> 3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid;
> 4. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid;
> 5. The first part of Section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971 is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such a policy shall be called in question in any Court on the ground that it does not give effect to such a policy" is invalid;
> 6. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.
> The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 (relating to abolition of privy purses and privileges of princes) in accordance with the law."

Mr. Seervai, in his monumental *Constitutional Law of India* (4th Ed.) has strongly criticized the summary and has expressed the view that it had no legal effect at all (see Vol. 3 (1996), pg. 3114). I find his criticism compelling. Nonetheless, whatever the basis the Indian Supreme Court proceeds on the principle that what *Kesavananda Bharati* decided was that Parliament cannot, in exercise of the amending power under Article 368, alter the basic structure or frame-work of the Indian Constitution. Such a conclusion has not of course escaped academic and scholarly criticism and there are strong dissentients (Mr. Andhyarujina being but one

example) from the accepted version. The reasons for the criticism and dissent are, not least, the shaky and unsound intellectual and conceptual underpinnings of the doctrine. I find this criticism wholly convincing. These points have already been made and taken by me in the earlier part of the judgment.

(74) Reverting to Khanna J.'s judgment, his conclusions need to be set out in full (emphasis supplied):

> "1550. I may now sum up my conclusions relating to power of amendment under Article 368 of the Constitution as it existed before the amendment made by the Constitution (Twentyfourth Amendment) Act as well as about the validity of the Constitution (Twentyfourth Amendment) Act, the Constitution (Twentyfifth Amendment) Act and the Constitution (Twentyninth Amendment) Act:
>
> (i) Article 368 contains not only the procedure for the amendment of the Constitution but also confers the power of amending the Constitution.
>
> (ii) Entry 97 in List I of the Seventh Schedule of the Constitution does not cover the subject of amendment of the Constitution.
>
> (iii) The word "law" in Article 13(2) does not include amendment of the Constitution. It has reference to ordinary piece of legislation….
>
> (iv) *Provision for amendment of the Constitution is made with a view to overcome the difficulties which may be encountered in future in the working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of governments. If no provision were made for amendment of the Constitution, the people would have recourse to extra-Constitutional method like revolution to change the Constitution*.
>
> (v) Argument that Parliament can enact legislation under entry 97 List I of Seventh Schedule for convening a Constituent Assembly or holding a referendum for the purpose of amendment of Part III of the Constitution so as to take away or abridge fundamental rights is untenable. *There is no warrant for the proposition that as the amendments under Article 368 are not brought about through referendum or passed in a Convention the power of amendment under Article 368 is on that account subject to limitations*.
>
> (vi) *The possibility that power of amendment may be abused furnishes no ground for denial of its existence*. The best safeguard against abuse of power is public opinion and the good sense of the majority of the members of Parliament. It is also not correct to assume that if Parliament is held entitled to amend Part III of the Constitution, it would automatically and necessarily result in abrogation of all fundamental rights.
>
> (vii) The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is

plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

(viii) *Right to property does not pertain to basic structure or framework of the Constitution*.

(ix) There are no implied or inherent limitations on the power of amendment apart from those which inhere and are implicit in the word "amendment". The said power can also be not restricted by reference to natural or human rights. Such rights in order to be enforceable in a court of law must become a part of the statute or the Constitution.

(x) Apart from the part of the Preamble which relates to the basic structure or framework of the Constitution, the Preamble does not restrict the power of amendment.

(xi) The Constitution (Twentyfourth Amendment) Act does not suffer from any infirmity and as such is valid.

(xii) The amendment made in Article 31 by the Constitution (Twentyfifth Amendment) Act is valid.

(xiii) The first part of Article 31-C introduced by the Constitution (Twentyfifth Amendment) Act is valid. The said part is as under.

31C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

Provided that where such law is made by the Legislature of a State, the provisions of the article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(xiv) The second part of Article 31-C contains the seed of national disintegration and is invalid on the following two grounds:

(1) It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution in important respects.

(2) The legislature has been made the final authority to decide as to whether the law made by it is for objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31C goes beyond the permissible limit of what constitutes amendment under Article 368.

> The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of remaining part 1 would, therefore, strike down the following words in Article 31-C:
>
> "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy".
>
> (xv) The Constitution (Twentyninth Amendment) Act does not suffer from any infirmity and as such is valid."

(75) Keeping in mind that Khanna, J was the "swing" vote, and reading his conclusions, I find it difficult to find fault with Mr. Andhyarujina's view of the *Kesavananda Bharati* case: "No majority, no minority, nobody could say what was the verdict". But for the "view of the majority" statement circulated by the learned Chief Justice and signed by nine Judges as noted above, the decision would have been cast permanently in a state of doubt and confusion. And, as admirably demonstrated by Mr. Seervai, the statement essentially was without legal effect.

(76) One immediate fallout of the decision in *Kesavananda Bharati* was that when the Chief Justice of India retired one day after announcement of the judgments, he was not succeeded by the senior most Judge (as had thitherto been the settled practice) but by A. N. Ray, J., who was fourth in seniority. The reason was the three senior most Judges had all been in the majority. Ray, J. had been in the minority, i.e., had held that Parliament had untrammeled power to amend the Constitution. *Res ipsa loquitur*. All three of the superseded learned Judges resigned and there were widespread protests by bar associations and other legal groups all across India. Mr. Muhammad Hidayatullah, who had earlier served as the 11th Chief Justice of India (February, 1968 to December, 1970) said of the supersession that it "was an attempt of not creating 'forward looking judges' but the 'judges looking forward' to the plumes of the office of Chief Justice" (quoted on the website of the Indian Supreme Court Bar Association: see http://www.lexsite.com/services/network/scba/history.shtml).

(77) The next case that requires consideration is *Indira Nehru Gandhi v. Shri Raj Narain* & Anr AIR 1975 SC 2299. Mr. Justice Ray was still the Chief Justice of India when the case came to be heard. The case itself came by way of an election appeal. Raj Narain had challenged Mrs. Gandhi's election in the 1971 General Elections in the Allahabad High Court. That case was decided against Mrs. Gandhi, the High Court holding her guilty of certain electoral malpractices (though of a relatively minor if not downright trivial nature). The result was that Mrs. Gandhi stood de-seated. She immediately applied to the High Court for suspension of the judgment, and getting a two-week reprieve (by way of an unconditional stay) appealed to the Supreme Court. She also applied for a stay from the Supreme Court, which would normally have been routinely granted in such circumstances. It being vacations, the stay application was heard on 24.06.1975 by a learned single Judge (Iyer, J.). Incidentally, Mrs. Gandhi was represented by the renowned Mr. Nani Palkhivala, who had been the lead counsel for the petitioners in *Kesavananda Bharati*. After a full day's hearing, Iyer, J. surprisingly only granted a conditional stay. The condition itself was relatively minor in nature. Thus, Iyer, J. (whose order is reported at AIR 1975 SC 1590) suspended the judgment of the High Court and directed that Mrs. Gandhi, although remaining Prime Minister could not vote in the Lok Sabha as a member thereof, nor in any joint sitting of Parliament. She also could not draw remuneration as a member of the lower House. The order came as a bolt from the blue for Mrs. Gandhi. She was a very powerful Prime Minister and had won by a landslide. To her it must have seemed as if the judiciary was gunning for her.

(78) Mrs. Gandhi reacted with unrestrained fury. Emergency was declared the very next day (25.06.1975). A massive crack down was launched. Hundreds and then thousands of political opponents were arrested. Civil liberties were curtailed. There was great turmoil in the country. It was Indian democracy's darkest hour. It was in such stressed circumstances that the Supreme Court heard Mrs. Gandhi's appeal against the verdict of the High Court. Judicial morale was at a low ebb, as

highlighted by a case that was decided by the Supreme Court a few months after the decision in Mrs. Gandhi's appeal (see below). One other consequence of the Emergency was that Mr. Palkhivala returned the brief; he refused to appear for Mrs. Gandhi in such circumstances.

(79) Before the appeal came up for hearing, Mrs. Gandhi took another drastic measure, in the shape of the 39th Amendment to the Constitution. This took effect on 10.08.1975. A new provision, Article 329A was added to the Constitution. It related to the election of the Prime Minister (and also, as a fig leaf, the Speaker). (There were certain changes made in respect of the President and Vice President.) It provided that the election of a member of the Lok Sabha, who was at that time the holder of any of these offices or thereafter became the holder thereof, could only be challenged by means of a special law and not otherwise. A special law was enacted, which sought, in effect, to cure the illegalities that the High Court had found in Mrs. Gandhi's case and this law was also placed in the 9th Schedule by the 39th Amendment. The attempt was patently to circumvent and render infructuous the decision of the Allahabad High Court, thus making the success of her appeal in the Supreme Court irresistible. The 39th Amendment and the special law were also allowed to be challenged by the Supreme Court in the pending appeal (of course, by the respondent). The decision of the Supreme Court can best be stated in the words of Mr. Andhyarujina, again taken from the article that appeared in *The Hindu* (see above):

> "On August 11, 1975, Indira Gandhi's election appeal against her disqualification was heard by five judges presided over by Chief Justice A.N. Ray. He had been appointed Chief Justice of India by the government the day after the judgments in the Kesavanada case superseding three other judges who had decided against the unlimited power of Parliament to amend the Constitution. The government believed that with the amendment to Article 329-A of the Constitution, her appeal would simply be allowed. But so outrageous was the amendment that all five judges declared it bad as it violated "the basic structure." Nevertheless, Indira Gandhi's appeal was allowed by an amendment made to the Representation of the People Act, 1951, which cured all illegalities in her election. *The court could strike down constitutional law but not an ordinary law that carried out the same purpose. To many this seemed perplexing.*" (emphasis supplied)

(80) I would venture to suggest that perhaps the decision of the Supreme Court was not as perplexing as some found it to be. Perhaps the Indian Supreme Court had taken a leaf out of a very old "book". This was a judicial decision that was 172 years old when Mrs. Gandhi's appeal was heard and decided, but one that continued to resonate. Indeed, it still resonates and is venerated around the world. It is the decision that is rightly regarded as the progenitor of judicial review: the world famous case of *Marbury v. Madison* 5 US 137 (1803) and the judgment delivered by the equally famous Justice John Marshall, regarded generally as the greatest Chief Justice in US history. The story of *Marbury v. Madison* has been told many, many times but perhaps one more telling will not prove too onerous. The plaintiff, Marbury, had been appointed a Justice of the Peace by the outgoing administration of President John Adams (whose Secretary of State, and who sealed the commission, was none other than the same John Marshall). The Federalist Party had lost the elections and with it control over Congress. In what would now be called the "lame duck" period the outgoing party sought to entrench itself in the federal judiciary by making wholesale appointments to offices such as magistrates and Justices of the Peace (who were of course minor cogs in the judicial machinery). These judicial appointees, including Marbury, are known to history as the "midnight judges" since they were appointed in many cases literally one day before the new administration took office. All this understandably infuriated the incoming administration of President Jefferson and his Republican party who vowed to undo, to the extent possible, the "damage" done by the Federalists. Now, it so happened that in the rush of last minute work, the outgoing Secretary of State (the aforementioned John Marshall) failed to deliver to Marbury his commission, without which he could not assume office. When the incoming Secretary of State (Madison) discovered this he withheld the commission on orders of President Jefferson. Marbury then filed suit in the Supreme Court, seeking a writ of mandamus for the delivery of the withheld commission. This he did on the basis of the original jurisdiction conferred on the Supreme Court by an Act of Congress. President Jefferson and the Republicans made it absolutely clear that

should the Supreme Court decide in Marbury's favor, they would ignore the Court's decision and simply disregard any writ of mandamus issued by it.

(81) Chief Justice Marshall and the Supreme Court were therefore on the horns of a dilemma. On the one hand was Marbury who undoubtedly had a legal right to his commission. (Marshall could hardly say otherwise since he had himself appointed him.) On the other, the Republicans, led by President Jefferson, waiting to reduce the Court to ridicule and impotence by simply ignoring any order or verdict delivered by it. The atmosphere was undoubtedly poisoned by partisan politics and leanings. The unanimous judgment of the Court was authored by the Chief Justice, and what Marshall did is now regarded as an act of high judicial statesmanship. He held that Marbury undoubtedly had the legal right to the commission. The judgment made this absolutely clear. Now, as noted above, Marbury had approached the Supreme Court in exercise of its original jurisdiction granted under an Act of Congress. However, the Supreme Court only had, and could be granted, such jurisdiction in a limited set of circumstances, being those set out in Article III, section 2 of the US Constitution. In no other cases did the Supreme Court have original jurisdiction and nor could such jurisdiction be conferred on it. The original jurisdiction that Marbury invoked did not fall within the scope of Article III, section 2. Therefore, the Act of Congress that he relied on was inconsistent with the Constitution. What ought the Court to do? Marshall had no hesitation in giving the answer: the Act had to give way to the Constitution. Congress had no the legislative competence to confer such jurisdiction on the Court. The relevant provision was *ultra vires*. It had to be set aside. Marbury had sued in the wrong forum. Professor McCloskey, in *The American Supreme Court* (5th revised ed., 2005, pg. 26), said as follows of *Marbury v. Madison*:

> "A more adroit series of parries and ripostes would be difficult to imagine. The danger of a head-on clash with the Jeffersonians was averted by the denial of jurisdiction; but, at the same time, the declaration that the commission was illegally withheld scotched any impression that the Court condoned the administration's behaviour. These negative manoeuvres were artful achievements in their own right. But the touch of genius is evident when Marshall, not content with having rescued a bad situation, seizes the occasion to set the doctrine of judicial review. It is easy for us to see in retrospect that

> the occasion was golden. The attention of the Republicans was focused on the question of Marbury's commission, and they cared very little how the Court went about justifying a hands-off policy so long as that policy was followed. Moreover, the Court was in the delightful position, so common in its history but so confusing to its critics, of rejecting and assuming power in a single breath, for the Congress had tried here to give the judges an authority they could not constitutionally accept and the judges were high-mindedly refusing. The moment for immortal statement was at hand all right, but only a judge of Marshall's discernment could have recognized it." (*ibid*)

(82) Perhaps, so I would venture to suggest, in *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299 did something similar. By allowing her appeal in terms of the statutory provisions, the Court obviated any need for her to take any other steps or measures. This meant that the Court's decision on the larger question, i.e., the constitutionality of the 39th Amendment and its invalidation, would not be challenged or questioned. Sometimes, so it would seem, judicial statesmanship requires that the Court lose the battle in order to win the war.

(83) Two further points before I move on to the next case. As noted above, the Emergency declared by Mrs. Gandhi was India's darkest hour in many ways, not least because of the damage to judicial morale. The extent of this judicial demoralization is illustrated by the highly controversial judgment of the Supreme Court in *A.D.M. Jabalpur vs Shivakant Shukla* (1976) 2 SCC 521. The facts were simple. Numerous opponents of the government were detained under the Maintenance of Internal Security Act ("MISA"). Writ petitions were filed on various grounds. The government relied on an order suspending the enforcement of fundamental rights under Article 19. It also relied on an amendment to the Act under which the grounds for detention could be treated as confidential and could be withheld. It was argued forcefully on behalf of the petitioners that whether or not the fundamental right was suspended the basic obligation of the Executive to act in accordance with MISA remained intact. The utmost that could be urged on behalf of the government was that no right could be claimed under the fundamental rights chapter of the Constitution. However the petitioners' case was that the rule of law, which had neither been nor could be suspended, required that a decision had to be made as to whether the detention was valid under MISA. This was a right which pre-

existed the Constitution and was still intact. It would be a startling proposition of law to hold that the suspension of fundamental rights entitled the government to refuse to abide by the laws made by it. The power of the High Court was not merely to enforce fundamental rights but also the laws of the land. The Supreme Court by a majority of 4:1 held that the order of detention could not be challenged, not merely on the ground that it was not passed in accordance the provisions of the Act but even if it was "*vitiated by mala fides factual or legal or is based on extraneous circumstances*" (emphasis supplied). Thus a Court which challenged the power of Parliament to amend the Constitution felt its hands were tied before an admittedly illegal and mala fide order passed by a very low level functionary.

(84) The second point is in relation to *Kesavananda Bharati*. Again, the story can be told in the words of Mr. Andhyarujina (emphasis supplied):

> "Everyone took it that the court had now [i.e., after the decision in Mrs. Gandhi's appeal] approved the basic structure theory by striking down the amendment to Article 329A everyone, that is, except Chief Justice A.N. Ray. He had stated in Indira Gandhi's case that the hearing would proceed "on the assumption that it was not necessary to challenge the majority view in Kesavananda Bharati case." On November 9, 1975, two days after the Indira Gandhi case was decided, the Chief Justice constituted a new bench of thirteen judges to review the Kesavananda Bharati case.
>
> For two days, N.A. Palkhivala made the most eloquent and passionate argument against the review. On November 12, the third day, the Chief Justice announced suddenly at the very outset of hearing: "The bench is dissolved." Thus ended an inglorious attempt to review the Kesavananda judgment. *Whatever the reasons for the dissolution of the bench, Chief Justice Ray's maladroit attempt to review the basic structure limitation gave it a legitimacy that no subsequent affirmation of it could have given*."

(85) Khanna, J. (the "swing" vote in *Kesavananda Bharati*) was also a member of the Bench that heard Mrs. Gandhi's appeal. Khanna, J. took the opportunity to "clarify" certain aspects of his judgment in *Kesavananda Bharati*. Before I take up the "clarification", it would be appropriate to refer to the next case, *Minerva Mills and others v. Union of India and others* AIR 1980 SC 1789. This concerned the 42nd Amendment to the Constitution, which came into effect on 28.08.1976 (or may be 3.1.1977). This Amendment made many changes to the Constitution. For present purposes two are of particular relevance. One was to make changes to Article 31C,

which had been added by the 25th Amendment and to which reference has been made above. The second was by way of two clauses added to Article 368. These were as follows (see s.55 of the 42nd Amendment):

> "(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, 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."

(86) As already discussed in the earlier part of this judgment, the Court had no difficulty in declaring clauses (4) and (5) violative of the "basic structure" doctrine. The conceptual difficulties in this regard have also been mentioned. This aspect need not therefore be touched upon again here. Also of importance is another point: that even in 1980, the question of what it was that had been decided in *Kesavananda Bharati* continued to perplex the Court. Once again, the point is made succinctly by Mr. Andhyarujina (emphasis supplied):

> "… In 1980, in the Minerva Mills case, the question was raised whether there was indeed a majority view on the limitation of the basic structure. Justice Bhagwati said that the statement signed by nine judges had no legal effect at all and could not be regarded as the law declared by the Supreme Court. He said the so-called majority view was an unusual exercise that could not have been done by judges who had ceased to have any function after delivering their judgments and who had no time to read the judgments. However Justice Bhagwati relieved himself from deciding what he called "a troublesome question" by saying that Indira Gandhi's case had accepted the majority view that Parliament's power of amendment was limited. This was not correct as that case was decided on the assumption that it was not necessary to challenge the majority view.
>
> So a single judge's opinion Justice Khanna's of a limitation of the basic structure on Parliament's power has passed off as the law. But Justice Khanna was responsible for another vital dimension of the basic structure two years after the case was decided. In the Kesavananda case, he did not say that fundamental rights were part of the basic structure of the Constitution, although six other judges said that and the case was entirely about the validity of amending fundamental rights by the challenged constitutional amendments. Three of Justice Khanna's brother judges in the Kesavananda case were clearly of the opinion that Justice Khanna had not held that fundamental rights were part of the basic structure in the Kesavananda Bharati case.
>
> But in Indira Gandhi's election case two years later, Justice Khanna "clarified"

> his judgment in the Kesavananda case. He now said that he had given clear indications in his judgment that fundamental rights were part of the basic structure. *By so clarifying his judgment, Justice Khanna did not realise that this clarification rendered his judgment in the Kesavananda case hopelessly self-contradictory, as he had held unconditionally valid two constitutional amendments that nullified vital fundamental rights. With that dubious exercise, Justice Khanna's "clarification" is now a vital part of the basic structure*. Fundamental rights are now immune to an amendment if it violates the basic structure of the Constitution."

(87) The judgment in the *Minerva Mills* case is important for present purposes for another reason. It, and its aftermath, expose the weaknesses of the conceptual underpinnings of the "basic structure" doctrine and, as I will respectfully demonstrate, highlight the undeniable fact that, being an entirely Judge made doctrine, how susceptible it is to whatever are regarded as being the pressing issues by the Judges of the day. The actual point in issue was the nationalization of the Minerva Mills. In other words, it related to the fundamental right to property, which Khanna, J. had *expressly* held in his conclusions (see sub-para (viii) thereof) not to pertain to the basis structure. The mills were taken over under the Sick Textile Undertakings (Nationalisation) Act, 1974, which had been placed in the 9th Schedule to the Indian Constitution by the 39th Amendment (1975). It will be recalled that the 25th Amendment (1971) had introduced Article 31C into the Constitution, which, as noted above, was modified by the 42nd Amendment (s.4). Although I have reproduced the original Article 31C above, it will be convenient to set it out once again, with the changes made by the 42nd Amendment also incorporated. The changes were by way of substitution. The replacing words of the 42nd Amendment are in square brackets; the original words being replaced are underlined:

> "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing <u>the principles specified in clause (*b*) or clause (*c*) of article 39</u> [all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by <u>Article 14, Article 19 or Article 31</u> [Article 14 or Article 19]; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy*:
>
> Provided that where such law is made by the legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

(For reasons that become clear below, certain words have also been placed in italics.) In order to fully appreciate the point that I wish to make, it will be necessary also to reproduce Article 39 of the Indian Constitution:

> "**39. Certain principles of policy to be followed by the State.** The State shall, in particular, direct its policy towards securing—
> (*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood;
> (*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
> (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
> (*d*) that there is equal pay for equal work for both men and women;
> (*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
> (*f*) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

I may note that clause (f) was added to Article 39 by the 42nd Amendment. Other than that, it has retained its form as originally enacted.

(88) It will also be recalled that Article 31C had been considered by the 13-Judge Bench in the *Kesavananda Bharati* case. There, the six Judges that had formed part of the majority had struck down Article 31C in its entirety, while the six Judges in the minority had upheld it, save that they had read down the words placed in italics. Khanna, J. (the "swing" Judge) had upheld the Article save that he had struck down only the words placed in italics. Thus, the position that emerged after consideration of Article 31C by a 13-member Bench was that it was regarded as validly enacted save that the portion placed in italics was in doubt.

(89) In the *Minerva Mills* case, the 5-member Bench that heard the case did something extraordinary, by a majority of 4:1. It struck down s.4 of the 42nd Amendment, whereby the aforementioned changes had been made to Article 31C. A 5-member Bench had, for all practical purposes, effectively overruled a 13-member

Bench although under a fig leaf. This becomes clear when the short order whereby the case was disposed off is considered:

> "Section 4 of the Constitution 42nd Amendment Act [whereby the changes were made to Article 31C] is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution. Section 55 of the Constitution 42nd Amendment Act [whereby two clauses were added to Article 368] is beyond the amending power of the Parliament and is void since it removes all limitations on the power of the Parliament to 264 amend the Constitution and confers power upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure."

And what is more pertinent, the majority decision was written by Chandrachud, CJ, who had been in the *minority* in *Kesavananda Bharati*, and had *upheld* the Article there (see para 2156 of the judgment, where the learned Judge has given his conclusions in this regard). How was this possible? The reason given for this apparent volte-face was that the 42nd Amendment had allegedly significantly altered Article 31C. As noted above, in the original article, reference had been made to only clauses (b) and (c) of Article 39 (the words underlined). The 42nd Amendment had substituted these with words that brought all of the directives of state policy within the ambit of Article 31C (the words placed in square brackets). The learned Chief Justice used this "change" to justify his change. I would respectfully point out that Articles 14 and 19 were always referred to in Article 31C. Furthermore, the specific issue involved in the *Minerva Mills* case was the nationalization of the mills. Now, as is clear from Article 39, this issue was covered by clauses (b) and (c) which were always covered by Article 31C. None of the other clauses of Article 39, or any other directives of state policy, was engaged. Thus, the basis on which the majority sought to justify its action simply did not exist. It is a salutary principle of interpretation that, when considering constitutional provisions, the court should only go so far as is necessary for the case before it, and no further. The *Minerva Mills* case exposes, like no other, the jurisprudential dangers inherent in

an amorphous doctrine such as the “basic structure” theory. Only one Judge, Bhagwati, J. dissented and he expressed himself as follows (emphasis supplied):

> “Once we accept the proposition laid down by the majority decision in Kesavananda Bharati's case that the unamended Article 31C was constitutionally valid, it could only be on the basis that it did not damage or destroy the basic structure of the Constitution and moreover in the order made in Waman Rao's case on 9th May, 1980 this Court expressly held that the unamended Article 31C "does not damage any of the basic or essential features of the Constitution or its basic structure," and if that be so, it is difficult to appreciate how the amended Article 31C can be said to be violative of the basic structure. If the exclusion of the Fundamental Rights embodied in Articles 14 and 19 could be legitimately made for giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39 without affecting the basic structure I fail to see why these Fundamental Rights cannot be excluded for giving effect to the other Directive Principles. If the constitutional obligation in regard to the Directive Principles set out in clauses (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the Fundamental Rights under Articles 14 and 19, there is no reason in principle why such precedence cannot be given to the constitutional obligation in regard to the other Directive Principles which stand on the same footing. *It would, to my mind, be incongruous to hold the amended Article 31C invalid when the unamended Article 31C has been held to be valid by the majority decision in Keshavananda Bharati's case and by the order made on 9th May, 1980 in Waman Rao's case*.”

(90) The decision of the majority in the *Minerva Mills* case did not escape criticism. It came, inter alia, in the shape of the next judgment that requires consideration, *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd. and another* AIR 1983 SC 239. The case was heard by a 5-member Bench. It was also regarding nationalization, this time of Coke oven plants. Some of these plants were taken over under the relevant statute, but others were left out of the nationalization program. The petitioner challenged the action in terms of Article 14 (which corresponds to our Article 25). The government’s response was that the action was covered by Article 31C. The principal judgment was written by Chinnappa Reddy, J., while Amarendra Nath Sen, J concurred. The petition was unanimously dismissed. The majority judgment identified the principal question for consideration being whether the impugned statute was protected under Article 31C. Naturally, learned counsel for the petitioner relied strongly on the *Minerva Mills* case in support of his contention that the impugned legislation ought to be struck down. The learned Bench that decided the *Sanjeev Coke* case was in no doubt as to what was the correct

position in law, and needs to be quoted at length on its views regarding the decision in *Minerva Mills*. The majority judgment started by commenting on the "rare beauty and persuasive rhetoric" of the judgment. However, it then continued as follows (emphasis supplied) (pp. 246-50):

> "11. We confess the case has left us perplexed. In the first place, no question regarding the constitutional validity of s.4 of the [42nd Amendment] appears to have arisen for consideration in that case. The question was about the nationalisation and takeover by the Central Government of a certain textile mill under the provisions of [an Act of 1974]…. In order … to challenge the provisions of the [said Act of 1974] on the ground of inconsistency or abridgement or taking away of the Fundamental Rights conferred by Art. 14 or Art. 19, it was necessary for the petitioners to challenge the constitutional validity of the Constitution Twenty-fifth Amendment Act, 1971 by which Art. 31C was first introduced into the Constitution. *That, however, was not open to the petitioners because of the decision of this Court in Kesavananda Bharati's case*. *It was so conceded too by the learned counsel who appeared for the petitioner in the Minerva Mills case*. The counsel who appeared, however, chose to question the constitutional validity of [s.4 of the 42nd Amendment] …. No question regarding the constitutional validity of [the said] s. 4 … arose for consideration in the case, firstly, because the immunity from attack given to a law giving effect to the policy of the State towards securing the principles specified in cl. (b) or cl. (c) of Art 39 was given by the [25th Amendment] itself and secondly because the [aforementioned Act of 1974] had been enacted before the [42nd Amendment]. Yet, counsel successfully persuaded the Court to go into the question of the validity of s. 4…. *An objection was raised before the Court by the learned Attorney General that the Court should not concern itself with hypothetical or academic questions. The objection was overruled on the ground that the Forty-second Amendment was there for anyone to see and that the question raised was an important one dealing with, not an ordinary law, but, a constitutional amendment which had been brought into operation and which of its own force permitted the violations of certain freedoms through laws passed for certain purposes. We have serious reservations on the question whether it is open to a Court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We (judges) are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords*. *We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon*.
>
> 12. In the second place, the question of the constitutional validity of Art.31-C appears to us to be concluded by the decision of the Court in Kesavananda Bharati's case.
>
> 13. In Kesavananda Bharati's case, the Court expressly ruled that Art. 31-C as it stood at that time was constitutionally valid. No doubt, the protection of Art. 31-C was at that time confined to laws giving effect to the policy of the cls. (b) and (c) of Art. 39. By the Constitution Forty-second amendment Act, the protection was extended to all laws giving effect to all or any of the principles laid down in Part IV. *The dialectics, the logic and the rationale involved in*

upholding the validity of Art.31-C when it confined its protection to laws enacted to further Art. 39(b) or Art.39(c) should, uncompromisingly lead to the same resolute conclusion that Art. 31-C with its extended protection is also constitutionally valid. No one suggests that the nature of the Directive Principles enunciated in the other Articles of Part IV of the Constitution is so drastic or different from the Directive Principles in cls (b) and (c), of Art 39, that the extension of constitutional immunity to laws made to further those principles would offend the basic structure of the Constitution. In fact, no such argument appears to have been advanced in the Minerva Mills case and we find no discussion and no reference whatsoever, separately to any of the distinct principles enunciated in the individual Articles of Part IV of the Constitution decision in Minerva Mills. The argument advanced and the conclusion arrived at both appear to be general, applicable to every clause of Art. 39, and every Article of Part IV of the Constitution, no less to clauses (b) and (c) than to the other clauses….

…

16. … To accept the submission of [learned counsel for the petitioner] that a law founded on discrimination is not entitled to the protection of Art. 31C, as such a law can never be said to be to further the Directive Principle affirmed in Art. 39(b), would indeed be, to use a hackneyed phrase, to put the cart before the horse. If the law made to further the Directive Principle is necessarily non-discriminatory or is based on a reasonable classification, then such law does not need any protection such as that afforded by Art. 31C. Such law would be valid on its own strength, with no aid from Art. 31C. To make it a condition precedent that a law seeking the haven of Art. 31C must be non-discriminatory or based on reasonable classification is to make Art. 31C meaningless. If Art. 14 is not offended, no one need give any immunity from an attack based on Art. 14….

17. *We are firmly of the opinion that where Art. 31C comes in Art. 14 goes out*. There is no scope for bringing in Art. 14 by a side wind as it were, that is, by equating the rule of equality before the law of Art. 14 with the broad egalitarianism of Art. 39(b) or by treating the principle of Art. 14 as included in the principle of Art. 39(b). To insist on nexus between the law for which protection is claimed and the principle of Art. 39(b) is not to insist on fulfilment of the requirement of Art. 14. They are different concepts and in certain circumstances, may even run counter to each other. That is why the need for the immunity afforded by Art. 31C. Indeed there are bound to be innumerable cases where the narrower concept of equality before the law may frustrate the broader egalitarianism contemplated by Art. 39(b)….”

(91) The next case that requires consideration is *I.R. Coelho v. State of Tamil Nadu* AIR 2007 SC 861. It was decided by a 9-member Bench, and made what is regarded as an important “refinement” in the basic structure doctrine. The 9-member Bench was constituted because earlier a 5-member Bench had referred the case for hearing by a larger Bench. The 9-member Bench stated the “broad question” before the Court to be as follows:

"5. The fundamental question is whether on and after 24th April, 1973 when basic structures doctrine was propounded [i.e., the date on which the *Kesavananda Bharati* case was decided], it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court."

After considering the question, the Court concluded as follows (emphasis supplied):

"149. The result of aforesaid discussion is that the constitutional validity of the Ninth Schedule Laws on the touchstone of basic structure doctrine *can be adjudged by applying the direct impact and effect test, i.e., rights test, which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor*.

In conclusion, we hold that:

150(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. *If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment*.

(ii) The majority judgment in *Kesavananda Bharati's case* read with *Indira Gandhi's case*, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) *Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III* as held in *Indira Gandhi's case*. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide Order dated 14th September, 1999 in *I.R. Coelho v. State of Tamil Nadu* [1999] 7 SCC 580.

> (v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.
>
> (vi) Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge.
>
> We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a Three Judge Bench for decision in accordance with the principles laid down herein."

(92) What were the "direct impact and effect test" and the "rights test" that were enunciated and applied by the Court? Before considering this question, it will be appropriate to recall what the 9th Schedule was about. As noted above, the very first amendment to the Indian Constitution had added Article 31B and the 9th Schedule thereto. Article 31B provided that the laws mentioned in the 9th Schedule were deemed not "to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part", i.e., the fundamental rights. As has been seen, various laws were from time to time added to the 9th Schedule and some of those constitutional amendments were challenged in the various cases mentioned herein above. In the *Coelho* case the Supreme Court directly took up the question whether, in view of the "basic structure" doctrine and with effect from the date on which the *Kesavananda Bharati* case was decided, there could be any immunity even if the law had been placed in the 9th Schedule. The answer given by the Court has been noted above. The reasoning behind the answer now needs to be looked at in some detail.

(93) The first point to note regarding the *Coelho* case is that the constitutionality of Article 31B was not contested, and the Court proceeded on the express basis that the said article was valid. However, on behalf of the petitioners it had been argued that in

the post-*Kesavananda Bharati* era "the consequence of the evolution of the principles of basic structure is that Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31B". The Court did not accept such a broad and sweeping proposition:

> "76. To begin with, we find it difficult to accept the broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31B read with Article 368 of the Constitution….In *State of Maharashtra and Ors. v. Man Singh Suraj Singh Padvi and Ors.* (1978) 1 SCC 615, a Seven Judge Constitution Bench, post-decision in *Kesavananda Bharati's case* upheld Constitution (40th Amendment) Act, 1976 which was introduced when the appeal was pending in Supreme Court and thereby included the regulations in the Ninth Schedule. It was held that Article 31B and the Ninth Schedule cured the defect, if any, in the regulations as regards any unconstitutionality alleged on the ground of infringement of fundamental rights."

The "real crux of the problem", described by the Court as being an "intricate issue", was, what was the extent and nature of the immunity that Article 31B could validly provide? I pause here to respectfully note that the problem was in fact created by the Court itself, perhaps in order for it to be able to give the "solution". The answer, according to the Court, lay in the "basic structure" doctrine. The Court referred to the various judgments in the *Kesavananda Bharati* and in particular to the "clarification" (referred to above) made by Khanna, J. in the *Indira Nehru Gandhi* case of what he had said in his judgment in *Kesavananda Bharati* to conclude that some, at least, of the fundamental rights were indeed part of the basic structure of the Indian Constitution.

(94) After citing extensively from Mr. Seervai's work already referred to above (paras 30.48 and 30.65 (Vol. 3)), and further consideration of some of the judgments in the *Kesavananda Bharati* case, the Court observed as follows (emphasis supplied):

> "98. The rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant Article, but subject to limitation of the doctrine of basic structure. *True, it may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post-Kesavananda Bharati's case which has limited the power of the Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure*.

> 99. To decide the correctness of the rival submissions, the first aspect to be borne in mind is that each exercise of the amending power inserting laws into Ninth Schedule entails a complete removal of the fundamental rights chapter vis-a-vis the laws that are added in the Ninth Schedule. Secondly, insertion in Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. *The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III in so far as Ninth Schedule legislations are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ, viz. the judiciary*.
>
> 101. … *If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine*…. By enacting Fundamental Rights and Directive Principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental Rights and Directive Principles have to be balanced. That balance can be tilted in favour of the public good. *The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution*.
>
> 55. Fundamental rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power…. The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting ability of majority to intrude upon them. *That wall is the 'Basic Structure' doctrine*. Under Article 32, which is also part of Part III, Supreme Court has been vested with the power to ensure compliance of Part III. The responsibility to judge the constitutionality of all laws is that of judiciary. *Thus, when power under Article 31-B is exercised, the legislations made completely immune from Part III results in a direct way out, of the check of Part III, including that of Article 32. It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution*….
>
> 104. Indeed, if Article 31B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. *The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise*.

(95) I would respectfully draw attention to the free use of phrases such as "nullification" of fundamental rights, the judiciary being an "independent organ", and the dangers of a "parliamentary hegemony" exercising the "power" under Article 31B in an "unchecked" and "rampant" manner. Such language may perhaps be

suitable for political speeches; it should, I respectfully submit, be avoided in judgments of courts of law. But, to return to the observations of the Court:

> "107. The Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case. Take the example of freedom of Press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a). If Article 19(1)(a) is sought to be amended so as to abrogate such right (which we hope will never be done), the acceptance of respondents contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given case, even abridgement may destroy the real freedom of the Press and, thus, destructive of the basic structure. Take another example. The secular character of our Constitution is a matter of conclusion to be drawn from various Articles conferring fundamental rights; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution because every fundamental right in Part III stands either for a principle or a matter of detail. therefore, one has to take a synoptic view of the various Articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the Articles in Part III. It is not necessary to multiply the illustrations."

This brings me to the nub of the Court's reasoning and conclusion (emphasis supplied):

> "108. *After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme…. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from judicial review, the abrogation of the principle on the essence of that right is an exercise which cannot be denied on the basis of fictional immunity under Article 31B.*
>
> 60. In *Indira Gandhi's case*, Justice Chandrachud posits that *equality embodied in Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated … Dealing with Articles 14, 19 and 21 in Minerva Mills case, it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. It was observed that three Articles of our constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. These Articles stand on altogether different footing*. Can it be said, after the evolution of the basic structure doctrine, that exclusion of these rights at Parliament's will without any standard, cannot be subjected to judicial scrutiny as a result of the bar created by Article 31B? The obvious answer has to be in the negative. *If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations from full judicial scrutiny either on the ground that the fundamental rights are not part of the basic structure or on the ground that Part III provisions are not available as a result of immunity granted by Article 31B. It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is*

more important than the equality in the abstract or formal sense. The majority opinion in *Kesavananda Bharati's case* clearly is that *the principles behind fundamental rights are part of the basic structure of the Constitution*. It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution….

…

114. … The result of the aforesaid discussion is that *since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case*.

…

139. The object behind Article 31-B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. *The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the 'essence of right' test but also the 'rights test' has to apply* ….

The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including *Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III*."

(96) The Court then elaborated on the "essence of the right test" and the "rights test" (emphasis supplied):

141. *There is also a difference between the 'rights test' and the 'essence of right test'*. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test … will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate…. We are considering the situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunization at will by the Parliament which, in our view, is incompatible with the implied limitation of the power of the Parliament. In such a case, it is the rights test that is appropriate and is to be applied…. Regarding Articles 31A and 31C (validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these Articles have an indicia which is not there in Article 31B. Part III is amendable subject to basic structure doctrine. *It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31-B but subject to right of citizen to assail it on the enlarged judicial review concept*. The Legislature cannot grant

fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine.

143. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary…."

(97) Finally, the Court reached the "logical" conclusion with regard to the extent of the amending power in the light of the basic structure doctrine (emphasis supplied):

"146. *The doctrine of basic structure as a principle has now become an axiom*. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine…. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder.

147. *The power to amend the Constitution is subject to aforesaid axiom*. It is, thus, no more plenary in the absolute sense of the term. Prior to *Kesavananda Bharati,* the axiom was not there. *Fictional validation based on the power of immunity exercised by the Parliament under Article 368 is not compatible with the basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution*. *This Court being bound by all the provisions of the Constitution and also by the basic structure doctrine has necessarily to scrutinize the Ninth Schedule laws*. It has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. *For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the basic structure doctrine. If on such further examination the answer is again in affirmative, the result would be invalidation of the Ninth Schedule Law*. Therefore, first the violation of rights of Part III is required to be determined, then its impact examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. Every time such amendment is challenged, to hark back to *Kesavananda Bharati* upholding the validity of Article 31B is a surest means of a drastic erosion of the fundamental rights conferred by Part III.

80. *Article 31B gives validation based on fictional immunity*. In judging the validity of constitutional amendment we have to be guided by the impact test. *The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights*. Parliament is presumed to legislate compatibly with the fundamental rights and this is where Judicial Review comes in. *The greater the invasion into essential freedoms, greater is the need for justification and*

> *determination by court whether invasion was necessary and if so to what extent. The degree of invasion is for the Court to decide*. Compatibility is one of the species of Judicial Review which is premised on compatibility with rights regarded as fundamental. *The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine*. The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law."

(98) I have quoted at some length from the *Coelho* case because in my view it illustrates, rather strikingly, all the deficiencies of, and dangers inherent in, the basic structure doctrine. The manner in which the manifest language of Article 31B is reduced to a "fictional immunity", and ultimate power is arrogated to the judicial branch, is the unsurprising culmination of the doctrine. The *Coelho* case highlights the reasons why I am entirely unable to subscribe to this doctrine. However, it still remains to assess the "refinement" introduced by the decision. It has created the concept of an inner "core" or "essence" for certain (but not all) fundamental rights. Of course, the rights so selected are the choice of the Court itself. This "essence" of the selected fundamental rights is part of the basic structure of the Constitution and cannot therefore be abridged or curtailed. Hence, the two-step "test" developed by the Court in respect of a law placed in the 9th Schedule. Firstly, the Court is to see whether, in fact, the law so placed would have violated any of the fundamental rights or not. If the answer is in the affirmative, but the right(s) so violated do not fall in the select category, the challenge presumably fails. However, if there is a violation of any of the rights in the select category, then the second step: an assessment of the "degree" of violation, i.e., its "effect". Should the "degree" be so great as to touch the "essence" of the fundamental right, then it would violate the Constitution's basic structure (but, presumably, not otherwise). Placing such a law in the 9th Schedule would then be of no avail. Article 31B could not stand in the way of striking down the law. This at once raises the obvious question: what is the test for determining the "essence" of any the selected fundamental rights and how is one to determine that the "degree" or "effect" of the invasion is such that the "essence" has been touched? Not surprisingly no answer can be given to this question except that it is at the will of the

Court itself.

(99) Before I proceed to consider the last Indian judgment, it is necessary to emphasize a point of fundamental importance regarding the Indian jurisprudence and which, with the utmost respect, I find very troubling. That is how, as I will show in a moment, the judgments of the Indian Supreme Court subsequent to the *Kesavananda Bharati* case, which have all been given by Benches comprising of smaller number of Judges, have moved the basic structure doctrine in directions that are not merely inconsistent with the earlier decision but flatly contradict it. This, to me, brings home like nothing else the acute dangers of this doctrine. How can smaller Benches transform any principle or rule of law into something that, in effect, negates the rule as laid down by a much larger Bench? Normally, Judges are most particular in following the binding rule that applies in such situations: if a point or principle of law has to be reconsidered then this must be done by a larger Bench. The oft-quoted case of *Multiline Associates v. Ardeshir Cowasjee and others* PLD 1995 SC 423 is nothing but the reaffirmation in this jurisdiction of a general rule firmly embedded in the common law tradition. It certainly finds its place in India. Now, in respect of the basic structure doctrine no Bench larger than the one that heard *Kesavananda Bharati* has been constituted in the Indian Supreme Court. Whatever was said there by the Court was (and is) therefore binding on the subsequent, smaller-member Benches. Yet, those smaller Benches, in such key cases as *Minerva Mills* and *Coelho*, have decisively altered the doctrine in a manner that directly conflicts with and contradicts *Kesavananda Bharati*.

(100) In order to appreciate this point, it must be kept in mind that Khanna, J. was the "swing", and therefore decisive, vote in *Kesavananda Bharati*. The relevant passages from his judgment, and the conclusions arrived at by the learned Judge, have been reproduced above. As is absolutely clear, Khanna, J. decisively rejected

the theory that there was any "core" or "essence" of or to fundamental rights. He had dismissed any such concept as an impermissible "over-refinement". If at all a power to alter or abridge fundamental rights existed (and Khanna, J. expressly accepted the existence of such a power) then it could not be "curtailed by invoking the theory that though a fundamental right can be abridged or taken away, the essence or core of that fundamental right cannot be abridged or taken away". But what did the *Coelho* case do? As is clear from the passages reproduced above, it created precisely such a distinction and incorporated it into the basic structure doctrine, thereby further drastically curtailing and abridging the amending power on such basis. This, in my respectful view, directly contradicts *Kesavananda Bharati*. The very point that Khanna, J. had dismissed as an "over-refinement" was resurrected as the principal finding and conclusion in the *Coelho* case. I would submit, with respect, that the Indian Supreme Court could not do in the *Coelho* case what it has purported to do. The entire "refinement" of the doctrine as made in that decision is in clear breach of the foundational case. Furthermore, in reviving the rejected point, the Bench in the *Coelho* case joined it to the fundamental rights enshrined in Articles 14, 19 and 21, thereby and to that extent rendering them unalterable. Again, this was in direct contradiction of what Khanna, J. had decided in *Kesavananda Bharati*. Khanna, J. had categorically denied any immutability to fundamental rights in the foundational case, although, as has been noted, he subsequently tried to backtrack in terms of his "clarification" in the *Indira Nehru Gandhi* case.

(101) *Minerva Mills* was, with respect, no better. As noted above, the point in issue in that case was the nationalization of the mills. In other words, the right violated was a right to property. In *Kesavananda Bharati*, Khanna J. had categorically stated that the "right to property does not pertain to basic structure of framework of the Constitution" (see sub-para (viii) of his conclusions). The principal part of Article 31C, which when read with clauses (b) and (c) of Article 39 (as referred to therein) had been expressly declared as valid. Yet, in *Minerva Mills*, s.4 of the 42nd

Amendment, which had amended Article 31C, was struck down as violative of the basic structure doctrine. The position has been explained in detail above and need not be repeated here. What is important to note is that in so deciding, the Bench in *Minerva Mills* in effect gave life to a right to property as part of the basic structure of the Indian Constitution. This was, in my view and with respect, in direct contradiction of *Kesavananda Bharati*. It was for this reason, in part, that the learned Bench in the subsequent case of *Sanjeev Coke* refused to follow *Minerva Mills* and trenchantly gave its views regarding the latter decision in the passages reproduced above.

(102) The points made herein above more generally in relation to the *Coelho* case are aptly illustrated by the subsequent decision in *Glanrock Estate (P) Ltd. v. The State of Tamil Nadu* (2010) 10 SCC 96. The judgment of the 3-member Bench was authored by Kapadia, CJI, who had been a member of the Bench that decided the *Coelho* case. The learned Chief Justice started his judgment rather oddly, if I may say so with respect. "Some doctrines", he opined, "die hard. That certainly is true of the doctrine of basic structure of the Constitution." At issue was a Tamil Nadu statute that had been inserted in the 9th Schedule by the 34th Amendment, which was made in 1974. It was thus added to the said Schedule after the *Kesavananda Bharati* decision and hence within the scope of the *Coelho* case. The learned Chief Justice observed:

> "In these matters, we are required to apply the principles laid down in I.R. Coelho's case in the matter of challenge to the [Tamil Nadu statute] on the ground that the said Act is beyond the constituent power of the Parliament since the [said statute] damages the basic or essential features of the Constitution."

The learned Chief Justice took the opportunity to explain the decision in *Coelho* case (emphasis supplied):

> "8. Coming to the applicability of the judgment of the 9-Judge Bench decision of this Court in I.R. Coelho (supra), time has come for us to explain certain concepts in that judgment like egalitarian equality, over-arching principles and reading of Article 21 with Article 14. *In this connection, one needs to keep in*

> *mind what is called as the "degree test". Ultimately, in applying the above three concepts enumerated herein, one has to go by the degree of abrogation as well as the degree of elevation of an ordinary principle of equality to the level of over-arching principle (s)*. One must keep in mind that in this case the challenge is not to the ordinary law of the land. The challenge is to the constitutional amendment. In a rigid Constitution [See Article 368] power to amend the Constitution is a derivative power, which is an aspect of the constituent power. The challenge is to the exercise of derivative power by the Parliament in the matter of inclusion of the [Tamil Nadu statute] … in the Ninth Schedule of the Constitution …. Since the power to amend the Constitution is a derivative power, the exercise of such power to amend the Constitution is subject to two limitations, namely, the doctrine of basic structure and lack of legislative competence. *The doctrine of basic structure is brought in as a window to keep the power of judicial review intact as abrogation of such a power would result in violation of basic structure*. When we speak of discrimination or arbitrary classification, the same constitutes violation of Article 14 of the Constitution. In this connection, the distinction between constitutional law and ordinary law in a rigid Constitution like ours is to be kept in mind. The said distinction proceeds on the assumption that ordinary law can be challenged on the touchstone of the Constitution…. However, when it comes to the validity of a constitutional amendment, one has to examine the validity of such amendment by asking the question as to whether such an amendment violates any over-arching principle in the Constitution. *What is over-arching principle? Concepts like secularism, democracy, separation of powers, power of judicial review fall outside the scope of amendatory powers of the Parliament under Article 368*…. Similarly, "egalitarian equality" is a much wider concept. It is an over-arching principle. Take the case of acquisition of forests. Forests in India are an important part of environment. They constitute national asset. In various judgments of this Court … it has been held that "inter-generational equity" is part of Article 21 of the Constitution…. The doctrine of sustainable development also forms part of Article 21 of the Constitution. The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21. The important point to be noted is that in this case we are concerned with vesting of forests in the State. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of over- arching principle. Equality doctrine has various facets. It is in this sense that in I.R. Coelho's case this Court has read Article 21 with Article 14. The above example indicates that when it comes to preservation of forests as well as environment vis-a-vis development, one has to look at the constitutional amendment not from the point of view of formal equality or equality enshrined in Article 14 but on a much wider platform of an egalitarian equality which includes the concept of "inclusive growth". It is in that sense that this Court has used the expression Article 21 read with Article 14 in I.R. Coelho's case."

I pause here to respectfully draw attention to the manner in which the "explanation" of the *Coelho* case has moved away from what was actually decided there. The *Coelho* case was concerned with the "essence" or "core" of the fundamental rights in the selected category. Here, the learned Chief Justice speaks of "egalitarian equality", which is stated to be an "over-arching principle", and a "much wider concept". Attention is respectfully drawn to the manner in which the

"explanation" has changed into something much broader. Vague and amorphous, concepts such as "inter-generational equity" and "sustainable development" are expressly and deliberately elevated to an over-arching principle. These are principles which are normally found in discussions of economic development or environmental protection. The learned Chief Justice quite openly asserts that the constitutional amendment (i.e., the placing of the Tamil Nadu statute in the 9th Schedule) has to be looked at from the point of view of a "much wider platform", which includes the concept of "inclusive growth". That, it is claimed, is the sense in which the Court used the "expression", Article 21 read with Article 14, in the *Coelho* case. With the utmost respect, nothing could be further from the actual position.

(103) I continue quoting from the judgment of the learned Chief Justice (emphasis supplied):

> "Therefore, it is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31B. *If every breach of Article 14, however, egregious, is held to be unprotected by Article 31B, there would be no purpose in protection by Article 31B.* The question can be looked at from yet another angle. Can Parliament increase its amending power by amendment of Article 368 so as to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all limitations/ restrictions placed on the amending power or free the amending power from all limitations. This is the effect of the decision in Kesavananda Bharati (supra). *The point to be noted, therefore, is that when constitutional law is challenged, one has to apply the "effect test" to find out the degree of abrogation*. This is the "degree test" which has been referred to earlier. *If one finds that the constitutional amendment seeks to abrogate core values/ over-arching principles like secularism, egalitarian equality, etc. and which would warrant re-writing of the Constitution then such constitutional law would certainly violate the basic structure*. In other words, such over-arching principles would fall outside the amendatory power under Article 368 in the sense that the said power cannot be exercised even by the Parliament to abrogate such over-arching principles."

I draw attention to the words emphasized. Even the most "egregious" violation of Article 14 would be sustainable and "immunized" by Article 31B as long as it does not amount to a violation of the "over-arching principles" such as "egalitarian equality", as described in the "explanation" of the *Coelho* case. Perhaps

the learned Chief Justice has not kept in mind the meaning of "egregious" when used negatively: "gross, flagrant, shocking" (*Shorter Oxford English Dictionary*, 2007, Vol. I, pg. 802). Apparently all that matters is that the Judge-created doctrine of the "core" or "essence" of the selected fundamental rights should not be breached. And that doctrine, which ostensibly has the appearance of being limited to the absolute 'heart' of the fundamental right, can suddenly expand manifold into something quite unexpected, if the Court so desires.

(104) The divergence of views expressed by the learned Judges of the Indian Supreme Court in the various judgments as to what is (or is not) included in the "basic structure" of the Indian Constitution has been conveniently encapsulated by Mr. Khalid Anwer in tabular form and presented to us during the course of his submissions. I have adopted that table as an Annex to this judgment since it graphically illustrates the point that I have made herein above as to one of the most fundamental deficiencies of the doctrine: what exactly are the (normative or prescriptive) "basic features" of the Indian Constitution? If we examine the chart/table setting out the findings of the different judges in the Keswananda Bharati matter something interesting emerges. It will be found that on none of the features, each one of which is separately discussed further below, did even a bare majority of seven judges agree. It should not be forgotten that the judges were very explicit in observing that what the basic structure is was very clear and obvious. Shelat & Grover held that the "basic structure of the constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizens nor the Parliament would be able to understand it are unfounded." (see para 599) How then do we get this remarkable conclusion that perhaps it was not obvious even to a simple majority of the learned judges. Let us take up the findings. In relation to the supremacy of the constitution three learned judges held that this formed part of the basic structure. In relation to the rule of law not a single judge was of this view. In relation to the vitally important question of separation of powers only three judges

held that this would be included in the basic structure. As far as the independence of the judiciary is concerned not a single judge in the Bharati case was of the opinion that this is part of the basic structure. Judicial review was considered important by five of the learned judges. The principle of federalism was considered part of the basic structure by three learned judges and secularism was considered as such by four learned judges. When we turn to the question of the status of the sovereign republic of India four judges were of the view that this formed part of the basic structure. Three judges were of the view that the unity and integrity of the nation was part of the basic structure. The largest number of votes were in favour of the republican and democratic form of government but even these only add up to six i.e. still not a majority. The parliamentary system of government was part of the basic structure according to one learned judge only. As far as free and fair elections are concerned not a single judge was of the view that this formed part of the basic structure. However, three learned judges were of the view that freedom and dignity of the individual was part of the basic structure. Social economic and political justice was considered important enough to be part of the basic structure by only one learned judge. The mandate to build a welfare state and egalitarian society attracted three votes. Fundamental rights were considered part of the basic structure by only three learned judges. The essence of fundamental rights was considered part of the basic structure by two learned judges and the directive principles were considered as such by three learned judges. Liberty of speech was considered important enough by only one learned judge and the principle of equality was considered to be part of the basic structure by three learned judges. If therefore not a single aspect of the basic structure could be agreed upon by even a bare majority of the learned judges, does this not say something eloquent about the doctrine. Subsequently, in the Indra Gandhi case Chandrachud, J. attempted to brush aside the difficulty by boldly declaring that what had been held to be a part of the basic structure in the case was "an enquiry both fruitless and irrelevant." The observation speaks for itself!

(105) It will also be convenient to consider here certain decisions of the US Supreme Court in relation to the amending power contained in Article V of the US Constitution. As will become clear, the approach of the US Supreme Court is in stark contrast—indeed is diametrically opposed—to the "basic structure" doctrine. Article V of the US Constitution is in the following terms:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

(106) Of the US Supreme Court decisions on Article V, only two need be considered, being *Dillon v. Gloss* (1921) 256 US 368 and *Coleman v. Miller* (1939) 307 US 433. The first mentioned case arose out of the 18th Amendment to the US Constitution. As is well known, by that amendment (adopted in 1919), Prohibition was declared, i.e., there was a complete ban on the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States". Dillon was prosecuted under a law made by Congress to give effect to the 18th Amendment. He argued, inter alia, that the 18th Amendment was ineffective since the resolution whereby Congress adopted and sent it for ratification by the States had provided that it would be inoperative unless ratified within seven years, and that condition was invalid rendering the amendment as a whole inoperative. Referring to Article V, the Court observed as follows:

> "The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all."

As to Congress' power to impose a time limit within which a proposed amendment had to be adopted, the Court observed as follows:

> "We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three- fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do….
> Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require;12 and article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

(107) The foregoing observations led some observers to conclude that the amending power under Article V was subject to some sort of judicial review, at least insofar as the reasonableness of the time period, if any, fixed for ratification by Congress was concerned. These views, in my opinion, were firmly quashed in *Coleman v. Miller* (1939) 307 US 433. At issue was an amendment to the US Constitution known as the Child Labor Amendment, proposed in 1924. In fact, this amendment was moved on account of certain decisions of the Supreme Court invalidating legislation relating to child labor passed by Congress. The resolution was sent to the States and the dispute before the Supreme Court arose out of Kansas. In January, 1925 the Kansas legislature had rejected the proposed amendment. However, many years later, in 1937 (the proposed amendment still pending ratification), it was reintroduced, and was passed by the state Senate. That body comprised of 40 senators. When the resolution came up for a vote in 1937, the house was equally divided: 20 senators voted in favor of the amendment and 20 against. The Lieutenant-Governor, who was in terms of the Kansas State Constitution the presiding officer of the state Senate (as

is the case of the US Vice President in respect of the US Senate) then cast his vote in favor of the resolution. On such basis it was certified as having passed in the state Senate. Subsequently, the state House of Representatives also adopted the resolution by a majority. The state Senators who had opposed the resolution (along with three members of the lower House) then filed suit in the Kansas Supreme Court challenging the resolution on various grounds. However, the challenge failed and the petitioners petitioned the US Supreme Court for a writ of certiorari on the ground that it involved a federal question, namely the interpretation and application of Article V of the US Constitution.

(108) A number of grounds were taken by the petitioners and the respondents, including a challenge to the jurisdiction of the US Supreme Court. The judgment of the Court (by majority) was delivered by the Chief Justice Hughes. Jurisdiction having been found, the Court then went on to consider the substantive questions. Two of the grounds taken were "the effect of the previous rejection of the amendment and of the lapse of time since its submission". The petitioners contended that "in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six states, and had been ratified in only five states, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality". The Court rejected the first ground (i.e., of the previous rejection) on the following basis (emphasis supplied):

> "We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, *should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment*."

As regards the second question (i.e., the lapse of time), reference was made to *Dillion v. Gloss*, including the passages reproduced above. Congress had fixed no time limit for the ratification of the Child Labor Amendment. The Court observed as

follows:

> "But it does not follow [from *Dillon v. Gloss*] that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications."

The Court asked, "[w]here are to be found the criteria for such a judicial determination?", and answered the question as follows (emphasis supplied; internal citations omitted):

> "In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, *these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable*. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

(109) Mr. Justice Black (with whom some of the other Justices agreed) issued a concurring opinion. He put the matter in much stronger terms (internal citations omitted; emphasis supplied):

> "The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the States has taken place 'is conclusive upon the courts.' In the exercise of that power, Congress, of course, is governed by the Constitution. *However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a 'political department' of questions of a type which this Court has frequently designated 'political.' And decision of a 'political question' by the 'political department' to which the Constitution has committed it 'conclusively binds the judges, as well as all other officers, citizens, and subjects of ... government*.' Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn insurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation. *To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.*
> …
>
> Undivided control of that process has been given by the Article exclusively and completely to Congress. *The process itself is 'political' in its entirety, from*

> *submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.*
>
> *Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as Dillon v. Gloss, supra, attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved*….
>
> Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. *Neither State nor Federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.*"

(110) The views expressed by the US Supreme Court in *Coleman v. Miller*, as noted above, accord with my own. As is clear that Supreme Court appears to have taken a position that is completely opposed to the "basic structure" doctrine developed by the Indian Supreme Court.

(111) Upon the foregoing review of the Indian and American authorities, I am firmly of the view that, with respect, the submissions made by learned counsel for the Petitioners in support of a "basic features" doctrine, whether as, or along the lines as, developed in the Indian jurisprudence must be rejected. I am equally firmly of the view that the "basic features" doctrine should not be adopted and made part of the constitutional law of Pakistan.

(112) The "salient features" doctrine, a variant of the "basic structure" doctrine developed by this Court, needs a separate discussion. In the two cases in which it was considered, it was a mere *obiter dictum* and never argued as such. It was meant to be a check on military dictators. The "salient features" doctrine is examined in detail below. This Court has rightly rejected these doctrines in the past. As noted above, the entire case law has been reviewed in detail by this Court in the *Pakistan Lawyers' Forum* case, and I would like to cite at length the relevant observations made by the

Court:

"41. It has been urged by the petitioners that the 17th Amendment in its entirety or at least specifically, Article 41(7)(b) and Article 41(8) should be struck down as violative of the basic features of the Constitution. It may first be noted that it has repeatedly been held in numerous cases that this Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds.

42. First this issue was examined in Ziaur Rahman's case [PLD 1973 SC 49] in which various persons who had been convicted by Military Courts had challenged the purported ratification of the acts of that regime vide Article 281 of the Interim Constitution of Pakistan, 1972. In addition, the said persons had also challenged the vires of the Interim Constitution itself, inter alia, on the basis that the said Constitution had been framed by an assembly which had been elected on the basis of a legal framework prescribed by a regime later declared to be illegal by this Court in Asma Jilani's case PLD 1972 SC 139. A five- member Bench of this Court held as follows:-

"So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will confine itself within the limits set by the Constitution... (page 69)

It is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether judiciary can, in the exercise of judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of Government they wish to establish. I, for my part, cannot conceive a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people, including the judiciary, as a Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation. (pages 70-71)."

43. This judgment was subsequently re-examined by a four-member Bench of this Court in Saeed Ahmed Khan's case PLD 1974 SC 151; in which the submission was that Article 269 of the Constitution of 1973 was liable to be struck down to the extent it sought to oust the jurisdiction of the judiciary. In this context, the Court held as follows:

"The learned counsel for the respondents has, relying on the statements of law contained in Vol.16 of the Corpus Juris Secundum, impressed upon us to constantly keep in mind the main purpose sought to be accomplished by the adoption of the Constitution and to so construe the same as to effectuate rather than destroy that purpose, which according to him, is enshrined in Article 3 of the Interim Constitution and Article 4 of the permanent Constitution. (pages 165-166).

We are not unmindful of these provisions but after our decision in Zia ur Rahman's case, we are no longer in a position to say that the Martial Law Regulations, under which the executive actions impugned in the present cases were taken, have not acquired the status of a "law" within the meaning of these Articles. In any event, it is not possible for us to declare that a provision

of the Constitution is not law because it seeks to oust the jurisdiction of the Courts with regard to certain subjects without affecting the judicial power itself. We cannot strike it down. We can only interpret it, according to the accepted rules of interpretation and define its nature and scope. (Emphasis supplied) (page 166)."

44. Subsequently, this Court reiterated this view in Brig. (Retd.) F.B. Ali's case PLD 1975 SC 507 in which at page 528 it held that "the Courts cannot strike down a law on any such higher ethical notions nor can Courts act on the basis of philosophical concepts of law".

45. It is worth noting that this Court in the cases of Zia ur Rahman, Saeed Ahmed Khan and F.B. Ali did not take into account 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 this Court in the well known case of Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57, 100 in which the vires of the amendment to Article 17 made by the Constitution (First Amendment) Act, 1974 came into question. More specifically, the Court noted the majority judgment in the case of Kesvavanda Bharati v. State of Kerala AIR 1973 SC 1461 and then held:--

"It is unnecessary for us to enter into this controversy, as this Court is committed to the view that the judiciary cannot declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people and the validity of a Constitutional amendment can only be challenged if it is adopted in a manner different to that prescribed by the Constitution. (page 100)."

46. A challenge to the Fourth Amendment to the Constitution on the ground of the doctrine of basic features was rejected by the High Court of Sindh in Dewan Textile Mills v. Federation PLD 1976 Kar 1368.

47. The challenge to the Seventh Amendment to the Constitution before the High Court of Sindh failed in the case reported as Niaz A. Khan v. Federation PLD 1977 Kar. 604 at 648.

48. Soon thereafter, this Court was once again faced with the issue of the validity of a Constitutional amendment in the case of Federation of Pakistan v. United Sugar Mills Ltd. PLD 1977 SC 397, which related to the Constitution (4th Amendment) Act, 1976. In the said case, a five member full Bench of this Court again referred to Indian cases on the subject and held:--

"In Pakistan, this Court in the case of Zia ur Rahman has, however, firmly laid down the principle 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. (page 410)".

49. In Jehangir Iqbal Khan v. Federation PLD 1979 Pesh 67 the Peshawar High Court rejected a challenge to the Fifth Amendment to the Constitution.

50. In the well known case of Fauji Foundation v. Shamim-ur-Rehman PLD 1983 SC 457 a four member Bench of this Court examined the concept of limitations on legislative power and reaffirmed the conclusions in the cases of Zia ur Rahman and United Sugar Mills. The Fauji Foundation's case is particularly noteworthy in that this Court specifically examined the various Indian cases on the point, as well the judgment of Mr. Justice Shameem Hussain Kadri in the case of Darwesh M. Arbey v. Federation of Pakistan PLD 1980 Lah 684. In that case the learned Judge had held with respect to the Constitution (7th Amendment) Act that "The Parliament is not sovereign to amend the Constitution according to its likes and dislikes much less, than changing the basic features of the Constitution". This Court noted at p.627 of Fauji Foundation case that the Indian cases did not advance the position taken by Kadri, J. and 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". The Darwesh M. Arbey case was overruled.

51. The issue of amendments to the Constitution was considered also by the High Court of Sindh in Sharaf Faridi's case [PLD 1989 Kar 404]. In the said judgment, a seven member full Bench of the said Court headed by Ajmal Mian, J. (as he then was) examined the question as to whether the changes in the Constitution brought about by the Fifth Amendment to the Constitution could be declared ultra vires to the Constitution and concluded that the said amendment could not be struck down, either on the basis of its alleged repugnancy to Article 2A of the Constitution or for being violative of the basic features of the Constitution.

52. Subsequently, another seven member Bench of that Court examined the precise question as to whether the superior judiciary was competent to strike down amendments to the Constitution in the context of the Eighth Amendment and the various amendments to the Constitution made by the 1985 Assembly in Abdul Mujeeb Pirzada's case [PLD 1990 Kar 9]. Ajmal Mian, J., (as he then was) concluded on behalf of a unanimous Full Bench, after a thorough and detailed review of both Pakistani and Indian case-law, as follows--

"I am, therefore, of the view that in presence of the above unambiguous dictums of the Pakistan Supreme Court, it is not open to this Court to hold that a provision of the Constitution can be struck down on the ground of its being violative of the Objective Resolution or of national aspirations or of higher ethical notions or of philosophical concepts of law or of the basic structure. (page 70)."

53. The judgment in Abdul Mujeeb Pirzada's case may also be noted with respect to the point that it specifically considered the contention of the petitioners therein that the doctrine of basic features already stood implicitly accepted by this Court in Faziul Quader Chowdhary's case PLD 1963 SC 486. This contention was rejected in the following words:

"It is, therefore, evident that the consistent view of the Pakistan Supreme Court has been that a Constitutional provision cannot be struck down on a ground other than that it was passed in a manner other than provided under the Constitution. The case of Fazlul Quader Chowdhary relied upon by Mr. Yahya Bakhtiar does not lay down any contrary proposition than what has been held by the Supreme Court in the aforesaid subsequent cases. (page 70)."

54. The judgment in the case of Abdul Mujeeb Pirzada was subsequently upheld by this Court in Mahmood Khan Achakzai's case. The said case was disposed of by virtue of a short order, reported as Abdul Mujeeb Pirzada's case 1997 SCMR 232, which stated in relevant part as follows:-

"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 as Article 2A inserted by the Eighth Amendment."

55. The detailed judgment in the said case was subsequently reported as Mahmood Khan Achakzai's case [PLD 1997 SC 426]. It may be noted further that the said case was decided not by one judgment, but that there were in fact three separate judgments. One of the two leading judgments was written by the Chief Justice, Mr. Justice Sajjad Ali Shah and was signed (in effect) by only four other Judges. Saleem Akhtar, J., did not sign the judgment of Sajjad Ali Shah, C.J. while Zia Mehmood Mirza, J., noted that he concurred only with the conclusion of the learned Chief Justice that the appeals deserved to be dismissed. Saleem Akhtar, J., instead authored a separate leading judgment, which was also signed by four other members of the Bench, this time with the exception of Zia Mehmood Mirza, J., and Sajjad Ali Shah, C.J. Finally Raja Afrasiab, J., who had also concurred with the judgments of both the Chief Justice and Saleem Akhtar, J., authored his own independent judgment as well.

56. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior Courts of this country have consistently acknowledged that while there may be a basic features to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic features, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, i.e., the people of Pakistan. In this context, it may be noted that while Sajjad Ali Shah, C.J. observed that "there is a basic features of the Constitution which may not be amended by Parliament", he nowhere observes that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. The theory of basic features or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features.

57. The conclusion which emerges from the above survey is that prior to Syed Zafar Ali Shah's case, there was almost three decades of settled law to the effect that even though there were certain salient features of the Constitution, no Constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the Courts. A Constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.

58. It may finally be noted that the basic features theory, particularly as applied by the Supreme Court of India, is not a new concept so far as Pakistani jurisprudence is concerned but has been already considered and

> rejected after considerable reflection as discussed in the cases noted hereinabove. It may also be noted that the basic features theory has not found significant acceptance outside India, as also discussed and noted in the Achakzai's case. More specifically, the Supreme Court of Sri Lanka refused to apply the said theory in a case reported as In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1990) LRC (Const.) 1. Similarly, the said theory was rejected by the Supreme Court of Malaysia in a case title Phang Chin Hock v. Public Prosecutor (1980) 1 MLJ 70.
>
> 59. The position adopted by the Indian Supreme Court in Kesvavananda Bharati case is not necessarily a doctrine which can be applied unthinkingly to Pakistan. Pakistan has its own unique political history and its own unique judicial history. It has been the consistent position of this Court ever since it first enunciated the point in Zia ur Rahman's case that the debate with respect to the substantive vires of an amendment to the Constitution is a political question to be determined by the appropriate political forum, not by the judiciary. That in the instant petitions this Court cannot abandon its well-settled jurisprudence."
>
> I respectfully agree, especially with the conclusions set forth in paras 56-59.

(113) As pointed out above, the theory of "salient features" of the Constitution was initially enunciated, or to be more precise suggested, in a passing reflection by Sajjad Ali Shah, C.J without any analysis, or justification, for the first time in the *Mehmood Khan Achakzai* case PLD 1997 SC 426 which, after an exhaustive analysis rejected the doctrine of the "basic structure" of the constitution as adopted in India (see pages 501 et al). Paragraph 35 of the concurring judgment of Salim Akhtar, J. clearly brings out this point (emphasis supplied):

> "35. Mr. Ismail Qureshi contended that the Objectives Resolution which was included in the 1956 Constitution as a Preamble is the key to the Constitution. This Resolution was moved in the First Constituent Assembly and has continued to be adopted as a Preamble to the Constitution. By Eighth Amendment, Article 2A was added, which has made the Objectives Resolution a substantive part of the Constitution, *but to say that it is the basic structure in the sense the Indian Supreme Court has adopted, does not hold force*. Mr. Ismail Qureshi contended that every building has a structure. He has referred to the meaning of structure as given in Black's Law Dictionary and contended that structural alteration or change affects the vital and substantial portion of a thing which changes its characteristics which destroys the fundamental purpose of its erection and contemplated uses. As observed earlier, there are some characteristic features in every Constitution which are embedded in the historical, religious and social background of the people for whom it is framed. It cannot be denied that every Constitution has prominent features, characteristics and picture-frame studded with public aspiration, historical inspiration, geographical recognition, political formulations and people's expectation. These winding paths which roll into the stream, with the

passage of time and tide do affect the flow in their own perspective which to the rigid theory would amount to unpardonable change but to a flexible theory it would be a natural result of such confluence and influence. Doubtless, Pakistan owes its creation to ideological belief which is so manifestly reflected in the Objectives Resolution that it has always remained the Preamble of almost all our Constitutions and has been a source of guidance to all. The provisions of the Constitution though not rigidly encircled by it, always remain within its horizon subject to all such changes which manifest different shades of the same colour. A Constitution is the aspiration of the people. It is the experience of the past, the desires of the present nation and last but not the least a hope for the future. A Constitution is a document for all times to come. It cannot be made rigid because such rigidity if confronted with the social and political needs of the time, is likely to create cracks in it. The consistent view of the superior Courts of Pakistan is more real and should be followed and maintained."

(114) The operative part of the judgment is contained in the short order of the Court which was incorporated in paragraph 10 of the judgment of Sajjad Ali Shah, CJ. This reads as follows:

"For reasons to be recorded later, we pass following short order:

(2) 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 as Article 2A inserted by the Eighth Amendment.

(3) The Objectives Resolution was Preamble of the Constitutions made and promulgated in our country in 1956, 1962 and 1973. Perusal of the Objectives Resolution shows that for scheme of governance the main features envisaged are Federalism and Parliamentary Form of Government blended with Islamic provisions. The Eighth Amendment was inserted in the Constitution in 1985, after which three elections were held on party-basis and the resultant Parliaments did not touch this Amendment which demonstrates amply that this Amendment is ratified by implication and has come to stay in the constitution unless amended in the manner prescribed in the Constitution as contemplated under Article 239. Article 58(2)(b) brought in the Constitution by the Eighth Amendment, which maintains Parliamentary Form of Government has 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.

(4) In the result the two Civil Appeals Nos.397-K/90 (Abdul Mujib Pirzada v. Federation of Islamic Republic of Pakistan), 399-K/90 (Haji Ahmed v: Federation of Pakistan and others), and three Constitutional Petitions Nos. 60/96 (Mahmood Khan Achakzai v. President of Pakistan and others), 67/96 (Habibul Wahabul Khairi v. Federation of Pakistan and others) and 68/96 (Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan and others) are dismissed."

(115) It is also important to keep in mind whether, once the doctrine of basic structure doctrine of the Constitution has been rejected and the validity of the 8th Amendment to the Constitution accepted, there is any legal significance of any observations relating to the salient features of the Constitution. Indeed the question of the validity of the 8th Amendment was expressly described as a political question as the following abstract from the judgment of Raja Afrasiab Khan, J. indicates:

> "The controversy may also be seen from another angle, inasmuch as on the face of it the validity or otherwise of 8th Amendment is substantially a political question which, of course, cannot be subject to judicial review."

(116) Any observations relating to the salient features must therefore be deemed to be merely *obiter dicta*. By definition the concept of an *obiter dictum* is relatable to those judicial observations which are not necessary for the decision in the case, which was of course to uphold the validity of the 8th Amendment. It is noteworthy that the decision came despite the fact that the 8th Amendment (which, as noted, was held to have been validly enacted) was passed in circumstances which were far from ideal. The parliament which approved it was elected in terms of party-less elections which were held under the directions of a military dictator. Nevertheless it was observed that these were essentially political issues and it was for Parliament and not the judiciary to decide the constitutional structure of the State.

(117) It is, in my opinion, a profound error to believe that every conflict or difference of opinion in the country must be subject to a judicial resolution. There are many questions of the utmost importance which are best left to be decided through democratic modalities. A perusal of paragraphs 26 and 27 of the judgment authored by Sajjad Ali Shah, CJ., in which the salient features are referred to, makes one thing crystal clear: no constitutional analysis or legal principles were enunciated to justify this radical and wholly unprecedented theory, which *ex facie* seems a shadow of the "basic features" doctrine, which however was explicitly rejected. Indeed the entire question was disposed of in one brief sentence, which is reproduced below:

> "In nutshell it can be said that basic structure as such is not specifically mentioned in the Constitution of 1973 but Objectives Resolution as preamble of the Constitution and now inserted as the substantive part in the shape of Article 2A when read with other provisions of the Constitution reflects salient features of the Constitution highlighting federalism, parliamentary form of Government blended with Islamic provisions."

(118) The extent to which this view was shared by the other judges is also clear. The judgment of Sajjad Ali Shah, CJ is signed by one other judge, namely Fazal Ellahi Khan, J. Zia Mehmood Mirza, J. only agreed with the conclusion arrived at in the judgment, namely, that the appeals and petitions should be dismissed and stated he would record his reasons separately. Irshad Hassan Khan and Munawar Mirza, JJ., added brief notes agreeing with the judgment proposed by the learned Chief Justice but also with that of Saleem Akhtar, J. although in fact, Saleem Akhtar, J. did not accept the theory of salient features as being a restriction on the powers of Parliament. The net result is that the judgment in this case contains no legal justification or legal doctrine whatsoever for adopting the theory of "salient features" as having virtually the same effect as the "basic structure" theory which was discussed at length and then rejected. As observed earlier the observations relating to salient features were by no means necessary for the decision of the case and thus should at best be treated as *obiter dicta*. It is also interesting to note that the salient features noted by the learned Chief Justice *did not include the independence of the judiciary*, which further indicates that the observations made in this behalf were neither fully developed nor intended to be more than *obiter dicta*. They were confined to federalism and parliamentary form of Government blended with Islamic provisions. As observed earlier, these stray observations are conspicuously missing from the operative order of the Court. Even if this judgment is therefore taken to be the touchstone on which the fate of the present case is to be decided it necessarily follows that the present Petitions must be dismissed.

(119) It is critically important to note that the short order does not state that the "salient features" theory controls or limits the power of Parliament to amend the

Constitution. *In brief, the salient features theory is descriptive of the Constitution and not prescriptive*. It merely states that the prominent features of the Constitution were to be found in the Objectives Resolution, which is now a substantive part of the Constitution and of course, that change was by means of a constitutional amendment. *Since the Objectives Resolution was never an integral part of the Constitution until it was so made by a military dictator, and subsequently this was formalized through the 8th Amendment, it is a little difficult to see how it could be treated to be a basic feature of the Constitution as originally promulgated.* The contention that the Objectives Resolution should be treated as the "conscience" of the Constitution and thus, impliedly, given some sort of supra-constitutional status, which is indeed what is implied by the basic features doctrine in the Pakistani context, was explicitly rejected by this Court in *Zia ur Rehman's case* as the following extract from the judgment of Hamood ur Rehman, CJ., clearly reveals:

> "It will be observed that this does not say that the Objectives Resolution is the grund norm, but that the grund norm is the doctrine of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it. I did not describe the Objectives Resolution as "the cornerstone of Pakistan's legal edifice" but merely pointed out that one of the learned counsel appearing in the case had described it as such. It is not correct, therefore, to say that I had held it, as Justice Ataullah Sajjad has said in his judgment, "to be a transcendental part of the Constitution" or, as Justice Muhammad Afzal Zullah has said, to be a "supra-Constitutional Instrument which is unalterable and immutable".

(120) There is a vitally important aspect of the Objectives Resolution, which is often generally disregarded by adherents of the "basic structure" doctrine. The opening paragraphs of the Resolution are, in a sense, the most important, since they encapsulate the Islamic Doctrine of sovereignty. The doctrine states that sovereignty over the entire Universe belongs to

Allah Almighty alone and the authority to be exercised by the people of Pakistan is a sacred trust. What is critical to note is that the Resolution explicitly states and delineates who is to exercise that authority. The language is (emphasis supplied):

> "Wherein the State shall exercise its powers and authority through the *chosen representatives of the people*".

It does *not* state that the authority is to be exercised by the judicial officers appointed by the State. The repository of ultimate power is the body of elected representatives. The final word must always therefore rest with them and with no one else. The judicial organ of the State cannot, and ought not, to claim that it is the ultimate authority in the land. Such a claim would be clearly violative of the explicit language of the Resolution.

(121) It is worth noting that the theory that the Constitution contains an unidentified, and constantly shifting, "supra-constitution" within itself is manifestly self-contradictory. If that were so what prevented the framers of the Constitution from identifying certain

features of the Constitution and declaring them unamendable? (In fact this is precisely what has been done in certain other constitutions and this is a matter to which I will revert subsequently.) Why should it be assumed, without the slightest shred of historical evidence, that that is what was intended in relation to the Objectives Resolution? And if they did not intend it, are we justified in ascribing such an "intention" to them? In fact, their intention was the exact opposite since they, in common with the framers of the earlier constitutions, left it with the status of a non-binding preamble. The title itself made it clear: it is a "*resolution*" which sets out the "*objectives*" which are contemplated, and not an iron straitjacket. In fact if the text of the Objectives Resolution is compared with the text of the substantive parts of the Constitution, numerous contradictions become self-evident. For example, take the following extract from the Objectives Resolution:

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

This paragraph guarantees fundamental rights. But where for example, is there a fundamental right about equality of opportunity? It does not exist. *The fundamental rights mentioned in this Objective Resolution are not congruent or co-terminus with the fundamental rights which appear in the text of the Constitution.* Furthermore, the text of the Constitution reveals that so far from being guaranteed, the fundamental rights are liable to be suspended at any time and in fact have been suspended for numerous years. Thus in a sense, the fundamental rights are amongst the least fundamental part of the Constitution, since the other Articles cannot be suspended. Indeed, fundamental rights were suspended from the very day that the Constitution came into force (14.08.1973), since Article 280 expressly continued the emergency that had been imposed on 23.11.1971, deeming it to be an emergency under the Constitution. Thus, the "guaranteed" fundamental rights were stillborn. Furthermore, is the "social, economic and political justice" referred to in the same paragraph of the Objectives Resolution guaranteed under the Constitution? Again, the answer is in the negative. Article 37 which is entitled "promotion of social justice and eradication of social evils" falls in Chapter 2 of Part II (Principles of Policy) and Articles 29 and 30 make it crystal clear that it is a non-enforceable right as far as citizens are concerned since the responsibility for doing this rests with the different organs of the State which deal with such matters. The judiciary has not been conferred any power in relation thereto. Even after the Objectives Resolution was made a substantive part of the Constitution by Gen Zia ul Haq, this Court in *Hakim Khan* v *Government of Pakistan* PLD 1992 SC 595 explicitly rejected any superior status being accorded to it, as is clear from the leading judgment of Nasim Hasan Shah, J.:

> "The role of the Objectives Resolution, accordingly in my humble view, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect the ideals and the objectives set forth therein. Thus, whereas after the adoption of the Objectives resolution on 12th March, 1949, the Constitution-makers were expected to draft such provisions for the Constitution which were to conform to its directives and the ideals enunciated by them in the Objectives

> Resolution h and in case of any deviation from these directives, while drafting the proposed provisions for the Constitution the Constituent Assembly, before whom these draft provisions were to be placed, would take the necessary remedial steps itself to ensure compliance with the principles laid down in the Objectives Resolution. However, when a Constitution already stands framed by the National Assembly of Pakistan exercising plenary powers in this behalf wherein detailed provisions in respect of all matters referred to in the Objectives Resolution have already been made and Article 2A was made a mandatory part thereof much later i.e. after 1985 accordingly now when a question arises whether any of the provisions of the 1973 Constitution exceeds to any particular respect the limits prescribed by Allah Almighty (within which His people alone can act) and some inconsistency is shown to exist between the existing provisions of the Constitution and the limits to which the man made law can extend; this inconsistency will be resolved in the same manner as was originally envisaged by the authors and movers of the Objectives Resolution namely by the National Assembly itself. In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself."

(122) There is also another very important aspect of the Objectives Resolution that must be clearly understood and kept in mind. The Objectives Resolution was introduced into a central position in constitutional discourse in *Asma Jilani's* case (PLD 1972 SC 139). However, it is often forgotten, that this was against a specific contextual setting. In *Dosso's* case (PLD 1958 SC 533) the Supreme Court had relied on Kelsen's Pure Theory of Law ("Theory") in order to justify the military take over of 1958. When the question of military rule again arose in 1972 the application of the Theory (as reproduced in *Dosso's* case) was firmly, and rightly, rejected. Kelsen had never ever advanced the Theory as a potential justification for the actions of military adventurers and it was clearly misread, misunderstood and misapplied in *Dosso's* case. It will be recollected that the Theory introduced the concept of a grundnorm or basic norm, into jurisprudence. In *Asma Jilani's* case this Court, while refuting the application of the Theory, noted, in passing, that in the presence of the Objectives Resolution there was no need to look for foreign guidance as to the norms to be applied. Building on this observation (as mentioned by me earlier), two of the judges of the Lahore High Court in a case which subsequently came to the Supreme Court and was reported as *State vs. Zia-ur Rehman and others* PLD 1973 SC 49 enhanced the status of the Objectives Resolution and carried it much higher. These

findings were, as I have pointed out before, sharply overruled by the Supreme Court. Hamoodur Rehman, C.J. (see pg. 71) categorically rejected the finding that the Objectives Resolution was to be treated as a grundnorm and therefore impliedly stood on a higher pedestal than the Constitution.

(123) The question of the status of the Objective Resolution has once again been raised in the present proceedings. A view, which is sometimes expressed, is that the Resolution offers a unique insight into the vision of the founders of Pakistan as articulated by them therein. That by means of it they expressed, definitively and once and for all, what their thinking and beliefs about the origin and future development of the state of Pakistan were. The Resolution is said to be an original statement, encapsulating their deepest hopes, their aspirations and the ideals which had inspired the Muslim nation in its struggle to create the state of Pakistan. It should therefore be treated as a hallowed document prepared by the founders of the State and, as such, to have a uniquely binding status in the development of constitutional law in the country. It should be treated as enforceable and binding for all times to come.

(124) Now, there can be no doubt about the importance of the Resolution, especially the opening sentence which sets out the Islamic doctrine of sovereignty. This doctrine postulates that sovereignty over the entire universe rests in Almighty Allah and in Him alone, and all temporal power is to be exercised as a sacred trust through the chosen representatives of the people. However, to confer a similar status on the rest of the Resolution is to clearly stray very far from the historical record. *The conceptual roots and contents of the Objectives Resolution (which was passed on 12th March, 1949 when the Quaid-e-Azam had already expired) are neither unique to Pakistan and, nor indeed, did the formulation of the Resolution even originate within the country.* In order to explore the subject further it is necessary to look over the border.

(125) On 9th December, 1946 the Constituent Assembly of India met for the first time in New Delhi. The session was fiercely opposed by the Muslim League, who

boycotted it. But Nehru was adamant and defiantly declared that whatever form of constitution was adopted by the Constituent Assembly would become the Constitution of India. He moved an Objectives Resolution which was passed by the Constituent Assembly on January 20, 1947. Thus the concept of an Objectives Resolution originated in the Indian Congress, and how it travelled across the border is something that we will see in a moment. This was unanimously adopted on 22nd January, 1947. Subsequently, on 29.8.1947 a drafting committee was set up under the chairmanship of Dr. B.R. Ambedkar to draft the Indian Constitution which was adopted on 26 November, 1949 and came into force on 26 January, 1950. In the meanwhile, in terms of the Mountbatten Plan of 3 June, 1947 a separate Constituent Assembly was set up for Pakistan which carried on after 14th August, 1947 but unfortunately never succeeded in finalizing a constitution. It is not necessary to trace the troubled constitutional history of this country further for purposes of the present case but if we set out both Objectives Resolutions, the original one as passed in India in 1946, and the Pakistan Resolution which was adopted two years later but modeled on the earlier document, the striking similarities will at once become apparent. As will be noted the framework, the structure and even occasionally the precise language of the Pakistan Objectives Resolution was based on the Indian document. *Indeed, a significant part has been copied out verbatim*.

India Objectives Resolution 1947

(1) THIS CONSTITUTENT ASSEMBLY declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(2) Wherein the territories that now comprise British India, the territories that now form the Indian States; and such other parts of India as are outside British India and the states, as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) Wherein the said territories; whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such

powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) Wherein all powers and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) Wherein shall be guaranteed and secured to all the people of India; justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and law of civilized nations, and

(8) this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of making."

Pakistan Objectives Resolution, 1949

"Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;

And whereas it is the will of the people of Pakistan to establish an order-

Wherein the State shall exercise its powers and authority, through the chosen representatives of the people;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;

Wherein adequate provisions shall be made for the minorities freely to profess and practice their religions and development their cultures;

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

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

> Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;
>
> Wherein the independence of the judiciary shall be fully secured;
>
> Where the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded;
>
> So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity:"

(126) The similarity between the nomenclature and structure of the two Objectives Resolutions is so striking as to leave no need for further debate or discussion on the point. *In particular, the all important paragraph relating to fundamental rights, equality of status, social, economic and political justice and freedom of thought, expression, belief, faith, thought and association subject to law and public morality is virtually a word by word copy*. The provision referring to minorities is also strikingly similar. The paragraphs relating to the integrity of the territory of the state and its sovereign rights on land, sea and air are also notable for their convergence of concept and phraseology.

(127) One additional point needs to be made. *Nehru obviously did not consider that the Objectives Resolution was so uniquely important that it should be embodied as part of the Indian constitution by being made the preamble thereto.* The Preamble to the Indian Constitution, as originally framed, is completely different:

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
> LIBERTY of status and of opportunity; and to promote among them all
> FRATERNITY assuring the dignity of the individual and the unity of the nation.
>
> IN OUR CONSTITUTENT ASSEMBLY this Twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

(128) It can be seen therefore, that the originators of the concept of an Objectives Resolution did not consider, or attach, so much importance to its phraseology and structure as to justify it being made a part of the Indian Constitution. It would seem to follow from the above that any attempt to attach a quasi-mystical, or supremely overarching significance and importance to the Objectives Resolution by this Court, as if it had been uniquely conceived by the founders of Pakistan, is not altogether justified, to say the least. Indeed, if a swift glance is cast at the numerous declarations of human rights, as well as the constitutions of different countries around the world, we will find similar ideas expressed in terminology which is sometimes similar and sometimes dissimilar, but in any event the ultimate objectives to be achieved are common to the entire civilized world. What is special about the Objectives Resolution is something else, namely its reference to the Islamic doctrine which states that sovereignty over the entire universe rests in Almighty Allah alone. That is the true basis of the Islamic Republic of Pakistan. Furthermore, and critically, the categorical assertion in it that the exercise of the power of the State is to rest in the chosen representatives of the people needs to be highlighted. *In other words supreme power is to rest in the elected representatives of the people and not in the judicial officials of the State*. If there is any moral to be drawn from this saga then surely this is it. *And this perhaps is the underlying reason that this Court has, in all its previous decisions on the point, firmly rejected the basic structure doctrine as itself being alien to the basic structure of the Constitution of Pakistan.* (Needless to say I am using the term "basic structure" in its descriptive and not prescriptive sense.) The primary importance of the Islamic doctrine of sovereignty is not strictly legal but essentially religious. *The doctrine would remain true for all believers in Islam whether it be included in the Constitution or not*. If at all a legal justification for its inclusion in the Constitution exists it is this, that all persons who wield power under the Constitution should have imbued in them a sense that they will be held responsible for their actions on the Day of Judgment. The elected representatives are responsible and accountable for their actions to the people of Pakistan. But to whom

is the judiciary answerable? Essentially, to itself! The judiciary in Pakistan is uniquely positioned. If compared with other judicial institutions around the world, it will be noted that there is no parallel for a judiciary which is appointed by the judiciary and is answerable to the judiciary. I would respectfully venture to suggest that we have sufficient judicial power already and do not need to confer further power on ourselves by clutching at the basic structure doctrine. We have no necessity to borrow Indian judicial theories which have been born and developed in response to a different history and a different socio-political background. When it is recognized that all power is in the nature of a sacred trust, then an ethical and moral dimension is introduced into the constitutional equation. *However, under all circumstances the democratic principle remains pre-eminent*. In the words of the Quaid-e-Azam in a speech in February 1948:

> "The constitution of Pakistan has yet to be framed by the Pakistan Constituent Assembly. I do not know what the ultimate shape of this Constitution is going to be, but I am sure that it will be of a democratic type, embodying the essential principles of Islam. Today, they are as applicable in actual life as they were 1,300 years ago. Islam and its idealism have taught us democracy. It has taught equality of man, justice and fairplay to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future constitution of Pakistan. In any case Pakistan is not going to be a theocratic State – to be ruled by priests with a divine mission. We have many non-Muslims – Hindu, Christians, and Parsis – but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan."

(129) The next important case is that of *Zafar Ali Shah* v *Pervez Musharraf* PLD 2000 SC 869. This was the case in which the question before the Court was about the validity of the military take over which was upheld on the basis of the discredited doctrine of state necessity which admittedly carries no credibility whatsoever at present. However, amazingly, after upholding the "validity" of military takeover– *which is all that the case was about*—this Court went on to "confer" power (which it did not enjoy itself) on the Army Chief to single handedly and unilaterally carry out constitutional amendments in terms of paragraph 6 which is reproduced below:

> "6.(i) That the Chairman, Joint Chiefs of Staff Committee and the Chief of the Army Staff through Proclamation of Emergency dated the 14th October, 1999,

followed by PCO 1 of 1999, whereby he had been described as Chief Executive; having validly assumed power by means of an extra - Constitutional step, in the interest of the State and for the welfare of the people, was entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:
All acts or legislative measures which. were in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

All acts which tended to advance or promote the good of the people;
All acts required to be done for the ordinary orderly running of the State; and

All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii) That Constitutional amendments by the Chief Executive could be resorted to only if the Constitution failed to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause (6), sub clause (i) (a) (ibid) was controlled by sub clauses (b), (c) and (d) in the same clause.
(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of judiciary, federalism, parliamentary form of Government blended with Islamic provisions.
(iv) That Fundamental Rights provided in Part II, Chapter 1 of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233(1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.
(v) That these acts; or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;
(vi) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State- necessity as stated above. Their powers under Article 199 of the Constitution, thus, remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on. his behalf.

(vii) That the Courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches, dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior Courts."

(130) It will be seen that the full legislative power was conferred on a single person. Furthermore, an additional power was conferred on the Army Chief to amend the Constitution if, *in his opinion*, the Constitution failed to provide solutions for the attainment of his "declared objectives" (*which were, amazingly, therefore given a supra-constitutional importance*) and furthermore that the power to amend the Constitution was "controlled" only by sub-clauses (b), (c) and (d) of clause (i) of the judgment, which sub-clauses are so vague as to be virtually meaningless. Why was

primacy given to the "declared objectives" of the Army Chief? No answer is provided to this vital question in the judgment. In other words, it was assumed that the "declared objectives" of the Army Chief were the touchstone on the basis of which the Constitution could be amended. This amazing theory had never before been either propounded or accepted by any court of law. A mere speech by the Army Chief had become more important than the text of the Constitution. Thus, the restriction which was also, at the same time, imposed on the power of the Army Chief to amend the Constitution by stating that no amendment should be made in the salient features of the Constitution, which were now described as being the independence of the judiciary, federalism and a parliamentary form of government blended with Islamic provisions, is *inextricably* linked up with the unprecedented power granted to him to unilaterally amend the Constitution. Surely, the restriction only applied, and was intended to so apply, to the Army Chief and not to a democratically elected Parliament under the Constitution. Once again, as in the *Mehmood Achakzai* case no legal analysis was carried out to justify this finding. With the profoundest respect it has to be observed that this Court quite clearly lacked the power to confer on the Army Chief the right to unilaterally amend the Constitution of Pakistan. If the power to make constitutional amendments was lacking it necessarily follows that the question of any restriction on this power does not arise. This judgment therefore hardly advances the case for adopting the "salient features" theory. The Bench hearing this case consisted of twelve judges (headed by Irshad Hasan Khan, CJ and included Iftikhar Muhammad Chaudhry, J. (as he then was)). All twelve judges had taken an oath under a PCO. *The five senior judges who had declined to take the oath had resigned and left judicial office earlier to their ever lasting credit – they had kept the honor of the institution alive.*

(131) Despite my candid and confirm view that this Court has no jurisdiction to examine and declare *ultra vires (or annul)* an amendment made in the Constitution, yet as extensive, strenuous and valuable submissions have been made by the learned

counsel for the parties on merits of the amendments, therefore, I am tempted to and do not want to miss this opportunity of expressing my opinion in this context as well. I thus now turn to examine the submissions made by learned counsel for the Petitioners with respect to the specific provisions challenged by them in terms of the 18th Amendment, namely the newly added Article 175A, the substituted Article 63A, and the deletion, from the substituted Article 17, of the requirement relating to intra-party elections. Before doing so however, I would like to clarify a point on which some confusion may unnecessarily arise, and that relates to the independence of the judiciary. There can be no cavil at all with the proposition that the judiciary must be independent. The jurisprudence of this Court is firmly established on the point and the case law is replete with judicial observations in this regard. The recent decisions of this Court in *Sindh High Court Bar Association* v *Federation of Pakistan and others* PLD 2009 SC 789 and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry* v *President of Pakistan and others* PLD 2010 SC 61 are but two examples which reaffirm this well established constitutional principle. There is no need to cite any specific passages from the aforementioned cases in support of the proposition: the independence of the judiciary is a bedrock principle of democracy and mode of governance. However, it must be kept clearly in mind that what is in issue in these Petitions is not whether the judiciary ought to be independent, but rather whether that independence is impinged upon or impaired by the constitutional amendments under challenge. And that is manifestly an altogether separate and distinct question. Simply repeating that the judiciary must be independent virtually as a mantra does not address, but rather obscures, the real question before the Court.

(132) Although there is a great deal of material on the importance of the independence of the judiciary, surprisingly, there is very little discussion on the anterior question, as to what precisely is the meaning of this phrase. The vital and all important question is, independence from what or whom? It is well settled that the

phrase has a precise and clearly enunciated meaning. It is a term of art. The phrase independence of the judiciary in constitutional parlance means:

(i) An *institutional* independence i.e., the judiciary, as an institution, is independent. The reference is not to personalities but to the office held by members of the judiciary.

(ii) An independence, above all, from the Executive, and

(iii) An independence also from the Legislature.

What is vitally important to grasp is that this concept is not to be confused with the power which is conferred on the judiciary by law. A powerful judiciary is not necessarily an independent judiciary. And conversely, an independent judiciary is not necessarily a powerful judiciary. Similarly, the jurisdiction conferred on the judiciary has nothing to do with the independence of the judiciary and vice versa. There is also a great deal of conceptual confusion on the distinction between judicial power and jurisdiction despite the fact that the point is amply clarified both in *Asma Jillani's* case (PLD 1972 SC 139) as well as *Zia-ur-Rehman's* case (PLD 1973 SC 49). The question of what jurisdiction is conferred on the judiciary is addressed in the Constitution and in any laws made under and in accordance with the Constitution. This Court is deciding the present case precisely because Article 184(3) framed by the legislature in the exercise of its constituent power has conferred the judicial power to do so on it. It need not have done so. And if it had not the matter would have been heard and decided by the High Court under Article 199. The judiciary is the creature of the Constitution – it is not above it. It must function in accordance with it. *Article 184(3) exists not because of the Objectives Resolution or Article 2A or because of any direct conferment of power by the people of Pakistan on the Supreme Court but because of the conscious decision of the duly elected representatives of the people to include it in the Constitution*. It would not be right either ethically, legally or constitutionally for the Court to now turn around and seek

to deny primacy to the language of that very Constitution and the right of elected representatives to amend it.

(133) It is now time to turn to the specific questions raised in the present petitions regarding the constitutionality of the 18th Amendment. I first take up Article 175A, since most of the submissions of learned counsel for the Petitioners were directed against this provision. This Article was subsequently amended by the 19th Amendment and the amended version reads as follows:

175A. Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.-

(1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of--

(i) Chairman Chief Justice of Pakistan;

(ii) Members four most senior Judges of the Supreme Court;

(iii) Member a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the four member Judges, for a period of two years;

(iv) Member Federal Minister for Law and Justice;

(v) Member Attorney-General for Pakistan; and

(vi) Member a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure

(5) Appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:-

(i) Member Chief Justice of the High Court to which the appointment is being made;

(ii) Member the most senior Judge of that High Court;

(iii) Member Provincial Minister for Law; and

(iv) Member an advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years:

Provided that for appointment of the Chief Justice of a High Court the most Senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

Provided futher that if for any reason the Chief Justice of a High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nomicated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission mentioned in paragraph (ii) of clause (2).

(6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:-

(i) Member Chief Justice of the Islamabad High Court; and

(ii) Member the most senior Judge of that High Court

Provided that for initial appointment of the Chief Justice and the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5) shall, mutatis mutandis, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.

(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:-

(i) four members from the Senate; and

(ii) four members from the National Assembly:

Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members of the Senate only mentioned in paragraph (i) and the provisions of this Article shall, *mutatis mutandis* apply.

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

(14) No action or decision taken by the Commission or a Committee shall

> be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.
>
> (15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.
>
> (16) The provisions of Article 68 shall not apply to the proceedings of the Committee.
>
> (17) The Committee may make rules for regulating its procedure.

(134) The submissions of learned counsel for the Petitioners can be stated, in effect, as follows. Article 175A is violative of the "basic features" of the Constitution since it allegedly affects the independence of the judiciary and disturbs the separation of powers among the three organs of the State. Parliament has thus acted beyond its amending power. In this context, reference was also made by learned counsel to the method now prevalent in the United Kingdom for judicial appointments under the UK Constitutional Reform Act, 2005 ("UK Act") and a reference was also made to the recent introduction of a judicial commission in India.

(135) I have already, in the earlier part of this judgment, expressed my views on the "basic features" doctrine. Obviously, if that view were to prevail, namely that the "basic features" doctrine ought to be rejected, that would be dispositive of the Petitions, since the specific objections to the particular Articles under challenge are all based and premised on the "basic features" doctrine. In this portion of the judgment, I will however examine the specific objections while assuming that there is, or can be, some such doctrine, and give my reasons as to why I conclude that the attack on Articles 175A, 63A and 17 must in the end fail even on this basis.

(136) In order to properly comprehend the objections to Article 175A, one must first examine and understand the system that prevailed in Pakistan prior to the 18th Amendment regarding the appointment of the superior judiciary, i.e., the judges of the Supreme Court, the High Courts and the Federal Shariat Court. The first point to note is that in all cases, except the appointment of the Chief Justice of Pakistan, the

President had to make the appointment in consultation with the consultees referred to in the relevant provisions. In other words, the President was the appointing authority. The reference to the President in this context meant the President acting on the advice of the Prime Minister in view of the relevant Articles of the Constitution. The second point to note is that admittedly prior to the decision of this Court in *Al Jehad Trust* v *Federation of Pakistan* PLD 1996 SC 324, the meaning attributed to the word "consultation" was that while the consultee nominated in the relevant Article had to be consulted, his view was *not* binding; it was but one element to be taken into consideration by the appointing authority, namely the President acting on the advice of the Prime Minister. *Thus, in the Constitution as originally promulgated, in relation to the appointment of judges of the Supreme Court and High Court the role assigned to the judicial branch was definitely neither determinative nor decisive*. It is also critically important to note that in relation to the appointment of Chief Justice of Pakistan the judiciary had no say whatsoever. The reason is that Article 177, as it originally stood, required "consultation", however, construed, only in relation to the appointment of Supreme Court judges. For the appointment of Chief Justice of Pakistan no consultation was required. The entirety of power was vested exclusively on the President of Pakistan in his sole and unfettered discretion. *Thus, it was the Executive which had the final say, and if the Constitution had a "basic structure" in 1973 it was this which was embedded into its foundation at the time of its birth*. Did this mean that the framers of the Constitution did not intend the judiciary to be independent? This is an important question which is worth pondering. *At this point it is necessary to make a fundamental and critical distinction in law between (i) mode of appointments, and (ii) the powers of an appointee, which is often ignored or obscured in the repeated discussions on the subject*. There is a clear distinction between these two concepts, which can perhaps be illustrated by two examples:

> (A) The Prime Minister has the power to appoint or remove an Army Chief under the Constitution. Does this mean that the Army Chief, on appointment, becomes the Prime Minister's man with no discretionary powers of his own? The history of this country, with its repeated military interventions, provides a clear and unambiguous answer, which does not need to be spelt out.

> (B) A judge of the US Supreme Court is nominated by the President, but confirmed by the Senate. What role does the judiciary have in his appointment? *None whatsoever*. Earl Warren is arguably the most famous chief justice of the US Supreme Court of the 20th century. What was he prior to his appointment as such? The Governor of California! He had no prior judicial experience. He was not recommended by any judicial forum. President Eisenhower proposed his name and the Senate confirmed him. But it would be a rash man who would thereby infer that there is no independence of the judiciary in the United States. The very idea is inconceivable. And let it not be forgotten that the concept of judicial independence, as also the allied concept of judicial review, both originated in the United States. If the objection be that conditions in the United States are different from Pakistan, and indeed they indisputably are, let it not be forgotten that *there is no country in the world in which the appointment of judges vests exclusively in the judiciary*. Are we really so different from the rest of the world? Are we unique? Are we perhaps not lacking a little in modesty when we tolerate such claims being made, even if impliedly. Robert Stevens, writing about the position in Great Britain but before the enactment of the UK Act, puts the matter bluntly in *The English Judges: Their Role in the changing Constitution* (2002):
>
> "*Judges choosing judges is the antithesis of democracy*. In all major common-law countries – the US, Canada, Australia and South Africa – the executive chooses the judiciary, although sometimes with advice from the Judicial Appointments Commission. To hand over the appointment of judges to a commission might well ensure bland appointments… The choice of judges is too important to be left to a quango… *At the very least, if there is to be a Constitutional or Supreme Court, its judges must be chosen by elected officials and subject to examination by a democratic body*." (pg 144; emphasis supplied)

(137) The interesting question which arises is, what is the reason for this lack of clarity on a crucial matter? For that one has to examine how the concept of the independence of the judiciary has evolved in Pakistan in the past years. The Provisional Constitutional Order of November 2007 was, in essence, a desperate attempt by a beleaguered military autocrat to save his rapidly sinking regime. When this attempt failed the Hon'ble Chief Justice was restored to office by a huge tidal wave of public opinion, in the vanguard of which stood the lawyers community and civil society. Thereafter, the consensus was that the judiciary was fully independent in Pakistan. We now come to the vital point: what is critical to note is that the restoration of the Hon'ble Chief Justice and consequential independence of the judiciary *was neither heralded nor followed by a constitutional amendment*. The Constitution under which the former Chief Justice and the present Hon'ble Chief Justice function is exactly the same. However, earlier the judiciary was not, in

practice, independent but today it is. What then has caused the change? *The answer, in one word, is democracy*. It was the forces of democratic change which compelled the Establishment to restore the Chief Justice: it was not a constitutional amendment! What was important was the spirit, not the letter of the law. From this one, and only one, conclusion flows: it is democracy and its attendant forces which are the true foundation of an independent judiciary. *When we weaken democracy we weaken the judiciary*. It is, in my opinion, essential for this Court to do *nothing* which may lead, directly or indirectly to a weakening of the foundations of democracy. What is important is not the calibre of the present elected representatives of the people of Pakistan—they are here today and will be gone tomorrow—but the all-important fact that they are the elected representatives and in all democracies all over the world ultimate power always resides in elected (and not appointed) representatives. This is exactly what the Objectives Resolution states: the ultimate power which resides in the Omnipotent Creator is to be exercised, *not by the judicial representatives, but by the elected representatives of the people*. If the Objectives Resolution is the conscience of the Constitution, then on this point, its language is crystal clear. This foundational point is purely institutional in nature and has nothing whatsoever to do with the calibre of the present members of Parliament or of the judiciary. *The interpretation of the Constitution cannot be altered merely because the members of any given Parliament, or any given set of judges, are not faithfully discharging their responsibilities*. Indeed, our history is replete with episodes in which military autocrats overthrew constitutional governments, often to the plaudits of the public and precisely on the ground that the elected representatives were corrupt and incompetent. It is incumbent on this Court to avoid so basic and fundamental a fallacy. It is not the function of this Court to weaken democratic institutions and traditions by declaring that since the elected representatives of the people are not, in its opinion, discharging their functions honestly, hence those functions in relation to the judiciary will be taken over by the judiciary itself. Let it not be forgotten that the judiciary in Pakistan is neither elected by the people *nor is it answerable or*

accountable to the people. It is answerable only to itself under Article 209 of the Constitution. No judge of a superior court in Pakistan has ever been prosecuted in a criminal court. Indeed, if any other institution claimed the right to be only answerable to itself there would be a public outcry. In other countries of the world, including India, the general rule is that the superior judiciary is answerable to the elected representatives of the people-- in India and England to Parliament and in the United States to Congress. The judiciary in Pakistan thus holds a uniquely privileged position constitutionally and it is therefore incumbent on it to exercise its great powers with restraint and wisdom. The basic postulate, on which all institutions rest, is, *the greater the power, the greater the responsibility*.

(138) I would therefore observe, with respect, that a moment's reflection on the original shape of the Constitution puts paid to the view now being advanced that somehow the independence of the judiciary is under threat because the legislative and executive branches have become involved in the appointment process. The legislative and executive branches have *always* been involved in the appointment process. To put the point differently, the involvement of the branches in the appointment process has *always been a "basic feature" of the Constitution*, and indeed up until the *Al Jehad* decision, the other two branches *always* had the larger role to play. Certainly, up to the early 1990's no one questioned the independence of the judiciary *at least on this basis*. The lack of independence of the judiciary was always ascribed to the personalities of different judges of the Court -- and not to the mode of appointment. (If Munir, CJ and his colleagues had so chosen they could have decided the *Tamiz-ud-din* case differently. There was nothing in the then Constitution preventing them from doing so.)

(139) To carry on the narrative, in the 1990's, a feeling did arise *in the judicial branch itself*, that the consultative system was perhaps not working as it should. In

particular, there was a feeling that perhaps the views of the *judicial branch* were not being given sufficient weight. Matters came to a head, as it were, in the *Al Jehad* case, and this Court gave new meaning and content to the word "consultation" used in the relevant Articles in the following manner:

"The words "after consultation" employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted *in the absence of very sound reasons to be recorded by the President/Executive*." (emphasis supplied)

(140) In the detailed judgments, emphasis was also placed on "participatory consultative process between the consultees and also with the Executive". Ajmal Mian, J., put the matter in the following terms:

> "I am, therefore, of the view that the words "after consultation" referred to inter alia in Articles 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate for Judgeship in the superior Courts, whereas the Governor of a Province and the Federal Government are better equipped to find out about the antecedents of a candidate and to acquire other information as to his character/conduct. *I will not say that anyone of the above consultees/ functionaries is less important or inferior to the other. All are important in their respective spheres.* The Chief Justice of Pakistan, being Paterfamilias i.e. head of the judiciary, having expertise knowledge about the ability and suitability of a candidate, definitely his views deserve due deference. The object of the above participatory consultative process should be to arrive at a consensus to select best persons for the Judgeship of a superior Court keeping in view the object enshrined in the Preamble of the Constitution…" (emphasis supplied)

(141) I do not of course, disagree with the observations and conclusions of the *Al Jehad* case, but for present purposes, the important point is this: by means of judicial interpretation, the content of what is now being described as a "basic feature" of the Constitution was decisively, and dramatically, altered. The views of the judicial branch were now to be accorded primacy. However, even the *Al Jehad* case did not do away with consultation among, and with, the other branches (in particular, the executive). It is to be remembered that the Prime Minister (on whose advice the

President was required to act) is the head of the Cabinet, and the Cabinet, both through the doctrine of collective responsibility and otherwise, is traditionally known as the "buckle" that fastens the legislative and executive branches in a parliamentary democracy. Thus, to involve the Prime Minister in any decision making process is to involve both the executive and legislative branches, directly and/or indirectly. Nor did *Al Jehad* provide that the judiciary's view could not be questioned. The effect of the *Al Jehad* case can therefore be stated as follows. In the appointment of judges, there had to be a proper and meaningful consultation among the different branches of the State. The views expressed by the judicial branch were to have primacy in relation to the merits, while the views of the Executive were to be considered in relation to the suitability and antecedents of a nominee, and if the other branches (in particular the executive) disagreed with the former, "very sound reasons" had to be recorded. *If such reasons were found to exist, then the executive/legislative branch could reject the opinion of the judicial branch, i.e., refuse to appoint the person recommended by the latter.* This aspect of the *Al-Jehad* case seems to have been totally overlooked in subsequent discussions.

(142) It will be seen that, in substance, all the points raised against Article 175A were to be found in the appointment process that existed prior to the 18th Amendment, even as modified by the *Al Jehad* decision. It was only the manner in which the appointment process was structured that was different from the method now adopted in Article 175A. How then, has Article 175A altered the situation and in particular, has brought about a change for the worse? In order to examine this question, the provisions relating to the Judicial Commission and the Parliamentary Committee will have to be examined separately. The first point to note about the Commission is that when nominating a person for appointment, it acts by a simple majority of its total membership, and the crucial point is that *it is judges (serving and retired) who comprise that total majority*. This is completely unprecedented in our history and also that of other well-established and functional democracies. Thus, in

the case of Supreme Court appointments, the Commission is to comprise of 9 members, of whom 6 are judges. In the case of High Court appointments (other than to the Islamabad High Court), the Commission is to comprise of 13 members, of whom 8 are judges. Thus, judges can, *independently of the other members of the Commission*, make nominations for vacancies in the superior courts. Article 175A, rather than derogating from the earlier position in which the views of the judiciary merely had primacy, *has actually strengthened the judiciary's hand immeasurably*. It should be welcomed and not criticized by all who value an independent judiciary. No matter what the Law Minister(s) and the Attorney General and the senior advocate appointed by the Bar(s) may say, or do; even if they act together, the judges' view will always prevail. This is an extraordinary, and indeed unique, situation. A judge of the superior courts can only be removed by the Supreme Judicial Council, a body comprising solely of judges. Now, the Constitution unequivocally provides that nominations for appointment as judges are to be made by a Commission that is not merely dominated by judges, but in which they have an absolute, and indeed, unassailable, majority. In all other constitutional systems, there is a decisive involvement of the other branches of the state in both the appointment and removal of judges. Thus, in the US Constitution, judges are appointed by the President (the executive branch) with the advice and consent of the Senate (the legislative branch), and judges are removed by impeachment by Congress (the legislative branch). In the UK, even under the UK Act of which learned counsel are so enamored, even the judges of the newly formed UK Supreme Court, hold office during "good behavior" and can be removed by Parliament (see s.33 of the UK Act). (The appointment process under the UK Act is examined in detail below and it will be seen that the role of the Executive is far greater than in Pakistan under the 18th Amendment.) In relation to the criticism which has repeatedly been advanced that the constitutional position in the United States is different and cannot be compared with Pakistan, the answer is that it is indeed different, but in a completely different way, which has not been envisaged by the Petitioners. The doctrine of the independence of the judiciary

flows from the theory of separation of powers, sometimes called the trichotomy of powers, i.e., that the constitution has erected barriers between the three great departments of the State, the legislature, the executive and the judiciary. But this doctrine is nowhere categorically stated or expressed as such in our Constitution. It is essentially a judicial interpretation of the structure of the Constitution. What needs to be stressed it is that the theory was first clearly set out in the US Constitution. Article I of the US Constitution states that all "legislative powers" shall vest in Congress, Article II states that the "executive power" shall be vested in the President and Article III states that "the judicial power of the United States shall be vested in one Supreme Court and such inferior courts" etc. Such a categorical assertion is not merely missing in our Constitution, but Article 175(2) in fact, if anything, tilts in the opposite direction by affirming that "no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law"! I therefore find this contention wholly unconvincing. On any conceivable basis, the creation of the Judicial Commission has strengthened, and not weakened, the independence of the judiciary.

(143) Quite apart from the foregoing, the inclusion of the other (i.e., non-judicial) members of the Commission does not, in my view, alter the situation for the worse. Thus, one member of the Commission in the case of Supreme Court nominations is a senior advocate of this Court nominated by the Pakistan Bar Council. In the case of High Court nominations, he is augmented by a senior member nominated by the Provincial Bar Council. The other members are the Federal Law Minister and the Attorney General, and (for High Court appointments) the Provincial Law Minister as well. There is nothing at all which would indicate that these members would act together to undermine the functioning of the Commission. They may even be at loggerheads. For example, if the government at the Federal level is formed by one party and that at the provincial level by another, the two Law Ministers may not see eye to eye on the appointments, with their votes in effect canceling each other. In any

case, while these latter appointments are *ex officio*, there is nothing to indicate that they are to act as representatives of the executive/legislative branches. Indeed, such conduct is now effectively precluded by the well-known judgments of this Court in relation to Article 175A. (Even if they were to so act, the situation would not, for the reasons already given, be materially different from that prevailing prior to the 18th Amendment.)

(144) There is one important feature of the Commission to which I would like to advert. Under the *Al Jehad* formula, primacy was accorded to one person, namely, the Chief Justice of Pakistan. This was understandable because the Constitution referred to him alone and not to his senior colleagues. Article 175A has now made a departure. The Chief Justice of Pakistan is now to share his responsibilities with his four senior most colleagues. Probably the rationale for this change is the feeling that these responsibilities are so onerous that the senior judges should be asked to assist the Chief Justice in their discharge. In India, although the language of the corresponding Article is somewhat different, the Indian Supreme Court has voluntarily evolved a system in which the four senior most judges (collectively known as the collegium) participate in the process.

(145) So much for the Commission. What of the Parliamentary Committee? The first point to note is that unless the Committee refuses to confirm the nominee in question within 14 days, the nominee shall be deemed to have been confirmed. Thus, in a sense, the formal "confirmation" by the Committee is irrelevant, and can only bring forward the confirmation. *The 14 day period is fixed and immutable*. Once the Commission has made its recommendation and it is communicated, the time begins to run at once, and once it starts to run, *nothing* can stop it. If at all the Committee wishes to refuse to confirm, it must do so within this period, or not at all. The second point is that such refusal must be by a three quarters majority, i.e., at least six out of

the Committee's eight members must refuse to confirm. The membership of the Committee is evenly split between the two Houses of Parliament, and the Treasury (i.e., government) and Opposition benches. It is therefore a diverse mix, and at least six must cast the negative vote. The position under Article 175A may now be compared with the situation prior to the 18th Amendment. In the latter case, the person nominated by the judicial consultees could be refused appointment by the President as long as he recorded "very sound reasons" for his disagreement. As already explained, in effect this meant the Prime Minister. Thus, *one individual alone* could block the person nominated by the judicial branch provided he could adduce "very sound reasons" for doing so. In the case of the Committee, not less than 6 individuals, representing the Government and the Opposition, who could be at loggerheads, would have to agree on the "very sound reasons" before the Commission's nominee could be blocked. It may also be noted that, unlike Article 175A, the Prime Minister did not face any deadline; he could "sit" on the file for however long he deemed appropriate. And, as regards the fear that the Committee would "politicize" the appointment of judges, in a parliamentary democracy, is not the Prime Minister pre-eminently a politician? Surely the question answers itself and needs no elaboration. It is only in a military autocracy that the Prime Minister is supposedly a technocrat. The Prime Minister is indeed a politician *par excellence*. Finally, and most definitively, there is now an established body of case law developed by this Court in which the role of the Parliamentary Committee, and the scope of its powers and how those powers are to be exercised has been exhaustively discussed and delineated. As the case law makes clear, the scope of action for the Committee, were six or more of its members be minded to reject a nomination made by the Commission, is limited indeed. The practical impact of the Committee on the appointment process stands narrowed considerably.

(146) It is also to be emphasized that Article 175A does not contain any provision barring the jurisdiction of the courts. As the case law of this Court vividly

demonstrates, even on those occasions where the Committee has refused to confirm the Commission's nominee, that action has been judicially reviewed, and judicial and legally enforceable verdicts have been pronounced. In my opinion, therefore, there is nothing in Article 175A, whether in respect of the Commission or the Committee as would in any manner derogate from the independence of the judiciary. If anything, the hand of the judicial branch has been considerably strengthened, and has certainly not been weakened.

(147) The submission that the political parties fought the General Elections prior to the 18th Amendment on platforms that did not refer to any intent to reform the method of judicial appointment is also without merit. It in effect requires that a constitutional amendment is valid only if has the "people's will" behind it, to the extent that this can be ascertained from the election manifesto of the party (or coalition) which wins the elections. This submission is both constitutionally and factually inappropriate. There is nothing at all in the Constitution that requires that the amending power cannot be exercised unless "supported" by a manifestation of the popular will; certainly, any such "requirement" is alien to Article 239. It is even alien to the "basic features" doctrine. For example, there is nothing in the Indian jurisprudence that would support any such conclusion. To hold that there is such a requirement would be to imply or read yet another limitation in the amending power, for which there is no warrant. On the factual side, it is notorious that even if parties publish election manifestoes, that is almost invariably in an attempt to gain votes, and hardly any member of the public avidly seeks out and reads such manifestoes and bases his decision to vote on the same. For example, a failure to implement an election slogan like "roti, kapra aur makan" does not mean that the Government's constitutionally conferred powers cannot be exercised. Secondly, the question of reform of the method of judicial appointment was very much part of the political discourse for some time, as manifested in declarations such as the Charter of Democracy, and other pronouncements of political leaders. Indeed, the Charter of

Democracy for the first time introduced the concept both of a judicial commission and a parliamentary committee, as the following extract from it reveals:

> "3. (a) The recommendations for appointment of judges to superior judiciary shall be formulated through a commission, which shall comprise of the following: i. The chairman shall be a chief justice, who has never previously taken oath under the PCO.
> ii. The members of the commission shall be the chief justices of the provincial high courts who have not taken oath under the PCO, failing which the senior most judge of that high court who has not taken oath shall be the member.
> iii. Vice-Chairmen of Pakistan and Vice-Chairmen of Provincial Bar Association with respect to the appointment of judges to their concerned province.
> iv. President of Supreme Court Bar Association.
> v. Presidents of High Court Bar Associations of Karachi, Lahore, Peshawar, and Quetta with respect to the appointment of judges to their concerned province.
> vi. Federal Minister for Law and Justice.
> vii. Attorney General of Pakistan.
> (a-i) The commission shall forward a panel of three names for each vacancy to the prime minister, who shall forward one name for confirmation to joint parliamentary committee for confirmation of the nomination through a transparent public hearing process.
> (a-ii) The joint parliamentary committee shall comprise of 50 per cent members from the treasury benches and the remaining 50 per cent from opposition parties based on their strength in the parliament nominated by respective parliamentary leaders.
>
> (b) No judge shall take oath under any Provisional Constitutional Order or any other oath that is contradictory to the exact language of the original oath prescribed in the Constitution of 1973.
>
> Administrative mechanism will be instituted for the prevention of misconduct, implementation of code of ethics, and removal of judges on such charges brought to its attention by any citizen through the proposed commission for appointment of Judges. (d) All special courts including anti-terrorism and accountability courts shall be abolished and such cases be tried in ordinary courts. Further to create a set of rules and procedures whereby, the arbitrary powers of the chief justices over the assignment of cases to various judges and the transfer of judges to various benches such powers shall be exercised by the Chief Justice and two senior most judges sitting together."

It was explicitly stated that this change was to be made through a constitutional amendment. Thus, in this respect at least the political parties cannot be faulted for failing to disclose their intentions. Both the major parties, the PPP and the PML(N) were signatories to the Charter. Thus, to hold that any exercise of the amending power must always be backed by specific and explicit public or popular demand would be entirely inappropriate. In fact, it is a negation of the principle of parliamentary democracy. Once a parliament has been elected, it is free to perform all acts permissible under the Constitution and if these do not accord with the ruling

party/coalition's manifesto, the remedy lies with the electorate in the ensuing elections and not in a distortion of the constitutional powers vested in Parliament. Furthermore, and it is worth pondering the point, with all due respects to all concerned, that it perhaps appears unseemly for the judicial branch to impose such a requirement on the elected representatives on their exercise of the amending power when the Court has on previous occasions itself deemed it appropriate to confer such a power on military dictators—who by definition impose their will on the people, though they sometimes do pretend to garner popular support through patently bogus referendums.

(148) Another objection which has been raised in the past was that the meetings of the constitutional committee that scrutinized the text of the Amendment while it was passing through Parliament took place in secret. There were no consultations with members of civil society or other stakeholders. And when the report was placed before Parliament, the 18th Amendment was passed with hardly any debate. I confess I am somewhat surprised by the nature of this objection. Since when has the constitutionality of any law been judged on the basis of the extent of consultations which take place with members of the public? Is there a single case which has laid down the proposition that Parliament's power to pass a law is predicated on the extent and nature of consultations or interactions with various stakeholders? If this be the criterion, not merely the 18th Amendment but the vast majority of laws enacted by Parliament would be struck down. Insofar as the paucity of debates in Parliament is concerned surely this is a matter of Parliament to internally regulate. If the members are agreed on the wisdom of a legislation or constitutional measure, is it the function of the courts to direct them to nevertheless continue debating the matter, whether they want to or not? The language of Article 69, which is reproduced below, is self explanatory:

> "(1) The validity of any proceedings in Majlis-e-Shoora (Parliament) shall not be called in question on the ground of any irregularity of procedure.

> (2) No officer or member of Majlis-e-Shoora (Parliament) in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in Majlis-e-Shoora (Parliament) shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.
> In this Article, Majlis-e-Shoora (Parliament) has the same meaning as in Article 66."

(149) Quite apart from the above, the spirit of the Constitution requires institutional respect—in both directions. The judiciary functions in its own manner, and subject to its own rules, and the legislature is entitled to the same respect. Any other approach can lead to an institutional clash. Suppose the Executive declined to implement the judgment of the Court on a similar ground, viz., that full and detailed arguments were not heard or that, if the matter pertains to public interest litigation, all the stakeholders were not issued a notice and given an opportunity to participate in the proceedings, would it be justified in doing so? Surely not. There should be consistency in such matters.

(150) It would be convenient to pause here for a summing up. Under the Constitution as it originally stood appointments of the superior judiciary were made in terms of Article 177 and 193 of the Constitution. Clause (1) of Article 177 provided that the Chief Justice of Pakistan shall be appointed by the President, and each of the other judges shall be appointed by the President after consultation with the Chief Justice. Article 193 of the Constitution, which relates to appointment of High Court judges, stipulated that a High Court judge shall be appointed by the President after consultation with the Chief Justice of Pakistan, with the Governor concerned and, except where the appointment was that of Chief Justice, with the Chief Justice of the High Court. As discussed above, Article 177 did not contemplate any consultations by the President with any other functionary of the State for the appointment of the single most important functionary in the administration of justice namely the Chief Justice of Pakistan. The power was conferred solely and exclusively on the President to be exercised in such manner as he may deem fit, acting of course on the advice of the Prime Minister. To reiterate: *the appointment process for the Chief Justice contemplated an exclusivity of power being granted to*

the Executive. In relation to other judges of the Supreme Court Article 177 mandated non-binding consultation with the Chief Justice. Similarly, in Article 193, in relation to appointments of High Court judges, although consultation was prescribed, nevertheless it was not provided that the consultation process was to be meaningful or binding. The consistent history of judicial appointments after the enforcement of the 1973 Constitution (and, indeed, even prior thereto) made it clear that the essential power of making appointments vested with the Executive. Then the first major change came: the landmark decision of this Court in the *Al-Jehad* case. This case laid down specific criteria in relation to how the appointment process was to take place. As described above, it was provided therein that the word consultation, as utilized in Article 177, was to be effective, meaningful, purposeful, consensus oriented and leaving no room for complaint of arbitrariness or unfair play. It was further laid down that the opinion of the Chief Justice of Pakistan (and the Chief Justice of a High Court) as to the fitness and suitability of a candidate for judgeship was entitled to be accepted in the absence of very sound reasons to be recorded by the President. On the basis of this judgment a new practice evolved in terms of which primacy was given to the view of the Chief Justice of Pakistan. However, it may be noted, that although this principle dealt with all appointments in relation to the Supreme Court and also, of course, in relation to the High Court (after taking into account and consideration the views of the Chief Justice of the concerned High Court), there still remained a gray area in relation to the appointment of the Chief Justice of Pakistan. The *Al-Jehad* case had made the consultation process binding but, since Article 177 did not use the word consultation in relation to the appointment of the Chief Justice of Pakistan , the question was, who was to be consulted? The *Al-Jehad* judgment did however lay down, in relation to the appointment of Chief Justice of a High Court, the principle of legitimate expectancy by stating that the senior most judge of a High Court had a legitimate expectancy to be considered for appointment as the Chief Justice and, in the absence of any concrete or valid reasons to be recorded by the President, he was entitled to be appointed as such in the High Court concerned. This

principle, however, was not laid down as being applicable to the office of the Chief Justice of the Supreme Court of Pakistan. This lacuna was subsequently filled in by this Court in *Malik Asad Ali and others v. Federation of Pakistan and others* PLD 1998 SC 161. What is important to note is that in the system that developed post these judicial interventions, the Chief Justice of Pakistan, once appointed, remained the pivotal figure since in relation to the appointment of other judges his view enjoyed not merely primacy but, for all practical purposes, conclusiveness. He had the final say in relation to the appointment of judges of the highest court in the land. *All power was concentrated in one pair of heads*. Was this desirable on the plane of principle? Should one man exercise so much power? It is this system which has been disturbed by the enactment of the 18th Amendment. At the risk of some repetition, what the 18th Amendment read with the 19th Amendment has done, in brief, is that it has made the appointment of judges, both to the Supreme Court as well as to the High Court, on the basis of decision making by a Judicial Commission which consists of and is headed by the Chief Justice of Pakistan and includes the four most senior judges of the Supreme Court as well as a former Chief Justice or former Judge of the Supreme Court (who is to be nominated by the Chief Justice of Pakistan in consultation with the four member judges for a period of two years). As analyzed in detail above, the Executive has been granted a very limited role in this process to the extent of two nominees only being members of the Commission. Even when the other members of the Commission are taken into account, as noted above the final say rests with the judiciary, and the judiciary alone. Essentially the same procedure is adopted in relation to appointments of judges of the High Court. Again, the judiciary has an absolute and unassailable command over the decisions of the Commission.

(151) The question which naturally arises is which system is superior? Is it (a) that which was originally contemplated by the framers of the Constitution, as per the basic structure doctrine in terms of which complete discretionary powers were conferred on the Executive, or (b) the system as introduced by the *Al-Jehad* judgment in terms of which essentially the views of one man alone, namely, the

Chief Justice of Pakistan, had dispositive and determinative effect, or (c) the present system which contemplates the sharing of power and responsibility by the Chief Justice of Pakistan with the four most senior most judges of the Supreme Court? I entertain no doubt in my mind that the present system is far superior both to the original one as well as the one contemplated by the judgment in the *Al-Jehad* case. The Judicial Commission does not impinge on the powers of the judiciary – what it does is to share the exercisable powers between the Chief Justice of Pakistan and the senior most judges. Surely, this is a great advance which is to be welcomed. Indeed, if at all anyone could have a grievance at the new system it would be an incumbent Chief Justice who felt aggrieved by the singular dilution in his discretionary powers. His powers have been diminished while those of his colleagues have been enhanced. Human nature being what it is it would be understandable if he felt the earlier system was preferable. Insofar as the functioning of the system as a whole is concerned surely there can be little doubt about the fact that a consultative process engaged in by the senior most members of the judiciary is exponentially superior to that in which all powers are conferred on one individual alone. I am accordingly of the opinion that if the 18th Amendment were to be struck down, the consequence of which would be a reversion to the prior system, that would certainly not be an improvement in the judicial appointments process. The conferment of exclusive and complete power on a single individual, whether he be a member of the Executive or the Judiciary, is surely less desirable then a meaningful, purposeful and consensus-oriented system in terms of which appointments are made by a broad based body after carrying out a consultative process falling within defined parameters. It follows therefore that the striking down of the 18th Amendment would be a significant step backwards and lead to a diminution in relation to the integrity of the appointment process.

(152) Returning to the case put forward by learned counsel for the Petitioners in relation to Article 175A, reliance was also placed on the UK Act to show, by

comparison, how a system of judicial appointments could be established in which there is no involvement of the executive or legislative branches. I have carefully gone through the provisions of the UK Act and there can be little doubt that the Executive has far greater powers in terms thereof than Parliament or the judiciary. The first point to note is the pivotal role played by the Lord Chancellor, *who is a member of the Cabinet, i.e., the executive*. Indeed, section 2 of the UK Act states that the Prime Minister (himself of course, a politician) is not to appoint any person as Lord Chancellor unless he is "qualified by experience", and then provides the following criteria for such qualification in sub-section (2): "The Prime Minister may take into account any of these— (a) experience as a Minister of the Crown; (b) experience as a member of either House of Parliament; (c) experience as a qualifying practitioner; (d) experience as a teacher of law in a university; (e) other experience that the Prime Minister considers relevant."

(153) The procedure for the appointments of the senior judiciary in England and Wales, and Northern Ireland, and the judges of the UK Supreme Court (itself created by and under the UK Act) is somewhat complicated and multi-layered, but for present purposes it is necessary to only examine and understand certain underlying principles. The first point to note is that the UK Act sets up a new body, akin to the Commission under Article 175A, called the Judicial Appointments Commission (s.61). Schedule 12 of the UK Act deals with the Judicial Appointments Commission ("JAC"). It is a body that comprises of a Chairman and 14 other members (i.e., a total of 15 members), *all of who are appointed by the Queen on the recommendation of the Lord Chancellor*. The Chairman must be a lay member, as must be 5 of the other members. Paragraph 4(3) defines a "lay member" as meaning a person *who has never held a listed judicial office or been a practicing lawyer*. (Schedule 14 lists the relevant judicial offices; these are essentially what we would regard as the subordinate judiciary.) *Thus, the Chairman and 5 members must, by law, have nothing whatsoever to do with the law*. Two of the other members of the JAC are to

be practicing lawyers. *Thus, the majority of the JAC are either lawyers or lay members,* all of whom are nominated by the executive. The other members of the JAC are judges, but come from both what we would consider the superior and subordinate judiciary. Thus, the JAC is a very diverse mix, containing not merely judges and lawyers but also lay members (in effect, ordinary citizens) *and it is this body which plays a central role in the appointment process of the senior judiciary*. It may be noted that the position in the recent past has been that the current chairperson of the JAC *has been a member of the House of Lords* (the upper House of Parliament), while the other lay members include a law professor, a former soldier, a journalist, a former chartered accountant and a governor of the London School of Economics. Of the two lawyer members, one is a practicing solicitor, and the other is a practicing barrister. The contrast with the Commission under Article 175A, *where the judges have an absolute majority,* could not be greater. I confess I am wholly unable to comprehend how the JAC could be termed to be a body which is consistent with the principles of judicial independence while Article 175A is not.

(154) The second body that must be considered (for reasons that will become clear) is the Judicial Appointments Board for Scotland. As its name suggests, it is concerned with judicial appointments for Scotland. (It will be remembered that the British judiciary is divided among England and Wales, Scotland and Northern Ireland.) The important point to note about this body, which originally was only an executive body, and was only given statutory recognition in 2008, is that it also comprises of judicial members, legal members and lay members. The number of lay members must be equal to that of the judicial and legal members combined, *and the legal and lay members are appointed by Scottish Ministers, i.e., the members of the Scottish executive.* Of the ten members of this body, three are judicial members, two are legal members and five are lay members. *Thus, once again, the non-judicial members form the majority*. The (lay member) chairman has been a former principal of the University of Glasgow, who was previously also the Permanent Secretary to

the Scottish Executive (i.e., the senior bureaucrat of the Scottish government). The other lay members include a professor, a chartered accountant, another former bureaucrat (a civil servant in the Education department), and a member of whom the official website says only that her "background is in human resources". Again, the contrast with the Commission under Article 175A could not be greater.

(155) The third body that must be considered (again, for reasons that will shortly become clear) is the Northern Ireland Judicial Appointments Commission. It comprises of 13 members who are again, a mix of judicial, legal and lay members. Its lay members have included two psychologists (one of whom is also a lay magistrate), two educationists, a human resource manager and a law professor.

(156) I now turn to the manner in which the UK Supreme Court judges are to be appointed. Sections 26 and 27 of the UK Act provide, *inter alia*, that the appointment is to be made by a selection commission. Schedule 8 deals with selection commissions. This provides that the selection commission is to comprise of 5 members, of whom one is the President of the Supreme Court, the second is the Deputy President, and the remaining three are one member each of the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. Thus, *once again, the ex officio judicial members of the selection body are in a minority, unlike the Commission under Article 175A*. Paragraph 6 of Schedule 8 deals with the non-judicial members. It provides that the Lord Chancellor is to appoint the non-judicial members on the recommendation of the body concerned, i.e., JAC, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission, *but that at least one of such members must be a person who is non-legally qualified*. This is however, only a *minimum* requirement; there is no bar on *all* of the non-judicial members being non-legally qualified. Therefore, if each of the bodies concerned (i.e., JAC, the Judicial

Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission) nominates a lay (non-legally qualified) member to the selection commission, the result would be that *the recommendation for appointment to the UK Supreme Court would be made by a body in which ordinary members of the public comprise the majority*. There could not be a greater contrast with the position of the Commission under Article 175A.

(157) I may note here that the first appointees to the UK Supreme Court were of course the Law Lords who had sat on the judicial side in the House of Lords. The first appointment, as such, to the court was that of Sir John Dyson. The selection commission in his case comprised of the President of the Supreme Court (Lord Philips), the Deputy President (Lord Hope) and three members nominated by the bodies concerned. Of these, one was a judge (Lady Smith), the second was a member of the House of Lords (a cross bencher, Baroness Prashar) and third a lay member, one Mrs Ruth Laird. The UK Act states that the selection commission must in each case select the selection process to be applied, without however elaborating what that process is to be. In the case of the vacancy eventually filled in with Sir John Dyson, the selection commission took the decision that the vacancy be advertised and interested persons invited to apply. *The position of a judge in the UK Supreme Court was therefore filled in by public advertisement*. Is this the model that learned counsel for the Petitioners are recommending for Pakistan?

(158) Once a selection commission has made a selection, it then recommends the name to the Lord Chancellor in a report (which must be in a form approved by the Lord Chancellor). On receiving the report, the Lord Chancellor must consult with any of the judges with whom the selection commission consulted during the selection process, and must also consult with the First Minister of Scotland, the First Minister for Wales and the Secretary of State for Northern Ireland (s.28 of the UK Act). I may

note that s.27 provides that as part of the selection process, the selection commission must also consult with, *inter alia*, the Lord Chancellor, First Minister of Scotland, the First Minister for Wales and the Secretary of State for Northern Ireland. *Thus, there is an ongoing, repetitive consultative process among the selection commission, senior judges and members of the executive (i.e., the politicians answerable to the legislature).* However, the mere fact that the Lord Chancellor is also part of this consultative process does not mean that his hands become tied and he is bound by the recommendation of the selection commission. *The Lord Chancellor may reject the recommendation or ask the selection commission to reconsider its decision*. Section 30 provides that the Lord Chancellor can reject the recommendation if he is of the opinion that the person selected is not suited for the post, and may ask for reconsideration on any of the grounds stated in sub-section (2). In either case, he must give reasons in writing to the selection commission for his decision. But for present purposes, the important point is that *a single member of the Cabinet (i.e., the executive) can reject the recommendation*. Is that what the Petitioners desire for Pakistan?

(159) Insofar as the appointment of other senior judges, including the Lord Chief Justice, the Master of the Rolls, the Presidents of the Queen's Bench and Family Divisions, Chancellor of the High Court and the Lord Justices of Appeal is concerned, a person has to be recommended for the vacant post by a selection panel of the JAC. In each case, the selection panel is to comprise of four members, of whom two are senior judges *ex officio*. However, the other two members of each selection panel are the chairperson of the JAC (who, as noted above, is a lay member) or his nominee and another lay member of the JAC. *Thus, ordinary members of the public have an equal say in the appointment of the senior most judges in England and Wales.* As in the case of the UK Supreme Court appointments, there is a consultative process and the Lord Chancellor *may reject the recommendation or ask the selection panel to reconsider its decision*. As with the

UK Supreme Court appointments, the Lord Chancellor may reject the recommendation if he is of the opinion that the person selected is not suited for the post, and may ask for reconsideration on any of the grounds stated in relevant provision of the UK Act.

(160) It should also be noted that at each level, and to each recommending authority, the Lord Chancellor may issue "guidance", which must be taken into account by the recommending authority while considering matter of appointments. However, the UK Act provides that such guidance must be placed in draft form before each House of Parliament, and it is only if both Houses approve the draft by resolutions that the same can be issued by the Lord Chancellor. There is thus an *explicit and direct involvement of the legislature* in the decision making process (quite apart from its indirect involvement through the office of the Lord Chancellor).

(161) As the foregoing summary analysis shows, anyone recommending the UK practice as preferable is clearly mistaken in his views about the UK Act. Not merely is the executive directly and deeply involved at all stages of the appointment process, but so are lawyers and ordinary members of the public. In each case, the lay members, with or without non-judicial members, are either in the majority or have equal representation. Nothing could be further from the process envisaged under Article 175A or indeed, even the procedure that was previously in place. If the independence of the judiciary were really and truly put under threat as a result of Article 175A, then (on the basis of the reasoning adopted by learned counsel) it would stand fatally eroded under the UK Act. But of course, any such conclusion would be plainly wrong. Judicial independence is not merely made strong there but ambiguously and incontrovertibility so.

(162) An interesting question that arises in the context of the UK Act is as to the role of the British Prime Minister in the entire process. Prior to the UK Act, the power to select and appoint judges rested solely and directly in the hands of Ministers, and in the case of the senior most judiciary, this power historically lay with the Prime Minister. Indeed, the powers of patronage that the Prime Minister enjoyed in this regard used to be regarded as a hallmark of that office. Over time, the exercise of appointing judges became more and more apolitical, but the decision making power lay always in the hands of the executive branch (and, since Britain is a parliamentary democracy, ultimately with Parliament). What is the position now under the UK Act? It would seem that in respect of the all judicial appointments, other than the UK Supreme Court, *the role of the Prime Minister has been eliminated altogether*. The appointments are made on recommendations made to the Lord Chancellor and are sent to the Queen for formal appointment. In the case of the UK Supreme Court, the Prime Minister does find mention in the UK Act, in s.26, sub-section (2) of which states that a Supreme Court judge is only to be appointed on the recommendation (to the Queen) of the Prime Minister. Sub-section (3) immediately clarifies that the Prime Minister may only recommend a person nominated to him as a result of the selection process (described above) and may not recommend any other person. In other words, the role of the British Prime Minister has been either eliminated totally or has been reduced sharply. But could one conclude from that that parliamentary democracy in the United Kingdom is under threat or is endangered or weakened? Any such suggestion in that country would be regarded, quite rightly, as untenable.

(163) In the context of judicial independence, it is pertinent to note that this Court has shown such sensitivity on the issue that even the Registrar has been directed not to appear before the public accounts committee of Parliament. That committee of course scrutinizes the budgets and expenditures of all departments of the Government. The attitude taken by this Court is in sharp contrast to the position in

the United States and the United Kingdom, where senior Judges regularly appear and testify before Congressional and Parliamentary committees, including in respect of budgetary matters. As is well known, the testimony given before such committees is on oath. Thus, e.g., on 23.03.2015, Justices Kennedy and Breyer of the US Supreme Court appeared before the House Appropriations Committee as "witnesses" in respect of the Court's budget for Fiscal 2016. Their testimony was broadcast live and is available at: http://www.c-span.org/video/?324970-1/supreme-court-budget-fiscal-year-2016. Likewise, on 22.01.2015, the Lord Chief Justice of England, Lord Thomas, appeared before the Justice Committee in respect of his annual report for 2014. The testimony was broadcast on "Parliament TV" and is available at: http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/lord-chief-justice-report-2014-evidence/. Tellingly, the hearing is described on the webpage as the Justice Committee taking evidence from the Lord Chief Justice. No one has of course ever suggested that the judicial independence of the United States and English judiciary has been compromised by such appearances. In my respectful view, we are far removed from any danger or threat to judicial independence on account of Article 175A. The apprehensions expressed by the petitioners are entirely misplaced and misconceived.

(164) Having dealt with the objections to Article 175A, I now turn to consider the objections to the substituted Article 63A, which provides as follows:

> "**63A. Disqualification on grounds of defection, etc**.-(l) If a member of a Parliamentary Party composed of a single political party in a House—
>
> resigns from membership of his political party or joins another Parliamentary Party; or
>
> votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to—
>
> election of the Prime Minister or the Chief Minister; or
>
> a vote of confidence or a vote of no-confidence; or
>
> a Money Bill or a Constitution (Amendment) Bill;

he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:

Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Explanation.- "Party Head" means any person, by whatever name called, declared as such by the Party.

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.

(4) Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.

(5) Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.

(6) Nothing contained in this Article shall apply to the Chairman or Speaker of a House.

(7) For the purpose of this Article,

"House" means the National Assembly or the Senate, in relation to the Federation; and a Provincial Assembly in relation to the Province, as the case may be;

"Presiding Officer" means the Speaker of the National Assembly, the Chairman of the Senate or the Speaker of the Provincial Assembly, as the case may be."

(Clause (8) has not been reproduced as being now only of historical interest.)

(165) What Article 63A clearly tries to do (i.e., the "mischief" that it seeks to address) is the perennial problem of "horse trading" and floor-crossing that has plagued politics in our country for decades. It provides that if any one of five specified situations arises in relation to any member of a parliamentary party, he may

be declared by the "party head" to have defected in which case, and the declaration is to be referred to the Chief Election Commissioner. Before making such a declaration, the "party head" must give an opportunity of hearing to the member concerned. The Chief Election Commissioner is then to lay the declaration before the Election Commission, and it is only if the Election Commission confirms the declaration that the member shall cease to be a parliamentarian and his seat shall stand vacated. The aggrieved party has the right to appeal to the Supreme Court.

(166) It is important to remember that Article 63A has a certain legislative history. It was first introduced into the Constitution by the 14th Amendment in 1997. As originally inserted, a member of a political party was deemed to have defected from his party if he (a) committed a breach of party discipline (which meant a violation of the party constitution, code of conduct and declared policies), or (b) voted contrary to any direction issued by the parliamentary party to which he belonged, or (c) abstained from voting in the House against party policy in relation to any bill. As is obvious, these provisions were much more draconian than those found in Article 63A after the 18th Amendment. The provisions were also much vaguer, making it all the more easier for a parliamentarian to be declared a defector. In brief, under the earlier version, the head of a political party had far more powers than under the present version. Furthermore, the original Article 63A had an ouster provision (in clause (6)) whereby defection matters were sought to be placed beyond the jurisdiction of all courts, including this Court and the High Courts.

(167) Article 63A was substituted by Gen. Musharraf by means of the Legal Framework Order 2002 and this substitution ("the first substitution") was validated by the 17th Amendment. When the first substitution is compared with the Article as it now stands, it appears that (apart from a few minor changes) there is only one

apparently significant difference; other than that, the two appear to be identical. This difference is that while previously the power to initiate proceedings lay with the head of the concerned "parliamentary party", that power now lies with the "party head", who is defined to be "any person, by whatever name called, declared as such by the Party". It is important to note that Article 63A, as first introduced by means of the 14th Amendment in 1997, was unanimously passed by Parliament. Under the original version as enacted by Parliament the power of removal vested not with the head of the parliamentary party (which was an innovation introduced by Gen Musharraf) but with the head of the political party. It is this original version which has now been unanimously reintroduced by Parliament. Thus, on two separate occasions Parliament has unanimously resolved that the power should rest with the head of the political party and not with the head of the parliamentary party. It is obvious that the head of the political party is the overall head, while the head of the parliamentary party, insofar as the ground realities are concerned, is the person nominated as such by the overall heads and then formally confirmed by a vote of parliamentarians. However, before proceeding to examine this difference, there are certain other matters which must be considered.

(168) The first point is that, as noted above, a petition under Article 184(3) is maintainable only if any fundamental rights have been infringed. The manner in which this has allegedly happened as a result of the insertion of Article 175-A has already been explained above. In relation to the substitution of Article 63-A however, no arguments have been advanced by learned counsel for the Petitioners in this regard. It is not at all apparent whether any fundamental rights are infringed by the substituted Article 63-A. This is of course a jurisdictional point and goes to the root of the Court's power to consider the objections to Article 63-A in the present proceedings. It is to be kept in mind that, as noted above, Article 63-A as it stands today and the first substitution are virtually identical, and the latter was validated by means of the 17th Amendment. This Court has already dismissed a challenge to the

17th Amendment in the *Pakistan Lawyers' Forum* case. Therefore, since there does not appear to be any infringement of any fundamental rights, the jurisdiction of this Court cannot be invoked in the present proceedings.

(169) Even if the first point is overlooked, there is a second point involved. It has not really been explained which "basic feature" of the Constitution has been tampered with or violated by the substitution of Article 63A. Presumably, the "basic feature" involved is parliamentary democracy. The question therefore is whether, and if so how, and to what extent, is parliamentary democracy weakened by this provision. Article 63A essentially places a curb on defections. Now the Indian Constitution also has an "anti-defection" clause in the shape of the 10th Schedule to that Constitution, which was inserted by the 52nd Amendment. Paragraph 2 of the 10th Schedule provides for disqualification and, insofar as is presently relevant, is in the following terms:

> "**2. Disqualification on ground of defection**- (1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House-
> if he has voluntarily given up his membership of such political party; or
> if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention."

(170) As is clear, the provisions of paragraph 2 are much more draconian than those of Article 63-A, and are quite similar in many respects to Article 63-A in its original form. The 10th Schedule also had an ouster of jurisdiction clause in paragraph 7. The constitutionality of the 10th Schedule was challenged before the Indian Supreme Court on the ground, *inter alia*, of being violative of the "basic features" doctrine. The Indian Supreme Court, by means of a majority decision in *Kihota Hollohon* vs *Zachilhu and others* (1992) Supp (2) SCC 651 *rejected the challenge and upheld the constitutionality of the 10th Schedule* (other than the ouster clause in paragraph 7,

which was declared invalid on certain technical grounds). The Supreme Court categorically held as follows (emphasis supplied):

> "The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, *violate the basic structure of the Constitution in that they affect the democratic rights of elected members and, therefore, of the principles of Parliamentary democracy is unsound and is rejected*."
>
> "That Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended… *The provisions are salutory and are intended to strengthen the fabric of Indian Parliamentary democracy by curbing unprincipled and unethical political defections*."

(171) It is interesting to note that the original Article 63A was also challenged on the ground of being violative of the basic structure of the Constitution. This challenge was rejected by this Court in the *Wukala Mahaz* case PLD 1998 SC 1263 on the ground that the doctrine of basic structure had never been accepted in Pakistan. In relation to the problems created by floor-crossing, the learned Chief Justice observed in vivid language that it was on account of the "cancerous vice" of floor-crossing that Parliament was unable to achieve stability. I concur with this view, that something which is so destructive in nature should be rigidly banned. I am also respectfully of the view that if an "anti-defection" clause is regarded as constitutionally valid in the birthplace of the "basic features" doctrine, especially when its provisions are much stronger and draconian than those Article 63A, then any objection to the latter provision is, to say the least, problematic.

(172) The two specific objections taken to Article 63A as presently inserted were as follows. The first objection was that it was contended that the power to make a declaration of defection now lay with the "party head" who may not even be a member of Parliament. On a purely personal plane, I have some sympathy with the view that it would have been preferable if the power had vested in the Parliamentary head, although in practice this would probably have made no difference. However, on the judicial plane, the position is different. Essentially this is a decision for

Parliament to make, and if it has unanimously resolved on two occasions that the power should vest in the overall head of the party, I think it would be inappropriate the Court to interfere. Thus, in my opinion, this objection is not sustainable. The reasons are manifold. Firstly, even the "party head" must give a show cause notice to the alleged defector. Secondly, his decision is not final and binding. His declaration is simply referred to the Election Commission (via the Chief Election Commissioner) and it is for the latter do decide whether a defection has occurred or not. Thirdly, an appeal lies to the Supreme Court. Finally, there is no ouster of jurisdiction clause, and the matter is therefore justiciable at every stage.

(173) The second objection is, if I may say so with respect, somewhat on the strange side. It was contended that as a result of Article 63A, even the Prime Minister could be declared to be a defector by the "party head" (assuming that the Prime Minister is not himself the "party head", which he usually is in a parliamentary democracy). Even a moment's reflection shows how truly strange this objection is. The first ground for applying Article 63A is of course, if the member defects from his party or joins another party. Obviously, a Prime Minister who did so would at once cease to be prime minister. The other grounds are if the member votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs in respect of (a) an election of the Prime Minister; or (b) a vote of confidence or a vote of no-confidence; or (c) a Money Bill or a Constitution (Amendment) Bill. I fail to see why a Prime Minister would ever vote contrary to the directions issued by the Parliamentary Party (which he would head, even if he is himself not the "party head") since all of these matters go directly to his position as prime minister and would inevitably result in his losing that position. Of course, it is not totally beyond the realm of possibility that a Prime Minister may wish to commit political suicide (in what would be a rather spectacular manner) by doing any of the

acts proscribed by Article 63A, but this possibility is so remote (and frankly, and with respect, so bizarre) that it need not be seriously countenanced.

(174) I turn to Article 17, and the removal of the requirement for intra-party elections. Incidentally, the changes made to Article 17 in relation to intra-party elections highlight one of the objections to the "basic features" doctrine noted above. If a fundamental right was originally in a certain form, and it was then amended in a manner that (presumably) is desirable, does Parliament lose the power to take the fundamental right back to its original form? For reasons already stated, I think not. In any case, the law of the land provides (and/or can provide) for intra-party elections. Even during the period that the requirement was part of Article 17, it was not complied with and was, to all intents and purposes, a dead letter. The important point therefore is to ensure the fulfillment of this obligation by all political parties, whether the obligation be found in ordinary law or constitutional law—and that, as is obvious, is a different matter altogether. The mere fact that it has been removed from Article 17 does not therefore in any manner mean or warrant that the said Article be nullified.

(175) One final point before I take up the objections taken to the 21st Amendment. As noted above, the "basic structure" doctrine, as it has developed and evolved, in effect means that the Constitution contains an unidentified and constantly shifting "supra-constitution" within itself, which renders certain provisions of the Constitution unamendable (and those provisions are themselves unknown and unknowable until the Supreme Court identifies them on a case by case basis). If at all the intent had been to make certain provisions of the Constitution unamendable, it would have been the simplest thing to say so expressly and that is what is to be found in numerous constitutions in other states including Germany (which is relevant since

the originator of the basic structure theory was a German jurist). Learned counsel for the petitioners drew attention to such constitutions, but surely the point goes decisively against their case. It was precisely because the people of Pakistan did not want the Constitution to be immutable in any manner or to any extent that no provision thereof was entrenched in the manner adopted in other constitutions. In addition to Germany, constitutions that contain express provisions relating to entrenchment of specific provisions include those of Algeria (in its Article 178), Brazil (Article 60), Greece (Article 110), Iran (Article 177) and Italy (Article 139). These articles expressly prohibit other provisions from being amended. The German constitution provides as follows in clause (3) of the provision (Article 79) that deals with the amendment of the Basic Law (as the German constitution is called):

> "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

Articles 2 to 19 contain the fundamental rights enshrined in the German constitution. Article 1 guarantees all such rights in Germany, binding each of the three organs of the State to abide by, and apply, them. Article 20 deals with the federal and democratic structure of the German state. Given Germany's history, and the horrors of its Nazi past, one finds (rather unusually but quite understandably in the historical context) clause (4) of Article 20 providing as follows: "All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available". The French constitution provides in Article 89 that "[t]he republican form of government shall not be the object of an amendment". Article 139 of the Italian constitution, noted above, in like manner provides that the republican form of government cannot be amended. Article 177 of the Iranian constitution has entrenched the "Islamic character of the political system", the "religious footing" and "objectives" of the Republic, the "democratic character of the government", the office of the "wilayat al-'mr the Imamate of Ummah", and the official religion, i.e., Islam according to the Ja'fari Fiqh. In Bangladesh, by the 15th

Amendment, a new Article 7B was inserted in the Constitution in 2011. This article has entrenched a number of provisions by making them unamendable. By one count, around one-third of the constitutional provisions are covered by Article 7B. Other constitutions, such as those of Norway, Turkey, Switzerland, Australia, Portugal, Romania, Nepal, Morocco, Mauretania, Haiti, Hong Kong, Cyprus, Bosnia and Angola have also specifically entrenched provisions. These examples can of course be multiplied, but the basic point is obvious enough. Whenever the amending power is to be curtailed, the constitution expressly says so itself. *If the people of Pakistan wished to place similar restrictions on the power of Parliament to amend the Constitution they could easily have done do so*. The matter has to be decided by the chosen or elected representatives of the people and put in black and white to place it beyond any doubt. It is not to be left in the hands of the judicial branch and nor is it to be an amorphous, ever shifting doctrine that can only be discovered by the courts by a tortuous process of reasoning. It is, in other words, to be the embodiment of the will of the people. If the people want to curtail the power that vests in them to exercise constituent power, then it is the people who must say so, *and no one else*. Surely that is the only true and proper manner in which the exercise of constituent power can be curtailed. To place constituent power in the hands of any other body, no matter how well intentioned, erudite and sensitive to the public good that body may be, is to begin to deviate from the path of the rule of law, and such deviation, no matter how slight it may initially be, invariably takes on a life of its own, becomes wider and wider, and sooner rather than later reaches the point of no return. That is the harsh and grim lesson that history teaches, and it would do well to pay heed to that hard teacher. The cord of private opinion (if one may be allowed to echo the famous words of Sir Edward Coke) will in the end invariably become crooked, no matter how elevated be the body whose opinion is given primacy, and that is a danger to which we must ever be alert and vigilant.

(176) I now turn to the 21st Amendment, and the question of the constitutionality of military courts and the amendments made in the Military Act. I have perused the judgment authored by my brother Sh. Azmat Saeed, J. and do not find much reasons to disagree with the views expressed therein. However I would like to emphasize certain specific aspects of the matter. In particular I would like to examine the status of military courts in other well entrenched democracies for reasons pertaining to comparative constitutional law. The logical point of departure for such an enquiry obviously has to be in relation to the United States Constitution which, after all, is the originator of the concept of judicial independence and separation of powers. *The Federalist Papers* is generally recognized to be the single most important work in relation to the origin and interpretation of the United States constitution. The book is a collection of articles written during the process leading up to the ratification of the United States Constitution when, after its drafting by the founding fathers, it was sent to the States in accordance with Article VII. It is a seminal work which has profoundly influenced the development and interpretation of constitutional law in the United States. The following extracts from Federalist No.47 (authored by Madison) are interesting and educative:

> "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.
>
> …
>
> The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavour, in the first place, to ascertain his meaning on this point.
>
> …

On the slightest view of the British Constitution, we must perceive that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority.

This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. *The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function*, though they may be advised by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate offices in the executive department. The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body", says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: *Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator*. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." Some of these reasons are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author. [Emphasis supplied]

(177) *The essential point can now be formulated with clarity. The exercise of both judicial and legislative power by the same persons is to be reprobated and condemned. But the basic structure doctrine requires judges to exercise not merely legislative power but constituent power, which is the highest form of legislative power, by deciding what should, and what should not remain part of the constitution.* A unanimously passed constitutional amendment, as is the case with the 21st Amendment, may be declared invalid under the basic structure doctrine. How can this be right? How can this be consistent with the principles of democracy?

(178) I have earlier referred to the fact that under the United States Constitution the totality of legislative power has been conferred on Congress under Article I. Similarly executive powers have been conferred on the President under Article II, and Article III confers the totality of the judicial power of the United States on the Supreme Court and other courts established by law. The question arises, what then is to be the status of military courts in the United States? Those safeguards which are available for and in relation to the Supreme Court and other courts established by law quite clearly and admittedly are not present in military courts or military tribunals or military commissions, howsoever called or set up. How then can they be considered to be valid under the constitution of the United States? This question has arisen on numerous occasions and there is no shortage of material in the United States which seeks to address it. By way of illustration I may refer to the following passage from a well established treatise, *American Constitutional Law* by Prof. Laurence Tribe (pg. 58):

> "The Supreme Court's decisions concerning the relationship between article III courts and the military justice system illustrate the "rights" based approach sanctioned in Crowell and perpetuated in Marathon. Article I (8) authorizes Congress to make Rules for the Government and Regulation of the land and naval Forces." As the Supreme Court long ago recognized in Dynes v. Hoover," this constitutional grant of authority empowers Congress "to provide for the trial and punishment of military and naval officers in the manner then and now practiced by civilized nations; … *the power to do so is given without any connection between it and the 3rd article of the Constitution defining the*

> *judicial power of the United States*." Congress has exercised this power to establish a system of military justice which in many ways "exists separate and apart from the law which governs in our federal judicial establishment." Because "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," inevitably the military has become "a specialized society separate from civilian society." As the Supreme Court noted in Parker v. Levy, *the Code of Military Justice "cannot be equated to a civilian criminal code*. While a civilian criminal code charges out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger argument of the activities of the more tightly knit military community."
>
> The distinct character of military justice is reflected not only substantively but procedurally. The Fifth Amendment exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from its requirement of grand jury indictment as a condition precedent to federal criminal prosecution. The Supreme Court stated in Ex parte Miligan that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the fifth." More generally, the Court suggested in Ex parte Quirin that "cases arising in the land or naval forces … are deemed accepted by implication" from the sixth amendment. The Court has not in recent years confirmed the Miligan and Quirin dicta, but it has held, in Middendorf v. Henry, that there is no sixth amendment right to counsel in summary court martial proceedings notwithstanding the fact that, under Argersinger v. Hamlin, such a right would exist in a civilian misdemeanor trial if that trial, like a summary court-martial proceeding, would result in a defendant's imprisonment. The Fifth Amendment due process clause does apply in the military context. But as the Middendorf Court demonstrated, the procedural limitations imposed by due process are flexible, and thus subject to relaxation when courts find the need for procedural protections outweighed by the exigencies of military life. Although the Supreme Court has not yet decided what procedural rights due process requires in the military context, the Court's current interest-balancing approach may yield a constitutional requirement which would tolerate the traditionally "rough form of justice" which has characterized military justice, "emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks." [Emphasis supplied]

(179) It will be seen that what the United States Supreme Court has done has been to find a pragmatic answer to the problem. The concept of independence of the judiciary required stringent safeguards in relation to the security of tenure as well as the other procedural safeguards provided in terms of the American Constitution. These, however, for fairly obvious reasons, are not really feasible in relation to the functioning of military courts. The answer to the dilemma was therefore found by the United States Supreme Court by drawing a distinction between the judicial power which was conferred on the Supreme Court under Article III of the Constitution on the one hand, and the power of Congress under Article I section 8, which sets out, or

enumerates the legislative powers of the latter. As presently relevant, section 8 provides as follows:

> "The Congress shall have power to …
>
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> To provide and maintain a navy;
>
> To make rules for the government and regulation of the land and naval forces; …"

(180) The same dilemma arose in Australia where also there is a strict demarcation in distribution of power similar to that in the United States Constitution. In the case of *King v. Bevan and others* (1942) 66 CLR 452 (which also related to the question of military courts), the following passage is illustrative of the principle involved (p. 466):

> "Now this case involves the interpretation of the Constitution, because the position of courts-martial in relation to the judicial power of the Commonwealth comes in question. This Court has held that the judicial power of the Commonwealth can only be vested in courts and that if any such court be created by Parliament the tenure of office of the justices of such court, by whatever name they may be called, must be for life, subject to the power of removal contained in sec. 72 of the Constitution. (Waterside Workers' Federation of Australia vs. J.W. Alexander Ltd. (3); British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation (4); Shell C. of Australia Ltd. v. Federal Commissioner of Taxation (5). Judicial power for this purpose may be described as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." (Huddart, Parker & Co. Pty. Ltd. v. Moorehead (6); Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation (7). Naval courts-martial are set up (Naval Defence Act 1910-1934 of the Commonwealth, which incorporates the Defence Naval ct 1903-1941 of the Commonwealth, (See secs. 5, 36), and Imperial Naval Discipline Act 1866, secs. 87, 45 and Part IV) and they exercise the judicial power of the Commonwealth? If so the proceedings of such courts are unwarranted in point of law. The question depends upon the interpretation of the Constitution and whether such courts stand outside the judicial system established under the Constitution. The Parliament has power, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of

the several States and the control of the forces to execute and maintain the laws of the Commonwealth. And by sec. 68 of the Constitution the command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the King's representative.

Under the Constitution of the United States of America the judicial power of the United States is vested in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish: Cf. the Australian Constitution, sec. 71. And the judges hold office during good behavior (art.III., sec.I). Power is conferred upon Congress to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces (art.I., sec. 8, clauses 13, 14). The President is Commander-in-Chief of the army and navy of the United States (art.II., sec. 2, clause 1). And the Fifth Amendment provides that no person shall be held to answer for capital or other infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, whereas the Australian Constitution (sec. 80) provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury but there is no exception in cases arising in the land or naval forces as in the American Constitution. But the frame of the two Constitutions and their provisions, though not identical, are not unlike. The Supreme Court of the United States has resolved that courts-martial established under the laws of the United States form no part of the judicial system of the United States and that their proceedings within the limits of their jurisdiction cannot be controlled or revised by civil courts. Thus in Dynes v. Hoover (1) Mr. Justice Wayne, delivering the opinion of the Court, said :- "These provisions" (that is, the provisions already mentioned) "show that Congress has the power to provide for the trial and punishment of military court and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other": See also Kurtz v. Moffitt (2); Willoughby on The Constitution, 2nd ed. (1929), vol. 3, p. 1542, par. 1011; Willis on Constitutional Law, pp.447 et seq.

In my opinion the same construction should be given to the constitutional power contained in sec. 51 (vi) of the Australian Constitution. The scope of the defence power is extensive, as is suggested by the decisions of this Court (Joseph v. Colonial Treasurer (N.S.W.) (3); Fary v. Burvett (4), and though the power contained in section. 51 (vi) is subject to the Constitutions, till the words "naval and military defence of the Commonwealth and the control of the forces to execute and maintain the laws of the Commonwealth," coupled with sec. 69 and the incidental power (sec. 51 (xxxix.), indicate legislative provisions special and peculiar to those forces in the way of discipline and otherwise and indeed the Court should incline towards a construction that is necessary, not only from a practical, but also from an administrative point of view."

(181) It is vitally important to note that both in the United States as well as Australia the above interpretations were given despite the fact that there was no specific provision in the constitutions of those countries which dealt with the question of military courts. The interpretation which was placed in both countries was that which

was drawn on the basis of the structure of taking a realistic and pragmatic view so as to enable the security and sanctity of the state to be maintained and kept alive. It should, of course, be noted that the discussion in relation to military courts in both those countries was not limited or confined only to times of war, or crisis, but even in relation to the functioning of military courts in peacetime. As against the above, the position in Pakistan is vastly different. If reference is made to Article 199 of the Constitution it will be seen that right from its inception the jurisdiction of the High Court was restricted in relation to persons who are members of the armed forces or subject to any law relating to those forces in respect of their terms and conditions of service or in respect of any matter arising out of their service, or in respect of any action taken in relation to them as members of the armed forces or as persons subject to such law. Subsequent to that of course has followed the 21st Amendment which has explicitly addressed the problem with which the country is confronted at present. Article 175, as amended by the 21st Amendment, is reproduced below:

175 Establishment and Jurisdiction of Courts.

(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.

Explanation.- Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court.

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.

Explanation:- In this proviso, the expression ‘sect’ means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.

(182) The essential points to note about the impact of the 21st Amendment in relation to the jurisdiction of courts are, firstly, that the amendment in question has been expressly limited to remain in force for the period of two years only in the hope

and expectation that by that time the existential threat which was being faced by the country would have been resolved. *Thus this is explicitly a temporary provision intended to meet a specific crisis.* It is not intended to remain a part of the permanent structure of the constitution. This is a vastly important circumstance which justifies the restriction placed therein in relation to the functioning of the normal courts. The second aspect of the amendment, which needs to be taken note of, is that it is Article 175 which not merely creates the Supreme Court as well as the High Courts but also explicitly states that no court shall have any jurisdiction save as is or may be conferred on it by the constitution by or under any law. But for the existence of Article 175 there would be no Supreme Court or High Court at all. Both the creation of the Courts, as well as the conferment of jurisdiction therein is comprehended by the said Article. By stating in terms of the proviso which has been introduced by the 21st Amendment that the provisions of this Article have no application to the trial of persons belonging to terrorist groups or organizations the legislative intent has been made clear beyond any doubt. If we revert, for a moment, to the position in the United States it may be noted that although no constitutional amendment has been introduced for, and in relation to, the fight against terrorism or the war against terrorism as it is referred to in the United States a number of decisions by the Supreme Court of the United States has made clear its considered view that due deference must be given to the Executive for and in relation to the war against terrorism. In the case of *Boumediene v Bush*, 553 US 723 (2008), it was observed as under at pp. 796-97:

> "In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branch. See United States v. Curtiss-Wright Export Corp. 299 US 304, 320 (1936). Unlike the President and some designated members of Congress, neither the member of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our nation and its people. The law must accord the executive substantial authority to apprehend and detain those who pose a real danger to our security."

(183) Another important judgment of the United States Supreme Court is the case of *Ex Parte Quirin* 317 US 1 (1942). This was a case in which the question was whether a federal court was entitled to refuse to issue a writ of habeas corpus during the Second World War. The case pertained to persons who were born in Germany and settled down and became citizens of the United States. The challenge in the case was to an order dated July 2, 1942 issued by the President, as Commander-in-Chief of the Army and Navy, appointing a military commission and directing it to try the petitioners for offences against the law of war and the articles of war. The said order prescribed regulations for the procedure on the trial and for review of any judgment or sentence of the commission. The proclamation further stated that all such persons were denied access to the courts of law. This was challenged in the United States Supreme Court. The main contention raised was that the President lacked any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offences with which they were charged and in consequence they were entitled to be tried in the civil courts with all due safeguards including trial by jury, which the 5th and 6th Amendments guarantee to all persons charged in such courts with criminal offences. It was further argued that the President's Order, in prescribing the procedure of the commission was in conflict with the articles of war adopted by Congress. The US Supreme Court noted that there was nothing in the proclamation to preclude access to the courts for determining its applicability to the particular case. It further noted that neither the proclamation, nor the fact that the petitioners were enemy aliens, foreclosed consideration by the courts of their contention that the Constitution and laws of the United States constitutionally enacted forbade their trial by military commission. An interesting aspect of the case was that the President had not relied on congressional legislation to justify the trial of the petitioners by military commissions. *He had exercised his powers as commander-in-chief under the Constitution*. The Supreme Court after examining the constitutional position including reference to article 1(8) which confers power on

Congress to set up the armed forces and to declare war eventually came to the conclusion that the petitioners were not entitled to relief.

(184) I have now neared the end of my judgment. Before concluding by summarizing the views that have been expressed herein above, I would like to quote Thomas Jefferson on what might be regarded as the general, but also fundamental, theme of this judgment: that the question whether, when or how the Constitution is to be amended ought to be left in its entirety to the chosen (i.e., elected) representatives of the people of Pakistan. Jefferson, who was one of the most famous and important of the Founding Fathers of the US Constitution and the principal draftsman of the Declaration of Independence, makes the point with his usual eloquence and elegance. He was very clear in his views that the original vision of the Founders should not operate as a straitjacket for all future times. In a famous document (a letter to one Samuel Kercheval written in 1816 some years after he had served two terms as President), Jefferson, speaking with the wisdom honed by a lifetime's experience, declared as under (emphasis supplied):

> "*Some men look at constitutions with sanctimonious reverence, and deem them like the [ark] of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it*. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. It is this preposterous idea which has lately deluged Europe in blood. Their monarchs, instead of wisely yielding to the gradual change of circumstances, of favoring progressive accommodation to progressive improvement, have clung to old abuses, entrenched themselves behind steady habits, and obliged their subjects to seek through blood and violence rash and ruinous innovations, which, had

> they been referred to the peaceful deliberations and collected wisdom of the nation, would have been put into acceptable and salutary forms. *Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. Let us, as our sister States have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils. And lastly, let us provide in our constitution for its revision at stated periods*."

(185) It will be convenient to conclude with a summary, in general terms, of the views expressed in this judgment. This summary must of course be read in the light of what has been stated herein above:

a. In India, the Constitution was framed by its founding fathers and therefore has a special place in Indian constitutional thought and development.

b. The fundamental rights as enshrined in the Constitution were for that reason accorded a sanctity that, it was acutely felt, was violated when attempts were subsequently made to abridge or curtail those rights, either through direct changes or by placing laws in the 9th Schedule (itself added to the Constitution by the first amendment). Thus, in an important sense the subsequent constitutional amendments were regarded as a "deviation" from the "ideal" situation created by the Constitution. The importance of this historical fact must always be kept in mind.

c. In our Constitution two important points must be made in relation thereto. Firstly, and most regrettably the fundamental rights conferred by the Constitution were stillborn: Article 280 expressly continued, from the commencing day, the earlier imposed emergency. Fundamental rights were not actually enforced till 1986. Furthermore, almost immediately and for reasons well known the Constitution was subjected to undesirable amendments. The examples include such notorious instances as the 5th Amendment, which was supposed to

"tame" the judiciary. *This change was made by the same Assembly which framed the Constitution* As I have shown, the more recent constitutional amendments have all had a generally positive intent and effect. Thus, unlike the Indian experience, the process of constitutional change through amendments has had a beneficial and useful effect.

d. Secondly, the Constitution on its promulgation was very much a document of its times (the early 1970's) when left-wing theories were much in vogue; witness the presence of the Marxist based Article 3. As pointed out earlier Marxism categorically rejects the principle of independence of the judiciary. Thus this is the direction in which the basic structure doctrine will take us. Is this what the Petitioners want?

e. The basic structure doctrine itself is, if I may say so with respect, has ended in becoming (and this was easily foreseeable) a vehicle for judicial aggrandizement of power at the expense of the elected representatives of the people. On the conceptual plane, it is devoid of merit and amounts to little more than a vessel into which the Judges can pour whatever economic, political or social theory as may catch their fancy or whim at any given time. The decisions of the Indian Supreme Court, discussed above, amply demonstrate this sorry state of affairs. What was decided in *Kesavananda Bharati* continues to perplex, elude and divide jurists and scholars, what to say of lesser mortals. *Minerva Mills* and the *Coelho* case, and the "explanation" of the latter decision in *Glanrock Estate,* more than amply demonstrate how amorphous and vague the central tenets of the doctrine actually are. The more the Judges indulge

in generalities the further the law moves from concreteness and comprehensibility.

f. Another danger of the doctrine is that it can tempt the Court into judicial overreach. This is amply demonstrated by the *Indira Nehru Gandhi* case and its aftermath including *ADM Jabulpur*, when the Indian Supreme Court had to ignominiously backtrack in the face of the aroused fury of a powerfully entrenched Prime Minister.

g. In the foregoing, and other, ways one especially damaging effect of the doctrine has been the erosion of the judicial method in India in constitutional matters. The essence of the judicial method, as practiced in common law countries (and certainly in India before the adverse effects of this doctrine assumed dominance), is that legal principles are objectively applied to concrete facts and disputes that arise before the court. Of course, the law continuously develops but it is not at the subjective whims of the judges. The basic structure doctrine on the other hand takes subjectivity to an extreme and elevates it to high constitutional principle. It is expressly a part of the doctrine that no one—not even the Judges—know what is included in its scope until the Judges themselves declare something to be part of the basic structure. None, save the Judges, know, or can know, what the "basic features" of the Indian Constitution are (as part of the prescriptive doctrine as opposed to simply being a descriptive concept). And even the Judges are at a loss to say in one go what those features are; they must grope their way forward on a case by case basis.

h. Constitutions in free societies are made by the people, for

themselves and through their chosen representatives. Of course, in an Islamic polity and for a Muslim community, this is subject forever to the undisputed fact that sovereignty over the entire Universe belongs to Allah alone. But, within the parameters of that eternal principle, it is for the chosen representatives and *no one else* to act in such matters. And, the same necessarily applies to constitutional amendments. Why should that power not be exercisable by such representatives in their collective wisdom, and why should its exercise be at the mercy of the collective wisdom of unelected Judges? The decisions of elected representatives have been wrong and have occasionally brought us close to disaster. Is the record of the judiciary that much better? The elected representatives at least need to have their mandate renewed periodically. What of Judges, who in any polity are the least accountable branch and in Pakistan in particular are, in a quite literal sense, a closed brotherhood?

i. The temptation to read too much into the Objectives Resolution, whether as the Preamble to the Constitution or an operative part thereof by reason of Article 2A, must be strongly resisted. The historical antecedents of the social, political and economic agenda spelt out in the Resolution has already been laid bare. It is in the very nature of constitutions that they must change in ways big and small and whether by way of judicial exposition or in the exercise of the amending power. To artificially bind down a constitution on the basis of a doctrine such as that expounded by the Indian Supreme Court would be a gross disservice to the development of constitutional law.

j. The experience of the (so far) greatest experiment in democracy, and the home of the modern written constitution, i.e., the United States, amply demonstrates the validity of what has been said herein above. The views of Thomas Jefferson, one of the most famous of the American Founding Fathers, have been reproduced. The considered opinions of the Justices of the US Supreme Court have been noted. There is a role and a place for the judiciary in the constitutional firmament and it is without any doubt a crucial and vitally important role and place. However, the Constitution does not end (it certainly did not begin) with the Judges, and the courts would do well to remember that. Every institution and each organ of the State has its own role to play. That realization and acceptance ensures that the constitutional balance is maintained. The Court should not do anything that unbalances the Constitution. It should never assume in its own favor that it is the ultimate arbiter in all constitutional matters. That, ultimately, is what the basic structure doctrine is about. This Court has in the past refused more than once to adopt this theory (or any variant thereof). It ought again to do so.

(186) In the end, I reiterate the point with which I began. Where should the amending power vest: in the hands of an unelected judiciary even though acting in good faith, or the chosen representatives of the people? As I hope is made clear by what has been said above, my answer is: the latter and not the former. Accordingly, I dismiss these petitions.

Sd/-

(Mian Saqib Nisar)

ANNEX

SUMMARY OF FINDINGS IN INDIAN CASE LAW RE BASIC STRUCTURE

	Supremacy of the Const	Rule of Law	Separation of Powers	Independence of the Judiciary	Judicial Review	Superintendence of High Court over other Courts	Federalism	Secularism	Sovereign Republic	Unity & Integrity of the Nation	Republican & Democratic form of Govt	Parliamentary system of governance	Free and Fair Elections
KESAVANANDA BHARATI													
SIKRI	✔		✔				✔	✔			✔		
SHELAT & GROVER	✔		✔		✔		✔	✔	✔	✔	✔		
HEGDE & MUKHERJEA					✔				✔	✔	✔		
REDDY								✔	✔		✔	✔	
KHANNA					✔								
INDIRA GANDHI													
CHANDRACHUD	✔	✔	✔					✔	✔		✔		
KHANNA		✔						✔			✔		✔
BEG	✔		✔										
MATHEW		✔			✔						✔		x
RAY		✔											x
	Supremacy of the Const	Rule of Law	Separation of Powers	Independence of the Judiciary	Judicial Review	Superintendence of High Court over other Courts	Federalism	Secularism	Sovereign Republic	Unity & Integrity of the Nation	Republican & Democratic form of Govt	Parliamentary system of governance	Free and Fair Elections
MINERVA MILLS													
CHANDRACHUD (+3)					✔								
BHAGWATI					✔								
WAMAN RAO													
CHANDRA KUMAR						✔							
GANPATRAO													
SAMPAT KUMAR													
BHAGWATI			x		✔								
MISRA			x		✔								
SAMBAMURTHY			✔										
IR COELHO			✔		✔			✔					
MADRAS BAR ASSN (2014)			x	✔	✔								

Asif Saeed Khan Khosa, J.:

The Constitution (Eighteenth Amendment) Act
(Act X of 2010)

Through these Constitution Petitions filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 some Bar Councils, Bar Associations, registered and other bodies and public-spirited individuals have challenged different parts of the Constitution (Eighteenth Amendment) Act (Act X of 2010). Apart from the generally common challenge thrown against the provisions of Article 175A of the Constitution, whereby a new mechanism has been introduced regarding appointment of Chief Justices and Judges of the Supreme Court of Pakistan, Federal Shariat Court and the High Courts, different petitioners have also called in question some parts and provisions of Articles 1, 17, 27, 38, 45, 46, 48, 51, 62, 63, 63A, 91, 106, 148, 175, 177, 193, 203C, 209, 219, 226, 245, 260 and 267A affected by the Eighteenth Amendment of the Constitution. Some of the petitioners have also assailed the repeal and deletion of Articles 17(4) and 58(2)(b) of the Constitution and one of the petitioners has prayed for striking down the entire Eighteenth Amendment of the Constitution. The petitioners have maintained that despite an ouster of this Court's jurisdiction by clause (5) of Article 239 of the Constitution *vis-à-vis* calling in question any amendment of the Constitution the Court has the requisite jurisdiction inhering in it to strike down an amendment of the Constitution if such amendment runs contrary to or adversely affects the basic features or the basic structure of the Constitution. The fate of these petitions, thus, primarily hinges upon the issue of jurisdiction of this Court in the matter which in turn depends upon acceptance or rejection of the theory of basic features or basic structure of the Constitution and I intend to weave my discussion about that theory mainly around the freshly introduced provisions of Article 175A of the Constitution which provisions have remained the centre of attention and focus throughout the hearing of these petitions.

2. "[T]he appointment of judges to the superior courts is too serious a matter to be left only to judges" was an opinion expressed not by any politician or bureaucrat motivated to undermine independence of the judiciary but by one of the most independent, experienced and revered judges of this country and he was none other than Justice (Retired) Dorab F. Patel. While delivering the Third Cornelius Memorial Lecture on December 23, 1995 the perceptive and astute judge had *inter alia* the following to observe on the subject:

> "------- the Indian Supreme Court has recently held that the concurrent advice of the chief justices about an appointment of a judge of High Court is binding on the Indian President. I regret my inability to agree with this view. The appointment of judges of High Courts is too serious a matter to be left to the judiciary alone. -------
>
> Unfortunately nepotism is a hazard in appointments to the judiciary in South Asia, and this state of affairs will continue as long as the press and the Bar associations are weak. In any case, the view that the people through their elected representatives should not have any voice in appointments to the Superior Courts is, in my opinion, contrary to democratic norms. -------
>
> A chief justice is in a far better position than the President to assess the ability of advocates and of district judges, but as he is not likely to know much about their private lives, he may, in good faith, recommend for appointment to the High Court an advocate who lacks integrity, who has resorted to sharp practices and got away with it. Or he may be influenced to recommend an inexperienced advocate for appointment. A more difficult case would be if a chief justice does not recommend a deserving person for appointment because of some personal or parochial prejudice. Society in this subcontinent is riddled with such prejudices, and chief justices are part of the society in which they live. That is why I said that the appointment of judges to the superior courts is too serious a matter to be left only to judges. -------
>
> I would now make a few suggestions for the appointment of Judges. The people must have a voice in those appointments, but at the same time, as far as is possible, judges should not be beholden to any political party for their appointments. High Court judges should be appointed by a Commission consisting of the Chief Justice of Pakistan, the Chief Justice and the Senior Judge of the High Court, and the provincial Chief Minister and the Leader of the Opposition. But for obvious reasons such a Commission should sit without any judge of the High Court when it has to appoint its Chief Justice. The appointment of all judges to the Supreme Court should be made by a Commission of five members: the Chief Justice of Pakistan, the two senior-most Judges of the Supreme Court, the Prime Minister and the Leader of the Opposition. Such a commission would not be appropriate for the appointment of the Chief Justice, because senior judges of the Court would be eligible for this appointment: In my opinion, the appointment of the Chief Justice of the country has to be left to the President, as is the practice in most democratic countries."

3. V. R. Krishna Iyer is one of the most celebrated names in the Indian legal circles and in his book *A Constitutional Miscellany* (2003) he had the following comment to make about the system of judicial appointments in India:

> "The system needs overhaul and democratization. If wars cannot be left to generals alone, judicial administration cannot be left to the 'robed brethren' alone. A superlatively dignified Judicial Commission, with the Chief Justice of India presiding, is a must if forensic chaos in the judicatory cosmos is to cease. ------- The composition of the proposed Indian Commission is a matter of pragmatic consideration. The Law Minister and the Home Minister have to be there. A few senior judges of the Supreme Court and of the High Courts may usefully be members, the Bar Councils in India may be represented and, perhaps, high academics from the Law Universities may be a valuable addition. A couple of outstanding statesmen, not involved in the political polemics of the country, may bring in a fresh approach in the selection process."

4. Justice (Retired) Dorab F. Patel has not been the sole proponent of change in the mode of judicial appointments in Pakistan as the idea for such change has been murmured in judicial and legal as well as political circles since long. Apart from innumerable private whispers and public outcries the need for change in the appointment process voiced from time to time by various relevant quarters has also been reflected in various documents emanating from representatives of the legal fraternity, responsible legislators and major political quarters manifesting the extensive sway of the popular demand in that regard. On 13.03.2000 upon a recommendation made by its Law Reforms Committee the Pakistan Bar Council, the highest elected body representing the lawyers of the country, adopted a resolution proposing a constitutional amendment for constituting a Commission for the purposes of appointment of judges of the superior courts and also for disciplinary proceedings against them. The proposed Commission was to comprise of the Chief Justice of Pakistan, two most senior Judges of the Supreme Court, all the Chief Justices of the High Courts, Vice-Chairman of the Pakistan Bar Council, President of the Supreme Court Bar Association, Presidents of all the High Court Bar Associations, a member of the National Assembly to be nominated by the Prime Minister, a member of the National Assembly to be nominated by the leader of the opposition in the National Assembly and four members of the Senate, one each from every Province. The proposed Commission was, thus, to have

representation of the judiciary, the legal fraternity and the people. On 13.07.2002 the Pakistan Bar Council passed another resolution declaring that no constitutional petition would be filed before the Supreme Court of Pakistan because the legal community had lost confidence in the independence and impartiality of the Court as it stood composed at that time. In the year 2003 the Pakistan Bar Council published a White Paper highlighting various instances which, according to it, manifested lack of independence and impartiality on the part of the superior judiciary of this country in general and this Court in particular. Subsequently, in the year 2005 Senator Raza Rabbani had tabled a Private Member's Bill before the Senate and through that Bill he too had proposed a constitutional amendment for constituting a Commission for the purposes of appointment of judges of the superior courts and also for disciplinary proceedings against them. The composition of the Commission proposed through that Bill was identical to that proposed earlier on by the Pakistan Bar Council. Still later, on 14.05.2006 the leaders of two major and most popular political parties of this country at that time had signed a document called the Charter of Democracy wherein concern was expressly voiced against "absence of rule of law" and "lack of confidence in the judicial system" and it had been agreed *inter alia* that the method of appointment of judges of the superior courts in the country needed a substantial change. The new system of appointment of judges of the superior courts envisaged by the Charter of Democracy included nomination of a candidate by a Judicial Commission and confirmation of the nomination by a Parliamentary Committee. In the Manifestoes issued by both the said political parties before participating in the general elections held in the country on February 18, 2008 it had expressly been resolved to implement the principles agreed upon in the Charter of Democracy and "restructuring and reforming of judicial system" on the lines agreed upon in that Charter. Determination to implement the principles agreed upon in the Charter of Democracy was, thus, expressly mentioned in the Manifestoes issued by both the said political parties before participating in the general elections held in the country on February 18, 2008 and as a result of the said general elections both the said political parties once again emerged as the

most popular political parties in the country. On 10.08.2009 the Democracy and Governance Panel of the Pakistan Institute of Legislative Development and Transparency (PILDAT) chaired by Justice (Retired) Saeeduzzaman Siddiqui, a former Chief Justice of Pakistan, also proposed some constitutional amendments introducing a new system of judicial appointments whereunder appointments to the superior judiciary would be made by a Judicial Appointments Commission and a Joint Parliamentary Committee. Nobody in his right mind could attribute oblique motives in the matter to the honourable former Chief Justice of Pakistan who had the experience of knowing the shortcomings of the prevalent system of judicial appointments first hand and who had in the past given a great personal sacrifice for the cherished independence of the judiciary of this country. After the general elections when the parliamentarians belonging to the two major political parties and those from all the other political parties represented in the Parliament were jointly contemplating constitutional reforms in the light of the Charter of Democracy and the election manifestoes of the major political parties the Pakistan Bar Council again passed a resolution on 13.03.2010 proposing a new system of appointment of judges of the superior courts and on 10.04.2010 a meeting of leaders of all the major Bar Councils and Bar Associations of the country unanimously expressed grave concern over some fresh appointments made to different High Courts and reiterated the need for changing the existing system of appointment of judges of the superior courts. It was in this backdrop that the Parliament had unanimously passed the Eighteenth Amendment of the Constitution which, amongst other changes, replaced the old system of appointment of judges of the superior courts with a totally new system. The new method of appointment of judges of the superior courts introduced through Article 175A of the Constitution (before Article 175A was itself amended by the Nineteenth Amendment of the Constitution) contemplates a nomination for appointment as Judge of the Supreme Court to be made by a Judicial Commission comprising of the Chief Justice of Pakistan, two most senior Judges of the Supreme Court, a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan in

consultation with the two member Judges, Federal Minister for Law and Justice, Attorney-General for Pakistan and a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council and such nomination to be confirmed by a Parliamentary Committee comprising of eight members out of whom four are to be from the Treasury Benches, two from each House, and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches is to be made by the Leader of the House and the nomination of members from the Opposition Benches is to be made by the Leader of the Opposition. For nomination for appointment as Judge of a High Court the Judicial Commission is also to include Chief Justice of the concerned High Court, the most senior Judge of that High Court, Provincial Minister for Law and a senior Advocate to be nominated by the Provincial Bar Council. One may, thus, wonder whether the initiative for the recent introduction of Article 175A in our Constitution had stemmed from motivated political quarters, as asserted before this Court by the petitioners in these cases, or from the accumulated judicial, legal, political and practical wisdom itself. It may well be that the script for the recently introduced Article 175A had started being written much earlier than its apparent recent origin. Chief Justice William Rehnquist of the Supreme Court of the United States of America had once remarked that

> "Justice is too important a matter to be left to the judges, or even to the lawyers; the American people must think about, discuss and contribute to the future planning of their courts."

It is evident that in the background of their past experiences the people of Pakistan have, in the words of Chief Justice William Rehnquist, thought about, discussed and contributed to the future planning of their superior courts and have collectively and unanimously decided to replace the earlier constitutional system of appointment of judges of the superior courts with a new system. The extent and pervasiveness of the desire for change in this regard may also be gauged from the fact that, while digging holes in the new system of appointment of judges of the superior courts introduced through Article 175A of the Constitution, all the learned counsel for the petitioners in all the present petitions, without any significant

exception, have expressly and categorically stated that they do not support the earlier system of such appointments and do not want its revival or restoration!

5. Very extensive and detailed arguments in support and in opposition of these petitions have been addressed before this Court by the learned counsel representing different parties and the learned law officers and such arguments and the supporting material find a detailed mention in the opinions proposed to be delivered by some of my learned brothers. I may, thus, avoid repetition and unnecessary burdening of my opinion in that regard. The main planks of the arguments addressed before the Court in these cases by the learned counsel for the petitioners are that in a country like ours having a written Constitution it is the Constitution and not the Parliament which is sovereign or supreme; the 'basic features' and the 'basic structure' of the Constitution cannot be altered or amended by the Parliament and independence of the judiciary is one of such basic features and a part of the basic structure of the Constitution of 1973; mode of appointment of judges of the superior courts has a direct nexus with independence of the judiciary as an institution and organ of the State and intervention of the other institutions or organs of the State, particularly parliamentarians and politicians, in the process of appointment of judges of the superior courts militates against separation of powers which is a cornerstone of the Constitution and undermines independence of the judiciary; and the Parliament cannot alter or amend the mode of appointment of judges of the superior courts prescribed in the original Constitution of 1973. The learned counsel for the Federal Government and the learned law officers including the learned Attorney-General for Pakistan and the learned Advocates-General of the Provinces and the Islamabad Capital Territory have, of course, opposed these petitions tooth and nail and have contested and controverted each and every argument advanced by the learned counsel for the petitioners. After hearing the learned counsel for the parties and the learned law officers at quite some length and after carefully going through the voluminous material relied upon by them in support of their respective contentions I have not felt persuaded to agree with any of the

arguments of the learned counsel for the petitioners mentioned above and my reasons in that regard are recorded in the following paragraphs.

6. It has been debated before us from one side that the Parliament in our country is sovereign whereas the other side has maintained that in a country adopting a written Constitution it is the Constitution which is sovereign and even the Parliament has to exercise its authority within the limits and scope prescribed for it by the Constitution. To me the answer to this question is provided by the Preamble to the Constitution which declares in no uncertain terms that "Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust." The said words contained in the Preamble had actually and substantially been borrowed from the Objectives Resolution of 1949 the principles and provisions of which were subsequently made a substantive part of the Constitution through insertion of Article 2A therein. It is, therefore, quite obvious that in our country sovereignty of Almighty Allah is to be exercised by the people of Pakistan and the only limitation placed upon such exercise of sovereignty is that the people of Pakistan cannot act against the limits prescribed by Almighty Allah. In other words in their collective activities as long as the people of Pakistan do not act against any Divine command they are free to act in any manner they consider good for them. It is also provided in the Preamble, and was also resolved through the Objectives Resolution, that "Whereas the State shall exercise its powers and authority through the chosen representatives of the people" and, thus, the delegated sovereign authority of the people of Pakistan practically vests with the chosen representatives of the people, i.e. the Parliament. It is true that while working within the existing framework of the Constitution the Parliament has to act within the parameters laid down by the Constitution but when it comes to amending the Constitution itself it has specifically been provided in Article 238 of the Constitution that "Subject to this Part, the Constitution may be amended by Act of Majlis-e-Shoora (Parliament)". It is important to highlight that the Parliament's power

to amend the Constitution is made subject only to the provisions contained in Part XI of the Constitution (dealing with 'Amendment of Constitution') and is not made subject to any other Part or provision of the Constitution. As if this were not enough, clause (6) of Article 239 of the Constitution has, without mincing words, gone on to clarify that "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." These provisions leave no doubt in my mind that the Constitution may enjoy supremacy and may be in a position to control the Parliament in the areas of its legislative and other powers, functions and processes prescribed by the existing Constitution but when it comes to amending the Constitution itself the chosen representatives of the people in the Parliament assume sovereignty and control and the existing Constitution cannot stop them from amending any provision of the Constitution in any manner they wish. During the hearing of these petitions a question has repeatedly been asked by some learned counsel and also by some honourable members of the Bench as to whether the Parliament can also amend the constitutional provisions regarding Islamic way of life and Islam being the State religion of Pakistan and my answer to that question is quite simple. Islam is not just a fundamental principle or a salient feature of the Constitution of Pakistan but it is the very life and soul of the Pakistani society and is a matter of faith transcending any constitutional dispensation. It is but obvious that in this country which was created in the name of Islam and which is predominantly inhabited by Muslims the Parliament is most unlikely to, notwithstanding any express or implied constitutional limitation to that effect or not, amend the Constitution for achieving something which may offend against any express Divine command because acting to the contrary may negate the *raison d'être* of the country's conception, creation and existence. It is an elementary lesson of political science that parliamentarians and politicians have their hands on the pulse of the nation and the representatives of the people are never fond of committing *hara-kiri*! I may, however, add that if at some future stage the people of this country have a change of heart or mind in this respect then the will of the people will have

its way and the aspirations of yore or yesteryears may not be able to shackle it.

7. With the help of some precedent cases from Pakistan and abroad and with reference to some academic opinions expressed by some authors beyond our shores it has been canvassed before us by the learned counsel for the petitioners that there are some 'basic features' of our Constitution upon which rests its 'basic structure' and that even the Parliament cannot amend the Constitution in a manner which brings about change in such basic features or structure or adversely affects them. After pondering over such arguments from diverse angles I have found it difficult to accept the same, particularly in our local context. To start with, the theory of basic features or basic structure of the Constitution may have some attraction in a country where a Constitution has been acted upon for a long time and where the people of the country have stuck or adhered to the basic features of that Constitution considering the same to be representing continued national aspirations and core values of the society. Such an academic theory may, however, have no relevance to a country like ours which has, quite unfortunately, seen many constitutional dispensations in its short history depicting varying salient features. A bare look at the Objectives Resolution of 1949, the Constitution of 1956, the Constitution of 1962, the Interim Constitution of 1972 and the Constitution of 1973 besides other constitutional instruments introduced from time to time like the Legal Framework Orders and the Provisional Constitution Orders, etc. clearly shows that it is practically not possible to lay down in black and white as to what the salient features of our constitutional dispensations have consistently been. Prescription due to efflux of time and long user, to my mind, is necessary to gather as to whether a particular feature of the Constitution continues to represent the national aspiration or resolve or not. In our context it is difficult to deny that the so-called basic features or the basic structures of the above mentioned Constitutions and constitutional instruments introduced and practised in our country from time to time have been vastly oscillating between different forms like federal and unitary, one unit and multiple provinces, presidential and parliamentary,

unicameral and bicameral, joint electorate and separate electorate, martial and democratic, capitalist and socialist, theocratic and liberal, provincial autonomy and central control, conservative and modern, and what not under the sun. Besides that, the Constitution of 1962 initially did not contain any Fundamental Right, and the Fundamental Rights provided in the Constitution of 1973 have mostly remained suspended and when they are operational most of them can be described at best as qualified rights because they are subject to so many conditions or restrictions to be imposed by law. Even the Constitution of 1973 itself has been amended from time to time so frequently and so drastically that it is not possible to observe with any degree of certainty as to what its salient features have throughout been, even if the intermittent and stretched periods of its suspension and abeyance are taken out of consideration. The Statement of Objects and Reasons accompanying the Constitution (Eighteenth Amendment) Bill, 2010, through which *inter alia* Article 175A was introduced in the Parliament, itself recognized that "The Constitution of 1973 was *not implemented* in letter and spirit. The democratic system was *derailed* at different times. The non-democratic regimes which came into power at different times centralized all authority and thus *altered the structure of the Constitution* from a Parliamentary form to a quasi-Presidential form of Government through the Eighth and Seventeenth Constitutional Amendments. Thus, the equilibrium established by the Constitution between various organs of State was *disturbed* which led to weakening of democratic institutions" (*italics have been supplied for emphasis*). It was, thus, recognized by the highest relevant quarters that the so-called basic structure of the Constitution of 1973 was not implemented properly, derailed, altered and disturbed from time to time and the Parliament had itself been partly responsible for or involved in the process of such non-implementation, derailment, alteration and disturbance. It is proverbial that a rolling stone gathers no moss and it is nothing but sad and unfortunate that the ever changing constitutional dispensation in our country has turned our Constitution into a rolling stone and the rapidity of its change has not allowed it to gather any moss of fixed values and aspirations to be termed or accepted as its basic features or basic structure and

this was so recognized by Saleem Akhtar, J. in the case of *Mahmood Khan Achakzai and others v. Federation of Pakistan and others* (PLD 1997 SC 426) in the following words:

> "The political history of the Constitution is checkered and marred by deviations and Constitutional breakdowns which bayoneted two Constitutions and the third one remained suspended for nine years. The dark shadows of military intervention had become a common phenomenon which has cast its influence on the death and birth of the Constitutions. *The history does not speak of consistent adoption of any basic structure for the Constitution.*"
>
> *(italics have been supplied for emphasis)*

It had also been concluded by this Court in the same case that:

> "What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality."

In this peculiar backdrop I for one am not ready to accept or apply the academic theory of basic features or basic structure of the Constitution to the situation in Pakistan at this stage of our constitutional history and growth. The aspirations that we as a society may entertain today unfortunately do not have the backing of a consistent and long history of practice and, therefore, the same are yet to mature into basic features of the Constitution for a court of law to accept and apply, if at all.

8. It has been argued by some of the learned counsel for the petitioners that by using the words "*the structure of the Constitution*" in the Statement of Objects and Reasons accompanying the Constitution (Eighteenth Amendment) Bill, 2010 the movers of that Bill had demonstrably recognized the theory of basic structure of the Constitution and, thus, this Court would be justified in applying the said theory in the present cases. Such an argument, however, overlooks the fact that the word 'structure' is an ordinary word of English language and that word is yet to attain the status of a term of art to be always understood in terms of a particular academic theory of constitutional law. In this view of the matter mere use of the words "*the structure of the Constitution*" by the movers of the Bill in the Statement of Objects and Reasons did not *per se* imply that the movers of the Bill had conceded to the courts the power of review of

constitutional amendments. In the context of all the previous judgments rendered by this Court on the subject, referred to later in this judgment, categorically rejecting applicability of the theory of basic features or basic structure of the Constitution it cannot be inferred that by using the words "*the structure of the Constitution*" in the Statement of Objects and Reasons the movers of the Bill had consciously and deliberately extended the jurisdiction of this Court even to the field which this Court had explicitly declared earlier on to be a forbidden area. The above mentioned argument also conveniently overlooks the fact that the same Statement of Objects and Reasons accompanying the Constitution (Eighteenth Amendment) Bill, 2010 contained the following in its paragraph No. 3:

> "The people of Pakistan have relentlessly struggled for democracy and for attaining the ideals of a Federal, Islamic, democratic, parliamentary and modern progressive welfare State wherein the rights of citizens are secured, and the Provinces have equitable share in the Federation."

It is strikingly noticeable that the aspirations of the people of this country mentioned in that paragraph were described therein as 'ideals' and not as basic features or as part of the basic structure of the Constitution! Even the Preamble to the Constitution (Eighteenth Amendment) Bill, 2010 as well as the Preamble to the Constitution (Eighteenth Amendment) Act, 2010 contained as follows:

> "AND WHEREAS the people of Pakistan have relentlessly struggled for democracy and for attaining the ideals of a Federal, Islamic, democratic, parliamentary and modern progressive welfare State wherein the rights of the citizens are secured and the Provinces have equitable share in the Federation."

Once again, the Preambles to the said Bill and the Act had referred to the relevant aspirations of the people as 'ideals' and not as basic features or as part of the basic structure of the Constitution. Those advancing the above mentioned argument have further, again very conveniently, ignored that the 'ideals' referred to in the Statement of Objects and Reasons as well as in the Preamble to the Constitution (Eighteenth Amendment) Bill, 2010 and the Preamble to the Constitution (Eighteenth Amendment) Act, 2010 did not contain any reference to independence of the judiciary! Apart from that any

reference to the Statement of Objects and Reasons in this particular context may not be quite apt because it is by now a settled proposition that a Statement of Objects and Reasons accompanying a Bill may sometimes be alluded to by a court for properly understanding or appreciating the spirit of the law proposed and enacted but such Statement of Objects and Reasons has no other utility for the court, certainly not the utility of opening a jurisdictional door which already stands firmly shut by many previous considered and authoritative judicial pronouncements.

9. Apart from what has been observed above the collective aspirations, ideals, objectives, values, morality and ethos of the people of a country are susceptible to change and that is in keeping with the evolving and changing times and ground realities. The people and society of one given time can also not be held as hostage to or slave of the aspirations, objectives, values, morality or ethos of their forefathers. Evolution of people and societies is a reality and it would be nothing but naïve to believe or hold otherwise. It is pertinent to mention here that such evolution and growth of the society was recognized by the people of this country when it had been observed in the Preamble to the Constitution of 1973 that "------- we, the people of Pakistan, ------- Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution" and the Constitution had categorically provided in Article 238 thereof that the Constitution may be amended by the Parliament besides clarifying in clause (6) of Article 239 that "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." The people had evidently and surely reserved their right to amend or even rewrite the Constitution in future so as to reflect their evolved or changed aspirations, objectives, values, morality or ethos or to change the mechanisms or methodologies adopted in 1973 for achieving such aspirations, objectives, values, morality or ethos and we would be doing a disservice to the people by denying them such right already explicitly reserved by them. The National Assembly adopting the Constitution of 1973 had never claimed or presumed that it was

omnipotent, as is evident from the provisions of Articles 238 and 239 mentioned above, and, thus, raising of any such presumption by a court of law at this late stage may be far-fetched and incongruous besides being inconsistent with the declared intention of the people. I may venture to observe in this context that it may not be possible for any court to accept or hold that the National Assembly of Pakistan adopting the Constitution of 1973 could bind all the successor Parliaments not to amend certain parts or provisions of the Constitution ever. It goes without saying that wisdom based upon experience knows no temporal limits and the concept of sovereignty of Parliament cannot be circumscribed by sequential bounds. An illustration of changing ground realities affecting some fundamentals of a Constitution is the concept of 'parity' between the West Pakistan and the erstwhile East Pakistan which was one of the fundamentals of the Constitution of 1956 but with subsequent cessation of East Pakistan the said fundamental simply disappeared because of the changed ground realities. Deeming the people or the Parliament of Pakistan to be bound by that fundamental for ever despite that subsequent development would be nothing but an absurdity. A useful exposition of the concept of changing ground realities and evolving aspirations, objectives, values, morality and ethos of the people and society is to be found in the judgment rendered in the case of *Dewan Textile Mills Ltd. v. Pakistan and others* (PLD 1976 Karachi 1368) wherein it was observed as follows:

> "Another circumstance which must not be lost sight of is that no generation has monopoly of wisdom nor has any generation a right to place fetters on future generations to mould the machinery of Government and the laws according to their requirements. Although a guideline for the organization and functioning of the future Government may be laid down and although norm may also be described for legislative activity, neither the guideline should be so rigid nor the norm so inflexible and unalterable as should rather than they be incapable of change, alteration and replacement even though the future generations want to change, alter or replace them. The guidelines and norm would, in such an event, be looked upon as fetter and shackles upon the free exercise of sovereign will of the people in times to come and would be done away with by method other than constitutional. It would be nothing short of a presumptuous and vain act, if one generation distrusts the wisdom and good sense of the future generations and to treat them in a way as if the generations to come would not be *sui juris*. The grant of power of amendment is based upon the assumption that as in other human affairs so in Constitution, there are no absolutes, and that human minds can never reconcile itself to fetters, in its quest for a better order of things. W. J. Garner in "Political Science and Government" at pages 537-538 said that "what is true of transcendental philosophy is equally true in mundane sphere of a

> constitutional provision. An unamendable Constitution, according to Mulford, is the worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which was adjourned without delay. It places the sceptre over a free people in the hands of dead men and the only office left to the people is to build thrones out of the stones of their spulchres.
>
> Each generation, according to Jefferson, should be considered as distinct nation with a right by the will of the majority to bind themselves but none to bind the succeeding generation, more than the inhabitant of another country. The earth belongs in usufruct to the living, the deads have neither the power nor the right over it."

In his poem 'On Children' Khalil Gibran had said something which may be relevant to the issue at hand. This is what he had said:

> "Your children are not your children.
> They are the sons and daughters of Life's longing for itself.
> They come through you but not from you,
> And though they are with you yet they belong not to you.
> You may give them your love but not your thoughts,
> For they have their own thoughts.
> You may house their bodies but not their souls,
> For their souls dwell in the house of tomorrow,
> which you cannot visit, not even in your dreams.
> You may strive to be like them,
> but seek not to make them like you.
> For life goes not backward nor tarries with yesterday."

In his book *Need to Amend a Constitution and Doctrine of Basic Features* (2007) Dr. Ashok Dhamija had the following to say on the subject:

> "What the future generations will require *more* is the amendment of the *basic features* of the Constitution because only that can meet their aspirations and requirements, if at all needed. It is only the non-amendability of the *basic features* of the Constitution which can lead to a revolution and not the *inconsequential* provision."

A good, but sad, example of this aspect of the matter is that of the people of the erstwhile East Pakistan who formed majority of the population of Pakistan at the time of its creation. Through their representatives in the then Constituent Assembly of the newly created Pakistan the people of East Pakistan had fully shared the common aspirations, ideals, objectives, values, morality and ethos with their counterparts in West Pakistan at the time of adoption of the Objectives Resolution in the year 1949 before framing of a Constitution for the motherland but within a little over two decades that community of interest and vision had undergone a drastic change. The people of East Pakistan lost their commitment to

Pakistan and the lofty ideals attached to its creation, broke away and carved out a new State for themselves with new ideals and commitments. A bare look at the Preamble to the Constitution of Bangladesh adopted in the year 1972 shows that the aspirations of the people of Bangladesh in 1972 were materially different from those of their forefathers reflected in the Objectives Resolution of 1949. It is strikingly noticeable that the aspirations of the forefathers about a State based upon Islamic ideology had, within a couple of decades, given way to the aspirations of their grandchildren regarding establishing a secular and socialist democratic State. In the original Constitution of Bangladesh, 1972 secularism was declared to be one of the fundamental principles of State policy. Later on in 1977 through the fifth amendment of the Constitution secularism was removed from the Constitution and Islam was introduced as the State religion but in 2010 the Supreme Court of Bangladesh struck down the fifth amendment of the Constitution restoring secularism as one of the fundamental principles of State policy and at the same time keeping Islam as the State religion. Turkey happens to be another example in this regard which had, in the past not too distant, traveled from being the headquarters of the Ottoman Empire and the seat of the Caliph of Islam to a secular country.

10. The constitutional position in the United States of America in this regard is no different. In his article *What in the Constitution cannot be amended?* (23 Arizona Law Review 717) Douglas Linder had the following to write on 'An Implied Limitation on the subject matter of Amendments: Case of the "Unamendable" Amendment':

> "Had the framers meant to prohibit amendments abolishing the Supreme Court, establishing a hereditary monarchy, or uniting two existing states, one could reasonably expect them to have said so. But the same cannot be said about a prohibition against enforcement of amendments that are by their own terms not subject to repeal. The prohibition of amendments that would dismantle certain fundamental institutions and arrangements established by the Constitution, including the states themselves, was a topic specifically debated by delegates to the Philadelphia Convention; the question of amendments that would alter the nature of the Constitution itself was not discussed. The debates indicate that the framers wanted the principles and institutions established in the Constitution to be open to evaluation and change. What is not clear is whether they intended their conception of a Constitution to be similarly subject to modification.

> There is little doubt, however, that the makers viewed the Constitution not as an end in itself but as a means of achieving a stable and just Union. The Constitution was to provide a vehicle through which change could peaceably occur. It was thought far preferable for dissatisfied constituent groups to work through the amending process than to resort to other means to achieve their objectives. Mason said at the Convention: "The plan now to be formed will certainly be defective, as the Confederation has been found, on trial, to be. Amendments therefore, will be necessary and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence." Later, Justice Story wrote:
>
> > "[T]he Constitution of the United States ------- is confessedly a new experiment in the history of the nations. Its framers were not bold enough to believe, or to pronounce it to be perfect. They believed that the power of amendment was ------- the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self destruction."
>
> Mason and Story, and indeed almost all of their contemporaries, shared a conception of a constitution as a "living" document. There was disagreement over precisely how difficult or easy it should be to change the Constitution; but almost nobody argued that change should not be possible.
>
> Nothing could be more inconsistent with the conception of the living Constitution than an unamendable amendment or an amendment authorizing unamendable amendments and which by its own terms is unamendable. As the framers recognized, the foreclosing of all possibility of constitutional change poses two dangers: it increases the risk of violence and revolutionary change, and it increases the risk that people will grow to disrespect the source of the institutions and arrangements that are forced on them."

11. While dwelling on the issue of basic features or basic structure of the Constitution I may add that if at all I were to accept the theory of basic features then I would recognize basic features of the aspirations of the people or society and stop short of considering them as basic features or basic structure of the Constitution so as to apply the legal theory attached with that concept. I would also draw a distinction between basic aspirations of the people and the modalities or methodologies for achieving such aspirations contained in a Constitution. A Constitution is a reflection of the basic aspirations of the people and society at the time of adoption of the Constitution and contains the prescribed modalities or methodologies for achieving such aspirations. I would refuse to accept that after adopting the Constitution the people and society may never be able to change or alter such modalities or methodologies in a bid to achieve the same aspirations through an improved or different modality or methodology. The arguments advanced by the learned counsel for the

petitioners depicting independence of the judiciary as an aspiration in itself and portraying the mode of appointment of judges of the superior courts adopted in the original Constitution of 1973 as the object in itself have failed to impress me because to me mere independence of the judiciary or a particular mode of appointment of judges of the superior courts cannot be accepted as ends in themselves because, to me, they are only some of the means to the end and the end, for sure, is achievement of justice for all through a good judicial system which delivers. It was recognized by this Court in the case of *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (PLD 2000 SC 869) that the relevant ideal was 'justice' and that independence of the judiciary was one of the components of the "system of administration of justice". Similarly in the case of *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan and others* (PLD 2010 SC 61), while recognizing 'justice' as the ideal, this Court had the following to observe:

> "While endorsing these views, let me also add that the courts set up by the Constitution or under its authority have been so established not just as a means of securing bread and butter for the members of the Bench or of the Bar but to provide justice to the people and the resultant peace in the society and it is thus they, who are the actual stake-holders and for whose benefit and welfare, the judicial system stands created."

12. It may not be inappropriate to observe that an independent judiciary is just one of the tools to be employed for achieving the ideal of justice for all. For diverse reasons conceivable by all an otherwise independent judiciary appointed through a particular mode may still not be impartial, competent, efficient or effective and that is why mere achievement or securing of independence of the judiciary may not be good enough if the real objective of justice for all remains an illusion. I may, therefore, emphasize that for any meaningful understanding of the issue it is imperative to realize and appreciate on a philosophical level that independence of the judiciary appointed through a particular mode is not the ultimate milestone to be crossed or the final target to be achieved but it is only one of the tools employed in an ongoing effort in which different targets are to be set and achieved, different stages are to be crossed and different levels

are to be attained till achievement of the ultimate objective of justice for all. It is generally appreciated and understood that for accomplishing justice for all there are different imperatives for a judicial system which are *sine qua non* and they include impartiality, independence, competence, efficiency and effectiveness. For each of such imperatives different factors play important roles and those for independence include constitutionally entrenched courts, security of tenure for judges, transparent appointment process, articulated judicial and ethical standards, impartial discipline process, adequate and constitutionally protected salary, physical security, civil immunity for judicial functions, freedom from interference in decision making from superior judicial officers outside of the appellate process, integration of subordinate courts as full members of the judiciary, separation of the judiciary from the executive, judicial control of its own budget, judicial control of its own administration, judicial control of the curriculum and faculty of judicial education, freedom from arbitrary geographic transfers, avoidance of retrospective legislation about anything to do with the judiciary, executive support to enforce judgments even against itself, executive support to prosecute and punish attempted or actual judicial corruption, executive restraint from interference in judicial decision making process, an independent Bar, a government sensitive to public opinion, an educated public demanding an independent and impartial judiciary and a free and informed print and electronic media. Similarly, the other imperatives for a judicial system to ensure justice for all, i.e. impartiality, competence, efficiency and effectiveness also have multiple factors playing important roles and it may not be necessary to enlist them here. It may, thus, be appreciated that, as already alluded to earlier, independence of the judiciary or adoption of a particular mode of appointment of judges of the superior judiciary is not an end in itself but it is only one of the means to the end. It is conceivable that a judiciary may be absolutely independent but it may still be partial in many ways or that it may be quite independent but incompetent, inefficient or ineffective and, thus, its independence may not be of any avail because the end result may not be just and fair. It also goes without saying that a judiciary known to be afflicted with its own biases or prejudices may

be independent from extraneous influences but it cannot be perceived by the public at large as an independent judiciary if it does not decide cases brought before it with the requisite independence of mind. In this view of the matter if justice for all is an ideal or an aspiration to be achieved then mere independence of the judiciary may not serve the purpose as long as the other imperatives are not simultaneously ensured.

13. I may also observe in this context that a particular mode of judicial appointments cannot be equated with the ideal or the objective itself and it cannot be laid down that one mechanism or methodology deemed appropriate by the society for achieving justice for all at one point of time is to be the only mechanism or methodology with which the society is to be stuck for ever. It may also be observed without fear of contradiction that an ideal or an aspiration is capable of surviving even if there is no Constitution or even if the existing Constitution is replaced or even if a particular mode of achievement of that ideal or aspiration adopted previously is changed. Let us not forget that the objective in the Objectives Resolution of 1949 "Wherein the independence of the judiciary shall be fully secured" has survived the abrogation, repeal, suspension and replacement of many constitutions and constitutional instruments that followed. It goes without saying that if one mechanism or methodology for achieving an objective fails to deliver according to the satisfaction of the society or the people then such mechanism or methodology can be changed by the society or the people without altering the objective itself. Recognizing the difference between substantial and machinery aspects of the Constitution it had clearly been observed by this Court in the case of *Mr. Fazlul Quader Chowdhry and others v. Mr. Muhammad Abdul Haque* (PLD 1963 SC 486) that "------- and if the Constitution were itself altered for some such reason, and that in a substantial, and not merely a machinery aspect, there would clearly be an erosion, a whittling away of its provisions, which it would be the duty of the superior Courts to resist in defence of the Constitution." In that case the reference to "a machinery aspect" was a reference to the mechanism or methodology of achieving a constitutional aspiration. It was also observed by this

Court in the case of *Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others* (PLD 1998 SC 1263) that any change or deviation as to the working of a limb of the State, which did not destroy any of the basic features of the Constitution, could be upheld. The reference in that case to change or deviation as to the working of a limb of the State was surely a reference to the change of modalities adopted for achievement of a basic aspiration. It was also recognized in the case of *I. R. Coelho v. State of Tamil Nadu* (AIR 2007 SC 861) that the whole theory of basic structure is based upon "core values" and not upon the machinery provisions or mode of achievement of those core values. It was further recognized in the case of *Ashoka Kumar Thakur v. Union of India and others* (AIR 2008 SC (Suppl.) 1) that an alteration or modification in the mode of accomplishing a basic feature is not destructive of the basic structure of the Constitution and that change of mode based upon evolution cannot be resisted. In the said case the theory of basic features or basic structure of the Constitution was put in proper perspective, and also significantly diluted, by K. G. Balakrishnan, C.J. by observing as follows:

> "91. A survey of the conclusions reached by the learned Judges in Kesavananda Bharati's case (supra) clearly shows that the power of amendment was very wide and even the fundamental rights could be amended or altered. ------- A close analysis of the decisions in Kesavananda Bharati's case (supra) shows that all the provisions of the Constitution, including the fundamental rights, could be amended or altered and the only limitation placed is that the basic structure of the Constitution shall not be altered. The judgment in Kesavananda Bharati's case (supra) clearly indicates what is the basic structure of the Constitution. It is not any single idea or principle like equality or any other constitutional principles that are subject to variation, but *the principles of equality cannot be completely taken away* so as to leave the citizens in this country in a state of lawlessness. *But the facets of the principle of equality could always be altered* especially to carry out the Directive Principles of the State Policy envisaged in Part IV of the Constitution. The Constitution (Ninety- Third Amendment) Act, 2005 is to be examined in the light of the above position.
>
> 92. The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that *they are not confined to the alteration or modification of any of the Fundamental Rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the Basic Structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or*

> *modified, that does not amount to the alteration of the basic structure of the Constitution.* Various fundamental rights are given in the Constitution dealing with various aspects of human life. *The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.*
>
> 93. ------- The larger principles of equality as stated in Article 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, *these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change in so far as it implicates the question of constitutional identity*.
>
> 94. -------
>
> 95. *If any Constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(g), it cannot be said that it violates the basic structure of the Constitution. If such a principle is accepted, our Constitution would not be able to adapt itself to the changing conditions of a dynamic human society*. Therefore, the plea raised by the Petitioners that the present Constitutional Ninety-Third Amendment Act, 2005 alters the basic structure of the constitution is of no force. Moreover, the interpretation of the Constitution shall not be in a narrow pedantic way. The observations made by the Constitution Bench in Nagaraj's case (supra) at page 240 are relevant: "Constitution is not an ephermal legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently *to be adapted to the various crisis of human affairs*. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. *A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges*."
>
> *(italics have been supplied for emphasis)*

14. The academic theory of basic features or basic structure of the Constitution had initially been rejected in India but subsequently it was in that country that it made its biggest gains. The Supreme Court of India had refused to accept or apply the said theory in the cases of *Shankari Prasad Singh Deo and others v. The Union of India and others* (AIR 1951 SC 458), *Sajjan Singh v. The State of Rajasthan* (AIR 1965 SC 845) and *I. C. Golak Nath and others. v. The State of Punjab and others* (AIR 1967 SC 1643) but finally it was accorded acceptance in the case of *Kesavananda Bharati v. The State of Kerala* (AIR 1973 SC 1461) and in the later cases of *Indira Nehru Gandhi v. Raj Narain* (1975 (Supp.) SCC 1), *Minerva Mills Ltd. v. Union of India* (AIR 1980 SC

1789), *Waman Rao and others v. Union of India and others* (AIR 1981 SCR 1), *Ashoka Kumar Thakur v. Union of India and others* (AIR 2008 SC (Suppl.) 1), *State of West Bengal and Ors. v. Committee for Protection of Democratic Rights, West Bengal and Ors.* (AIR 2010 SC 1467), *Madras Bar Association v. Union of India* (2014 10 SCC 1), *Pramati Educational and Cultural Trust and others v. Union of India and others* (AIR 2014 SC 2114) and *Union of India and Ors. v. Major General Sri Kant Sharma and Anr.* (Civil Appeal No. 7400 of 2015 decided by the Supreme Court of India on 11.03.2015) the said theory was applied as a matter of course. In Bangladesh the legal position declared in India in the case of *Kesavananda Bharati* was unquestioningly followed by the Appellate Division of the Supreme Court of Bangladesh in the cases of *Anwar Hossain Chowdhary v. Bangladesh* (1989 BLD (Spl.) 1) and *Khondker Delwar Hussain v. Bangladesh Italian Marble Works and others* ((2010) 62 DLR (AD) 298). It is, however, noticeable that there is a parallel trend in the judgments of the Indian Supreme Court towards diluting the scope of that theory restricting the same to the core values and not applying the same to the modes of achieving those core values, as is evident from its judgment in the case of *Sanjeev Coke Manufacturing Company v. M/S Bharat Coking Coal Ltd.* (AIR 1983 SC 329) wherein "serious reservations" were expressed against the earlier judgment delivered in the case of *Minerva Mills Ltd.* (*supra*) and also from its above mentioned judgment in the case of *Ashoka Kumar Thakur*. Renowned Indian legal commentator Dr. Durga Das Basu was critical of the judgment in the case of *Kesavananda Bharati* and he had observed that

> "The Court took upon itself the task of differentiating between the essential and non-essential features of the Constitution. No such power was vested in the Court by Article 368 either expressly or by implication."

It is obvious that in our country the experience with the previous system or method of appointment of judges of the superior courts has, unfortunately, failed to convince the people of its continued efficacy or utility and, arguably, introduction of Article 175A in the Constitution is a vote of no-confidence against the previous system and the people surely have the right to change the mode of achieving

the original ideal or the machinery provisions in that regard while still striving to achieve the original ideal or basic aspiration. The Statement of Objects and Reasons accompanying the Constitution (Eighteenth Amendment) Bill, 2010 expressly referred to the Parliament's commitment to independence of the judiciary which it wanted to achieve through the proposed new system of judicial appointments because the previous system had failed to live up to the people's aspirations. In his speeches made before the National Assembly on 06.04.2010 and before the Senate on 13.04.2010 Senator Mian Raza Rabbani, Advisor to the Prime Minister and Chairman of the Special Committee of the Parliament for Constitutional Reform, had also unambiguously reiterated that commitment while introducing the Constitution (Eighteenth Amendment) Bill, 2010 to the two Houses of the Parliament. Let us not forget that through the Constitutional Reform Act, 2005 the United Kingdom has drastically changed the method of appointment of judges of all the courts in the country and nobody has ever accused her of deviating from the ideal of independence of judiciary on account of change of method of judicial appointments. I may also observe in this context that if a particular mode of judicial appointments is to have anything to do with independence of the judiciary then there was a universal hue and cry in our country that the judiciary was not independent for the better, *nay* substantial, part of the period of currency of the previous system of judicial appointments and that by itself had provided a reason or justification good enough for reform in that regard.

15. It may also be stated in this context that if mere change of mode or manner of appointment or election to a constitutional office provided in the original Constitution of 1973 were to be accepted as adversely affecting the basic features or basic structure of the Constitution or adversely affecting independence or character of an institution or organ of the State then subsequent enlargement of the Electoral College for election of the President, change of mode of election of the Prime Minister from invitation to ascertainment to election, change of mode of election to the seats reserved in the Parliament for women and minorities and change of composition,

strength and jurisdiction of the Senate, to cite only a few examples, would also be questionable but no question has ever been raised against that so far. If that be so then questioning change of mode of appointment of judges of the superior courts may appear to be equally immune for the simple reason that a mere change in the mode or manner of an appointment, selection or election has previously been deemed by all concerned not to be relevant to independence or character of the relevant institution or organ of the State.

16. In the case of *Al-Jehad Trust and others v. Federation of Pakistan and others* (PLD 1996 SC 324) this Court had observed that "The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the superior Judiciary" and with reference to that observation it has vehemently been argued before us by the learned counsel for the petitioners that the mode or the process of appointment of judges of the superior courts is an integral part of and inseparably linked with the basic feature of the Constitution *qua* independence of the judiciary and, therefore, any change in the process of appointment may directly impinge upon independence of the judiciary. I have, however, not felt persuaded to accept this argument as advanced. The process of appointment to a high judicial office may be relevant to independence of the judiciary but not always so because not all processes of such appointment may have the effect of undermining independence of the judiciary. The learned counsel for the petitioners are in unison in maintaining that the process of appointment of judges of the superior courts adopted through the recently introduced Article 175A of the Constitution is going to politicize the process as it associates politicians and political office holders in the process and such politicizing of the process would undermine the cherished independence of the judiciary. As regards politicizing the matter of appointment of judges of the superior courts suffice it to observe here that the people of this country are the most important stakeholder in the matter and, thus, their involvement in the same through their chosen representatives cannot be termed as politicizing the matter. This observation of mine finds a wholehearted support

from the observations made by this Court in the case of *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry* (*supra*) reproduced above and according to the same the people "are the actual stake-holders and for whose benefit and welfare, the judicial system stands created". A judicial office may be a high office carrying a lot of prestige and honour but it cannot be denied that the people are the ultimate worldly sovereign as well as the paymasters and if they wish to have a direct role in the matter of hiring persons for such office then such role cannot be denied to the sovereign paymasters by branding it as politicization. With respect to those advancing the argument, I find such an argument to be smacking of contempt for the people and their chosen representatives which runs counter to our commitment to democracy and parliamentary system of government. Apart from that the contention advanced in this regard overlooks two critical aspects and they are, firstly, that in our constitutional dispensation involvement of some other organs of the State in appointments or elections to a different organ already stands recognized and is in vogue for long and, secondly, that in our constitutional scheme of things independence of an organ or of its members starts after the organ already stands constituted and its members are already appointed or elected and not before that stage.

17. It cannot be laid down as a general rule or principle that involvement of some other organs in appointments or elections to a different organ is always destructive of independence of that organ. In fact our Constitution and laws already recognize involvement of some other organs in appointments or elections to a different organ inasmuch as appointments to the Executive involve the Legislature laying down the parameters, qualifications and procedures, etc. and the Judiciary participating in the process of selection through membership of the Public Service Commissions and also judicially scrutinizing the appointments when challenged so as to ensure adherence to the required parameters, qualifications and procedures, etc.; elections to the Legislature involve the Election Commission comprising of Judges holding the elections, the Executive arranging and organizing such elections and the Judiciary ensuring that only eligible and genuinely elected candidates become members of the

Legislature; and it is conceded before us by all concerned that appointment of judges of the superior courts is essentially an Executive function and even under the previous constitutional process appointments to the superior judiciary involved not only the Chief Justice of Pakistan and the Chief Justice of the concerned High Court but also the President and the Governors representing the Executive and the Prime Minister and the Chief Ministers representing the respective Legislatures. Such involvement of the other organs is meant to ensure *inter alia* legality, regularity, correctness and fairness of the process of appointment or election and also to make the process democratic and participatory, conferring acceptability of all the stakeholders upon the appointments made or the elections held. It is after such participatory manner of appointment or election that the relevant organ stands constituted or persons become part of that organ and thereafter independence of that organ or its duly appointed or elected members actually starts. According to my understanding of our constitutional scheme independence of an organ or of its members starts after the organ stands constituted and its members are duly appointed or elected to the same and the concept of independence of the organ cannot be unduly stretched or applied to the process of appointment or election to an organ, especially where such process is made participatory and democratic by the Constitution itself. This is why when the Constitution speaks of independence of the 'judiciary' it speaks of independence of the judiciary as an existing organ when the judges already stand appointed to the same and this is also why when the Constitution contemplates sovereignty of the Parliament it contemplates sovereignty of the Parliament as an existing organ when its members already stand duly elected to the same. At such a stage the participatory roles of the other organs cease as far as functioning of the organ is concerned and independence of the organ from the other organs is jealously guarded. Independence of an organ, thus, is relatable to its functioning as such and not to its initial formation or creation and support for this is to be found from Articles 68 and 69 of the Constitution. According to Article 68 "No discussion shall take place in Majlis-e-Shoora (Parliament) with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge

of his duties." According to clause (1) of Article 69 "The validity of any proceedings in Majlis-e-Shoora (Parliament) shall not be called in question on the ground of any irregularity of procedure" and clause (2) of Article 69 goes on to provide that "No officer or member of Majlis-e-Shoora (Parliament) in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in Majlis-e-Shoora (Parliament), shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers." It has already been observed above that appointment of judges is essentially an Executive function. It is also evident that in our constitutional and legal scheme of things the Legislature may have a role in the appointment of a person to the Judiciary and the Judiciary may have a role in the election of a person to the Parliament but after a person becomes a part of the Judiciary and after a person becomes a part of the Parliament the mechanisms of independence of the institutions or organs set out by the Constitution become operational and start protecting one institution or organ from the other *vis-à-vis* its functional autonomy. Thus, even from this angle I have not been able to accept the argument of the learned counsel for the petitioners that involvement of the Parliament or the parliamentarians in the process of appointment of judges of the superior courts is likely to impinge upon independence of the judiciary and would thereby adversely affect the basic structure of the Constitution inviting application of the academic theory attached with that concept. I understand that the concept of independence of the judiciary envisioned by the Constitution is primarily relatable to independence of the judges individually and collectively *vis-à-vis* discharge of their functions as part of the judicial organ of the State and that a judge becomes a judge and a member of the judiciary only after completion of the selection process and after making the oath of his office prescribed by the Constitution, and not before that.

18. It may be relevant to mention here that on many previous occasions this Court has already firmly and categorically declined to accept or apply the theory of basic features or basic structure of the Constitution for the purposes of striking down an amendment of the

Constitution and I may not burden my judgment with detailed references to such cases as they already find a detailed mention in the opinions proposed to be delivered by some of my learned brothers. These cases include the cases of *The State v. Zia-ur-Rehman* (PLD 1973 SC 49), *Pir Sabir Shah v. Federation of Pakistan and others* (PLD 1994 SC 738), *Federation of Pakistan through the Secretary, Ministry of Finance, Government of Pakistan, Islamabad, etc. v. United Sugar Mills Ltd., Karachi* (PLD 1977 SC 397), *Mahmood Khan Achakzai and others v. Federation of Pakistan and others* (*supra*), *Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others* (*supra*), *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (*supra*) and *Pakistan Lawyers Forum and others v. Federation of Pakistan and others* (PLD 2005 SC 719). In some of these cases this Court had, however, referred to some "fundamental principles", "salient features" and "basic features" of our various Constitutions, including the Constitution of 1973, but admittedly in none of the said cases any validly and properly enacted constitutional amendment had actually been struck down by this Court on that yardstick. In the case of *Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary Ministry of Law and Justice, Islamabad and others* (PLD 2009 SC 879) this Court had declared the Constitution (Amendment) Order, 2007 (President's Order No. 5 of 2005) promulgated by General Pervez Musharraf, President of Pakistan, after proclamation of Emergency amending Articles 175, 198 and 218 of the Constitution (establishing the Islamabad High Court), amending Articles 186A, 270B and 270C of the Constitution and adding Article 270AAA to the Constitution as void because such purported amendments had not been brought about through the procedure provided by the Constitution for amendment of the Constitution and not because such amendments had adversely affected the basic structure of the Constitution. It may not be out of place to mention here that in Sri Lanka the Supreme Court had refused to accept or apply the basic structure theory in the case of *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1990) LRC (Const.) 1 and the Supreme Court of Malaysia had also rejected that theory in the case of *Phang Chin*

Hock v. Public Prosecutor (1980) 1 MLJ 70. In the United States of America challenges to constitutional amendments have invariably failed before the United States Supreme Court and a reference in this respect may be made to the cases of *State of Rhode Island v. A. Mitchell Palmer* (253 U.S. 350), *Leser v. Garnett* (258 U.S. 130) and *United States of America v. William H. Sprague* (282 U.S. 716). I may, however, add and clarify that none of the challenges so made before the United States Supreme Court was based upon the doctrine of basic features or basic structure of the Constitution as no such theory or doctrine has so far succeeded in finding any place in the legal or judicial reasoning in that country.

19. It is but obvious that every document of whatever nature or character has some salient or basic features and whenever that document is amended in any significant way its earlier salient or basic features do stand altered accordingly. Thus, salient or basic features of the original document by themselves are never immutable or unalterable and they have no permanence of their own as they are relatable to the shape and contents of the relevant document as it exists at a particular time. In this context salient or basic features can clearly be distinguished from immutable features which carry a different connotation. Apart from that recognizing a salient or basic feature is one thing and applying a legal theory to the same is another thing. This is exactly why despite recognizing certain salient or basic features of our Constitutions in various judgments mentioned above this Court had invariably stopped short of applying the academic theory of basic features or basic structure of the Constitution because it did not accept the said academic theory and it said so in so many words. The salient or basic features were recognized by this Court in those cases only to help it properly interpret the relevant provisions of the Constitution and not for striking down any provision or amendment of the Constitution. The plethora of precedent cases and other material from some other countries cited and referred to by the learned counsel for the parties also finds a detailed mention in the judgments proposed to be delivered by some of my learned brothers and I would, therefore, avoid any detailed reference to those precedent cases and material

and would prefer, as far as possible, to record my own views, perceptions and understanding of the issues relevant to these petitions. It is important to mention here that the case of *Syed Zafar Ali Shah* (*supra*) was the only case in which this Court had ever observed that "the Parliament cannot alter the basic features of the Constitution" but while observing so the Court was labouring under an impression that it had already been so held by this Court in the case of *Mahmood Khan Achakzai* (*supra*). Apparently, and I observe so with great respect, this Court had overlooked on that occasion that the majority of the Honourable Judges deciding the case of *Mahmood Khan Achakzai* had in fact not agreed with that view expressed by some other Honourable Judges. However, what is more important in the present context is the circumstances or the background in which the above reproduced observation, though factually mistaken, was made by this Court in the case of *Syed Zafar Ali Shah*. The full observation made in that case by this Court was "We are of the considered view that if the Parliament cannot alter the basic features of the Constitution, as held by this Court in *Achakzai's* case (*supra*), power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament." It was in the context of a military takeover that while allowing the usurper to amend the Constitution for the purposes of day-to-day governance of the country he had been restrained from amending the basic features of the Constitution. There is hardly any need to emphasize that restraining a military usurper from tinkering with the salient or basic features of the Constitution is materially different from setting at naught an amendment of such salient or basic features brought about by the people, the political sovereign, themselves which salient or basic features had been incorporated in the Constitution by the people themselves in the first place. This Court has never adopted the latter course before and, in my considered opinion, it ought not to adopt that course on this occasion either. Unfortunately our history is full of military takeovers and in cases coming up in that background this Court had tried to regulate the authority to amend the Constitution extra-constitutionally and not the authority bestowed by the Constitution itself to amend. Those cases may only be authority for

the limits of amending the Constitution in a situation where the Constitution is not fully in force and not authority for a situation in which the Constitution is completely in force and governs its own procedures. A perusal of the precedent cases from the Indian and other jurisdictions cited before this Court clearly shows that the Indian and other courts had referred to, accepted or applied the theory of basic features or basic structure in the backdrop of some serious actual or apprehended threats to the constitutionally guaranteed rights of the people. Those cases were products of extraordinary situations and the Indian and other courts had leaned in favour of protecting the people and their rights. The situation in Pakistan in this respect has also not been any different inasmuch as the salient or basic features of the Constitution had been referred to by the courts in this country only when the matters in hand called for protecting the constitutional and legal rights of the people from the hands of military rulers or puppet governments or parliaments and not otherwise. The common thread, therefore, running between the judicial approaches adopted in Pakistan, India and other countries in such matters has throughout been that if the people have voluntarily demonstrated a will to amend the Constitution then the courts have decided not to stand in their way but when some amendments are brought about in the Constitution by an otherwise unconstitutional force or by a democratic force trying to force its way against the people's constitutionally and legally protected rights through its temporary majority in the Parliament then the courts have played their role in trying to protect the people's rights even if they had to invoke some academic theories for the purpose. It may be well to remember that the theory of implied limitations of the amending power (the theory of basic features or basic structure of the Constitution) is in essence meant for extreme situations where an existing constitutional dispensation is to be preserved in the face of an overpowering transient force attempting to mutilate it, be it a brute temporary majority in the parliament or a military force momentarily usurping constitutional apparatus, and invoking such a theory for blocking an amendment unanimously passed by the Parliament and yearned for by the people at large for decades would amount to committing violence upon that theory itself. We have been

informed that none of the constitutional amendments interfered with by the Supreme Courts of India and Bangladesh had been passed by the Parliaments of the said countries unanimously and that surely is a clear and unmistakable point of distinction as far as the Eighteenth Amendment of the Constitution of Pakistan is concerned. In his autobiography *Before Memory Fades* (published by Hay House, India) Fali S. Nariman, a legendary Indian lawyer, had called the basic structure theory "of doubtful legal validity" and "illogical" but had found the Supreme Court of India to be justified in utilizing that theory for protecting the Constitution and the people from a temporary overpowering majority in the Parliament. He had observed that

> "Though of doubtful legal validity, the basic structure theory was the reaction of a court that was apprehensive of an *over-enthusiastic, over-powering one-party majority in Parliament.*
> ---
> The basic structure theory was the response of an anxious, activist court to the experience of the working of the Indian Constitution during the first 23 years. It remains today an auxiliary precaution against a possible tidal wave of *majoritarian rule* – majoritarian rule was the political order of the day for 40 long years (from 1950 right up to the late 1980s)."
> *(italics have been supplied for emphasis)*

Even Dr. Durga Das Basu in his classic commentary on the Constitution of India had commented on this matter on the same lines when he had written that

> "The doctrine of basic features had been *invented* by the Supreme Court in order to shield the Constitution from frequent and multiple amendments by *a majoritarian government*."
> *(italics have been supplied for emphasis)*

It is, thus, palpable that in India the "illogical" theory of basic features or basic structure of the Constitution which was "of doubtful legal validity" had been "invented" by the Supreme Court of India only to preserve the existing Constitution in the face of a brute temporary majority in the Parliament attempting to mutilate some of its fundamentals to the detriment of the minority political opinion in the country. That theory was found in India to be relevant to a political divide on a constitutional issue and it shall be nothing but unthoughtful and incentive-incompatible to invoke and apply the said theory in our country for setting at naught a constitutional

amendment passed *unanimously* by the Parliament and yearned for by the people at large for decades. It may be well to remember in this context that the academic doctrine of *necessity* had been invoked by the courts of this country for the wrong reason, i.e. in support of abridging the rights of the people and we all know the disastrous consequences that had followed. Article 175A has been introduced in our Constitution with the unanimous support of all shades of public opinion and invoking another academic theory of basic features or basic structure of the Constitution for defeating the popular will in this regard may also lead to equally calamitous consequences. The bottom line is that protecting the people's rights even by invoking academic theories may appear to some to be justifiable but to others utilizing academic theories for defeating the people's free will may be unforgivable.

20. I must record here a note of caution against unthoughtful utilization of purely academic theories by a court of law while adjudicating upon practical issues, particularly in matters affecting governance and running of the State. I may observe with profound respect to those in the academia that academic theories depicting intellect, scholarship and ingenuity and advanced through a lecture or a book are like intellectual kite-flying which may be essential or useful for intellectual growth, making contribution to jurisprudence and advancement of learning through triggering thought processes but such theories remain in the air till they attain general acceptability on the ground. It may be quite hazardous for a court of law to decide constitutional or legal issues solely on the basis of half-baked academic theories until such theories mature and season as doctrines fit for being used as standards or yardsticks and until they attain general acceptability or widespread recognition. The theory of basic features or basic structure of a Constitution is one of such academic theories which is still in its nascent or embryonic stage and attempts made to introduce or apply the said theory in courts of law have so far failed to meet any noticeable success on the broader canvas. As a matter of fact the said theory has already been expressly rejected by this Court on many a previous occasion. We in this country are in a good position to appreciate that when in the past an

academic and jurisprudential theory, i.e. Hans Kelsen's 'pure theory of law' based upon 'necessity' and 'effectiveness' was imprudently utilized by the courts for deciding real life cases involving governance and running of the State and society the results were catastrophic and calamitous, as had been experienced in our country during the last about half a century. It is, thus, not surprising that the said theory invoked and applied with trumpeting and fanfare in the case of *State v. Dosso* (PLD 1958 SC (Pak) 533) had ultimately to be buried with a not so mournful knell tolling in the case of *Sindh High Court Bar Association and another v. Federation of Pakistan and others* (*supra*). A similar half-baked academic and jurisprudential theory of 'implied limitations of the amending power', commonly known as the theory of basic features or basic structure of the Constitution, propounded by a German jurist named Professor Dietrich Conrad is now trying to make an inroad into our constitutional law and practice and is being advocated for overthrowing an overwhelming popular will and I believe that we shall do better if we exercise caution and restraint in this regard at such a premature stage in the larger interest of democracy and constitutionalism in our country. It may be well to remember that the said academically propounded theory has so far principally been judicially accepted and applied only in one of the hundreds of countries of the world, i.e. India and that too with the thinnest of majority and gravest of controversy and Bangladesh has only followed the Indian example. Even when accepting and applying that theory every Judge of the Supreme Court of India had discovered and identified different basic features of the Constitution of India and according to a research paper read out before us so far as many as twenty-seven basic features of the Indian Constitution have been identified by different judges in different cases and that list is still expanding. Such elasticity of that theory with the concomitant uncertainty by itself makes that theory unworthy of acceptance as a constitutional test and that is why in Pakistan this Court has already declared in the case of *Mahmood Khan Achakzai* (*supra*) that "What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality." Some of our sages have already warned us in this regard in the past and we should pay heed to their words of wisdom. In the

case of *Brig. (Retd.) F. B. Ali and another v. The State* (PLD 1975 SC 506) Hamoodur Rahman, C.J. had observed that "The Courts cannot strike down a law on any such higher ethical notions nor can Courts act on the basis of philosophical concepts of law". Mamoon Kazi, J. had also observed in the case of *Wukala Mahaz Barai Tahafaz Dastoor* (*supra*) that "validity of a Constitutional provision cannot be tested on the touchstone of any other provision or rule or a doctrine." The most relevant observation made in the present context was that made by this Court in the case of *Fauji Foundation and another v. Shamimur Rehman* (PLD 1983 SC 457) wherein, after refusing to follow the Indian judgments on the theory of basic features or basic structure of the Constitution, it was added that "So what is now left is only a theory of basic structure or framework of the Constitution having no legal compulsion as a constitutional principle." Only a few months ago in the case of *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* (PLD 2010 SC 265) my learned brother Jawwad S. Khawaja, J. had observed asunder:

> "The Court while exercising the judicial function entrusted to it by the Constitution is constrained by the Constitution and must, therefore, perform its duty of resolving matters coming before it, in accordance with the dictates of the Constitution and the laws made thereunder. *If the Court veers from this course charted for it and attempts to become the arbiter of what is good or bad for the people, it will inevitably enter the minefield of doctrines such as the 'law' of necessity or salus populi suprema lex, with the same disastrous consequences which are a matter of historical record.*"
>
> *(italics have been supplied for emphasis)*

Apart from what has been observed above it must not be ignored that by virtue of Article 175(2) of the Constitution of Pakistan, 1973 "No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law" and Article 239(5) of the Constitution mandates that "No amendment of the Constitution shall be called in question in any court on any ground whatsoever". It ought to go without saying that a jurisdiction expressly taken away from a court by the Constitution itself cannot be deemed to have been "conferred" upon such court by an academic theory propounded by a foreign scholar. I find it very difficult to accept that an unambiguous textual ouster of jurisdiction can be ignored on the basis of nothing but a conceptual argument or statement.

21. Examining the contentions of the learned counsel for the petitioners from yet another angle I may observe that while invoking the theory of basic features or basic structure of the Constitution the learned counsel for the petitioners have tried to set up the provisions of the newly introduced Article 175A of the Constitution against the so-called basic feature *qua* fully securing independence of the judiciary introduced through Article 2A of the Constitution which had made the Objectives Resolution of 1949 a substantive part of the Constitution. It is important to note that both Article 2A and Article 175A were not a part of the original Constitution of 1973 and were inserted therein at different subsequent stages. The Objectives Resolution was not a substantive part of the original Constitution of 1973 but was merely a part of the Preamble to the Constitution and, thus, unenforceable. The whole argument based upon the Objectives Resolution being the *grund norm* manifesting the basic features of the Constitution, therefore, may be misconceived as the said so-called *grund norm* was not treated by the Founding Fathers even worthy of enforceability! Before insertion of Article 2A in the Constitution making the Objectives Resolution a substantive part of the Constitution its status as a part of the Preamble to the Constitution *vis-à-vis* the substantive provisions of the Constitution had been examined by this Court in the case of *Zia-ur-Rahman* (*supra*) and it had been concluded as follows:

> "A body having the power of framing a Constitution is not "omnipotent" nor can it disregard the mandate given to it by the people for framing a Constitution or can frame a Constitution which does not fulfil the aspirations of the people or achieve their cherished objectives, political, social or economic. These limitations on its power, however, are political limitations and not justiciable by the judiciary. If a Constituent Assembly or National Assembly so acts in disregard of the wishes of the people, it is the people who have the right to correct it. The judiciary cannot declare any provision of the Constitution to be invalid or repugnant on the ground that it goes beyond the mandate given to the Assembly concerned or that it does not fulfil the aspirations or objectives of the people. To endeavour to do so would amount to entering into the political arena which should be scrupulously avoided by the judiciary."

After insertion of Article 2A in the Constitution making the Objectives Resolution a substantive part of the Constitution its position *vis-à-vis* the other provisions of the Constitution came under scrutiny of this Court in the case of *Hakim Khan and 3 others v. Government of Pakistan through Secretary Interior and others* (PLD 1992 SC 595) and

it was found by this Court that in case of an apparent conflict between two provisions of the Constitution the courts must try to harmonize the seemingly conflicting provisions but if they are incapable of being harmonized or the conflict between them is incapable of being resolved then the courts ought not to embark upon choosing or preferring one provision of the Constitution over the other and in such a situation the matter should be left to the Parliament to resolve the same through its power to amend the Constitution. What is critical in the context of the present petitions is that in that case of *Hakim Khan* it had categorically been held by this Court that the provisions of Article 2A of the Constitution or of the Objectives Resolution of 1949 cannot be used as a touchstone or a test of repugnancy or contrariety *vis-à-vis* the other provisions of the Constitution. The petitioners in the present petitions wish to establish exactly the opposite of what this Court had unmistakably held in the case of *Hakim Khan*. Some extracts from various opinions recorded in that case may be particularly relevant to the controversy in hand and they are reproduced below:

> "The question before us now, therefore, is whether the High Court rightly construed the amplitude of the provisions of Article 2A, especially their effect on the other provisions of the Constitution, such as Article 45 thereof?"
>
> ---
>
> "This rule of interpretation does not appear to have been given effect to in the judgment of the High Court on its view that Article 2A is a supra-Constitutional provision. Because, if this be its true status then the above-quoted clause would require the framing of an entirely new Constitution. And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution. According to the opening clause of this Resolution the authority which Almighty Allah has delegated to the State of Pakistan is to be exercised through its people only "within the limits prescribed by Him". Thus all the provisions of the existing Constitution will be challengeable before Courts of law on the ground that these provisions are not "within the limits of Allah" and are in transgression thereof. *Thus, the law regarding political parties, mode of election, the entire structure of government as embodied in the Constitution, the powers and privileges of the President and other functionaries of the government will be open to question.* Indeed, the very basis on which the Constitution is founded namely the trichotomy of powers i.e. that the three great organs of the State have their own particular spheres of authority wherein they exercise their respective powers or the system of checks and balances could be challenged, alongwith all the ancillary provisions embodied in the 1973-Constitution in relation thereto. *Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its*

eventual destruction or at least its continuance in its present form. This presumably was not the intention -------. Their intention simply was that the Objectives Resolution should no longer be treated merely as a declaration of intent but should enjoy the status of a substantive provision and become equal in weight and status as the other substantive provisions of the Constitution. In case any inconsistency was found to exist between the provisions of the 1973 Constitution and those of the Objectives Resolution would, they expected, be harmonised by the Courts in accordance with the well-established rules of interpretation of the Constitutional documents already mentioned. Being creatures of the Constitution it was not visualised that they could not annul any existing Constitutional provisions (on the plea of its repugnancy with the provisions of Article 2A) as no Court, operating under a Constitution, can do so. To use the picturesque words of Mr. Justice (Rtd.) Sh. Aftab Hussain, former Chief Justice of the Federal Shariat Court, in his discourse on the subject of "the Shariat Bill and its implications" PLD 1986 Journal 327, "The Courts are the creation of the Constitution and on no principle of law can they be allowed to cut the tree on which they are perched".

(per Nasim Hasan Shah, J.)
(italics have been supplied for emphasis)

"Nowhere in the Objectives Resolution, either expressly or impliedly do I find either a test of repugnancy or of contrariety, nor empowering of an individual or of an institution or authority or even a Court to invoke, apply and declare Divine limits, and go on striking everything that comes in conflict with it by reference to Article 2A. Such an interpretation of Article 2A of the Constitution and appropriation of authority so to do amounts to usurpation. It would indeed be so when the amplitude of power reserved for the Parliament in the same Constitutional instrument is kept in view."

"The view taken in the Supreme Court decisions so far is that Article 2A of the Constitution did not subordinate Chapter 3-A of Part VII of the Constitution (Ahmed v. Abdul Aziz PLD 1989 SC 771); that it could not be adopted as a rule of repugnance for defeating the other Articles of the Constitution (Safdar Ali's case PLD 1988 SC 287); it could be utilised for correcting and reviewing the orders of judicial and quasi-judicial tribunals as held in the case of Mian Aziz A. Sheikh (PLD 1989 SC 613)".

"The Court's primary duty is to adjudicate by reference to positive law in a manner to lend certainty, clarity and precision to the application of law to concrete questions of law and fact necessarily required to be decided. The Court should not undertake examination of theoretical academic questions nor should ordinarily look for anomalies in the Constitution with a view to suggest to Parliament amendment or improvement in the Constitution. If the introduction of Article 2A of the Constitution as a substantive provision of the Constitution does not by itself authorise the Court to adopt it as a test of repugnancy with regard to the other Constitutional provisions it would be better for the superior Courts not to undertake this exercise or to record opinions on merits with regard to such repugnancy. That would be a commitment not conducive to the purely judicial functions that the Courts are required to perform under the Constitution."

(per Shafiur Rahman, J.)

"I also agree that if any Article of the Constitution is in conflict with Article 2A the appropriate procedure is to have it amended in accordance with the prescribed provision for the purpose."

(per Abdul Shakurul Salam, J.)

22. Subsequently in the case of *Mst. Kaneez Fatima v. Wali Muhammad and another* (PLD 1993 SC 901) this Court had observed in the context of Article 2A of the Constitution and the Objectives Resolution of 1949 as follows:

> "As is obvious from the aforesaid weighty observations, Article 2A cannot be pressed into service for striking down any provision of the Constitution on the ground that it is not self-executory and also that another provision of the Constitution cannot be struck down being in conflict with any other provision of the Constitution. -------
> Article 2A makes the Objectives Resolution a substantive part of the Constitution. *The Objectives Resolution inter alia provides that ------- and ensures the independence of judiciary. These high ideals were set out to be incorporated in the Constitution and on the basis of these guidelines the Constitution was framed -------.*"
>
> *(italics have been supplied for emphasis)*

In the later case of *Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another* (PLD 2010 SC 483) a Bench of this Court comprising of fourteen Honourable Judges (including the present Honourable Chief Justice and Jawwad S. Khawaja, J.) had the following to observe in respect of the Objectives Resolution of 1949 and Article 2A of the Constitution:

> "The Objectives Resolution remained a subject of discussion in various judgments and the judicial consensus seems to be that "*while interpreting the Constitution, the Objectives Resolution must be present to the mind of the Judge and where the language of the Constitutional provision permits exercise of choice, the Court must choose that interpretation which is guided by the principles embodied therein. <u>But that does not mean that Objectives Resolution is to be given a status higher than that of other provisions and used to defeat such provisions</u>. <u>One provision of the Constitution cannot be struck down on the basis of another provision</u>. The Objectives Resolution made substantive part of the Constitution provides a new approach to the constitutional interpretation since the principles and provisions of the Objectives Resolution have been placed in the body of the Constitution and have now to be read alongwith the other provisions of the Constitution.*"
>
> *(italics and underlining have been supplied for emphasis)*

Two things decided in that case are of critical importance to the present set of petitions: firstly, any *conceptual* assumption of jurisdiction by this Court by treating the principles (called by whatever name or expression) of the Objectives Resolution of 1949, the Preamble to the Constitution or Article 2A of the Constitution, upon which the theory of basic features or basic structure of the Constitution is largely based by the petitioners, to be of higher status than the other provisions of the Constitution is not acceptable in our

constitutional dispensation and secondly, even *textually* one provision of the Constitution or a concept attached to the same cannot be allowed to be utilized for the purpose of striking down any other provision of the Constitution which may seemingly be in conflict with that provision or concept. In the presence of that judgment unanimously handed down by a fourteen-member Bench of this Court the Objectives Resolution, the Preamble and Article 2A as well as the principles contained therein (the so-called basic features or basic structure of the Constitution) cannot now by declared as a touchstone or a test of repugnancy or contrariety *vis-à-vis* the other provisions or an amendment of the Constitution unless in the present or in some future case fourteen or more Honourable Judges of this Court hold otherwise by overruling the interpretation of the Objectives Resolution, the Preamble and Article 2A propounded in the said case of *Justice Khurshid Anwar Bhinder*. It is also important to note that the declaration that "One provision of the Constitution cannot be struck down on the basis of another provision" made by fourteen Honourable Judges of this Court in that case undoubtedly covers all the provisions of the Constitution including Article 175(3) pertaining to separation between the Executive and the Judiciary and the said declaration made and the principle enunciated by fourteen Honourable Judges of this Court cannot now be undone or departed or deviated from by a Bench or group of Honourable Judges of lesser numerical strength. I understand that in the present set of cases the numerical strength of the Honourable Judges of this Court purporting to assume jurisdiction in the matter, be it on conceptual or textual basis, is less than fourteen and if that be so then, with profound respect, such an endeavour or enterprise may, in the words of Shakespeare, amount to 'much ado about nothing' because the constitutional interpretation advanced and the law declared by fourteen Honourable Judges of this Court in the case of *Justice Khurshid Anwar Bhinder* would still hold the field.

23. Through the present petitions the provisions of Article 175A of the Constitution have been assailed on nothing but the touchstone of the Objectives Resolution, the Preamble and Article 2A of the Constitution, particularly with reference to the provision contained

therein regarding fully securing independence of the judiciary. In the case of *Hakim Khan* (*supra*) this Court had particularly noticed with reference to some specific portions of the speeches made by some very important and responsible Founding Fathers before the Constituent Assembly that the ideals and objectives mentioned in the proposed Objectives Resolution could even be modified at the time of framing of the actual Constitution itself. It is, thus, obvious that using the ideal and objective *qua* fully securing the independence of the judiciary contained in the Objectives Resolution, now forming a substantive part of the Constitution through Article 2A, and making the same a basis for accepting and applying the theory of basic features or basic structure of the Constitution would be misconceived besides being in conflict with the manifest intention of the Founding Fathers in this regard. It is also clear from the judgments rendered by this Court in the cases of *Hakim Khan, Mst. Kaneez Fatima* and *Justice Khurshid Anwar Bhinder* (*supra*) that the Objectives Resolution was meant only to envision the pillars on which the structure of the proposed Constitution was to be erected and that once the structure was in fact erected then the ideals and objectives contained in the Objectives Resolution could not be allowed to be utilized for the purpose of demolishing any pillar or any part of the structure actually constructed or for pulling or tearing down any modification of such structure. To me that approach was a very prudent approach and in a somewhat similar situation thrown up by the present petitions that course would be the wisest to adopt. In view of the considered opinions already recorded by this Court on the subject in the above mentioned three cases there is hardly any occasion, proverbially speaking, to try to reinvent the wheel through the present petitions.

24. Apart from what has been observed above I may add that it is quite understandable as to why the provisions of the Objectives Resolution of 1949, the Preamble to the Constitution reflecting the principles of the Objectives Resolution and Article 2A of the Constitution making the principles and provisions set out in the Objectives Resolution a substantive part of the Constitution and giving them effect accordingly had not been accepted in the above

mentioned cases as a touchstone or a test of repugnancy or contrariety *qua* the other provisions of the Constitution and the reasons prevailing in that regard can also be pressed into service with an equal persuasive force for not accepting and applying the theory of basic features or basic structure of the Constitution. The Objectives Resolution of 1949 contained the ideals and objectives of the people and was passed by the Constituent Assembly to guide the framers of the Constitution in framing the Constitution. The basic ideals and objectives of the people reflected in the Objectives Resolution revolved around Islam, democracy, federalism, provincial autonomy, fundamental rights including protection for minorities and independence of the judiciary. It is not disputed that the Preambles to all the permanent Constitutions framed in this country after passage of the Objectives Resolution were by and large based upon the provisions of the Objectives Resolution and the Constitutions themselves enshrined more or less all the said ideals and objectives and in fact all the said Constitutions were actually woven around those ideals and objectives. Through insertion of Article 2A in the Constitution of 1973 the principles and provisions set out in the Objectives Resolution were made a substantive part of the Constitution and effect had been given to them accordingly. The nexus, *nay* interchangeability, between the Objectives Resolution, the Preamble, Article 2A and the salient features of the Constitution of 1973 is, thus, undeniable and the same was so recognized in the Short Order passed unanimously by all the Honourable Judges deciding the case of *Mahmood Khan Achakzai* (*supra*). The relevant part of the Short Order read as follows:

> "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 as Article 2A inserted by the Eighth Amendment."

That being the factual position it may arguably be said that the principles of Islam, democracy, federalism, provincial autonomy, fundamental rights including protection for minorities and independence of the judiciary formed the bedrock, fundamental principles, basic features or basic structure of all the Constitutions

framed and adopted in this country. Such a statement necessarily sets the stage for launching and accepting the theory of basic features or basic structure of the Constitution and opens a door for this Court to strike down any provision of the Constitution or any amendment of the Constitution on the touchstone of that theory of basic features or basic structure but, quite clearly, in the above mentioned cases of *Hakim Khan, Mst. Kaneez Fatima* and *Justice Khurshid Anwar Bhinder* this Court was conscious of the dangers inherent in accepting the ideals and objectives set out in the Objectives Resolution, the Preamble and Article 2A as a touchstone or a test of repugnancy or contrariety *qua* the other provisions of the Constitution because acceptance of one of the afore-referred fundamental principles or basic features as a touchstone or a test of repugnancy or contrariety would have meant acceptance of each of the other fundamental principles and basic features also as a touchstone or a test of repugnancy or contrariety and that would have rendered the entire Constitution vulnerable. It is evident that in those cases this Court was conscious of the fact that the Objectives Resolution, the Preamble, Article 2A and the basic features of the Constitution were different sides or facets of the same coin and acceptability of one as a touchstone or a test of repugnancy or contrariety would *ipso facto* mean giving the same effect to the other and this Court consciously wanted to avoid that result. Regarding Islam as a touchstone it had been observed by Nasim Hasan Shah, J. in the case of *Hakim Khan* that "Thus all the provisions of the existing Constitution will be challengeable before Courts of law on the ground that these provisions are not "within the limits of Allah" and are in transgression thereof. Thus, the law regarding political parties, mode of election, the entire structure of government as embodied in the Constitution, the powers and privileges of the President and other functionaries of the government will be open to question." Likewise, if democracy were to be allowed to become a touchtone then the provisions in the Constitution regarding bicameral legislature, structure of governments, mode of elections, powers of the political executive, etc. would become shuttlecocks in the courts at the hands of people advocating different forms and patterns of democracy. Similarly, if federalism and provincial autonomy were to be accepted

as touchstones then the provisions in the Constitution regarding legislative lists, relations between the Federation and the Provinces and inter-provincial relations would be assailable before the courts through all sorts of challenges. In the same vein, if independence of the judiciary were to be declared and accepted as a touchstone or a test of repugnancy or contrariety *qua* the other provisions of the Constitution then the provisions of the Constitution in respect of structure of the judicial hierarchy, jurisdiction of various courts, modes of appointment and disciplinary processes would all become challengeable before the courts of law on different grounds. All such challenges would, of course, require a value judgment by the courts and instead of the people deciding as to what is good for them it would ultimately be the courts determining as to what is good for the people. That surely would bring serious damage and destruction, if not doom, to the constitutional system as we know it today and this is exactly what had been warned against by Nasim Hasan Shah, J. when his lordship had observed in the case of *Hakim Khan* that "Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form." There is hardly any difference between the ideals and objectives contained in the Objectives Resolution, the Preamble and Article 2A of the Constitution on the one hand and the basic features or basic structure of the Constitution canvassed before us through these petitions on the other hand. In this view of the matter the approach adopted by this Court in respect of the Objectives Resolution, the Preamble and Article 2A in the cases of *Hakim Khan, Mst. Kaneez Fatima* and *Justice Khurshid Anwar Bhinder* (*supra*) must also be adopted in respect of the so-called basic features or basic structure of the Constitution if we are to properly discharge our duty to "preserve, protect and defend the Constitution" as sworn by us in our official oath. This also explains why in the above mentioned cases of *Zia-ur-Rehman*, *Pir Sabir Shah*, *United Sugar Mills*, *Mahmood Khan Achakzai*, *Wukala Mahaz Barai Tahafaz Dastoor* and *Pakistan Lawyers Forum* (*supra*) this Court had, despite identifying and

recognizing some salient features of the Constitution, consciously and consistently refused to treat them as basic features in a particular sense lest they might be utilized for attracting the theory of basic features or basic structure of the Constitution and, as Nasim Hasan Shah, J. had remarked in the case of *Hakim Khan*, "pave the way for its eventual destruction or at least its continuance in its present form." This is also the reason why despite acceptance and application of the theory of basic features or basic structure of the Constitution by the Indian and some other courts the courts in Pakistan have so far stopped short of acceptance and application of that theory because such acceptance and application of that theory would rekindle and unleash the destructive potentials engrained in treating the principles and provisions of the Objectives Resolution of 1949, the Preamble and Article 2A of the Constitution of Pakistan as touchstone or test of repugnancy or contrariety *vis-à-vis* the other provisions of the Constitution. Admittedly the said theory has no textual support from the Constitution and I entertain no manner of doubt that any attempt made to reintroduce and apply that academic and judicially discarded theory in the garb of or under the veil of a conceptual interpretation of the Constitution would be wrought with the same hazards and perils as were feared from a direct acceptance and application of that theory. The proverbial old wine, if oxidized and turned into vinegar and declared as such, would be equally sour even if presented in a new bottle.

25. An apparent conflict between two or more fundamental principles or core values of a Constitution is a challenge which is frequently being faced by the judiciaries of many countries these days and for resolving such conflicts based upon competing principles or values or based upon conflicting rights guaranteed by different provisions of the same Constitution different approaches are being adopted in different parts of the world. In Canada Part I of the Constitution Act, 1982 contains the Canadian Charter of Rights and Freedoms and section 1 of the same provides as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, apart from the competing rights context, Canada's Supreme Court was confronted with a very interesting proposition that involved resolving and articulating underlying constitutional values derived from history, and not the text. The question was whether Quebec could legally and constitutionally secede from Canada by holding a unilateral referendum and the Court *inter alia* held as follows:

> "Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. *These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.*"
>
> *(italics have been supplied for emphasis)*

Secession would involve an amendment to the Constitution and Quebec could not amend the Constitution unilaterally. On the other hand, the referendum had no constitutional recognition or value. The Court said that the underlying principle of democracy demanded that the referendum be given some value. On the other hand, underlying principles of federalism, democracy, constitutionalism and rule of law required that unilateral action not be taken (because for the other states inclusion of Quebec in the union was part of the bargain of being within the union). Therefore, the Court reconciled these conflicts by reading into the amendment clause a duty to negotiate Quebec's exit should such a referendum take place and have that result.

26. In the context of two or more competing fundamental rights the Canadian approach is that where a state action seems to restrict a fundamental right/freedom the constitutionally prescribed test under Section 1 is whether or not the 'restriction can be demonstrably justified in a free and democratic society'. The Canadian Supreme Court laid down the test for when a restriction can be demonstrably justified in a free and democratic society in *R v. Oakes* [1986] 1 S.C.R 103 and later on the said test was applied in the cases of *Ross v. New*

Brunswick School District No. 15 [1996] 1 S.C.R. 825, *R v. S. (N.)* 2012 SCC 72, *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R 385, *R v. Keegstra* [1990] 3 S.C.R. 697, *Canada (Human Rights Commission) v. Taylor* [1990] 1 S.C.R 892 and *R v. Mills* [1999] 3 S.C.R. 668.

27. In Germany the Constitution ("The Basic Law") explicitly ranks certain provisions over others and states that certain portions of The Basic Law are un-amendable. Article 79(3), governing amendment to The Basic Law, provides:

> "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

Article 1 provides for the right to free development of personality (subject only to the constitutional order, the rights of others and the 'moral law'). It also provides for the right to life, physical integrity and freedom of the person. Article 20 provides for the democratic, social federal State, i.e. the nature of the State that Germany will be and these features cannot be amended. It was in this context that Germany decided two Abortion cases. In the *Abortion Case I* of 1975 the law was amended and it was laid down that abortion would be punishable if (a) carried out in the first 12 weeks with consent of the pregnant woman; (b) carried out after 12 weeks and there was a danger to life or health of the woman; (c) carried out prior to 22 weeks if the child had some grave hereditary or other harmful condition. In all cases the pregnant woman would have first received counseling and only then would abortion not be punishable; and in case of after 12 weeks, the counseling center had to certify that the condition in question existed. The question was whether Article 2(2) (right to life and physical integrity) read with Article 1 (human dignity, inalienability of human rights) protection extends to a fetus and what about the fundamental rights of the living person (the mother)? The Federal Constitutional Court of Germany very much adopted a "hierarchy of rights" approach. It stated that the right to life is protected not just against attacks by the State itself but there is an obligation on the State to protect life against attacks by others, i.e. a duty to preserve life and punish the act of its taking. Therefore, the

unborn child had a right to life as against its mother and it was required that abortion be a criminal act. However, in limited circumstances, where the totality of circumstances would make it unreasonable that a woman be forced to carry a pregnancy to term against her will (e.g. where to do so would jeopardize her own life or risk serious health issues) the legislature could make provision for such abortions not to be punished. The scope of judicial intervention in this legislative domain was carefully articulated by the Court and it was observed as follows:

> "The constitutional requirement to protect developing life is directed in the first instance to the legislature. The duty is incumbent on the Federal Constitutional Court, however, to determine, in the exercise of the function allotted to it by the Basic Law, whether the legislature has fulfilled this requirement. Indeed, the Court must carefully observe the discretion of the legislature which belongs to it in evaluating the factual conditions which lie at the basis of its formation of norms, which discretion is fitting for the required prognosis and choice of means. The court may not put itself in the place of the legislature; it is, however, its task to examine carefully whether the legislature, in the framework of the possibilities standing at its disposal, has done what is necessary to avert dangers from the legal value to be protected."

In the context of conflict between competing rights the Court had the following to observe regarding the hierarchy of rights:

> "The Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced (Decisions of the Federal Constitutional Court, 2, i 12), that human beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially "worthless" and which therefore excludes the destruction of such life without legally justifiable grounds. This fundamental constitutional decision determines the structure and the interpretation of the entire legal order. Even the legislature is bound by it; considerations of socio-political expediency, even necessities of State, cannot overcome this constitutional limitation (Decisions of the Federal Constitutional Court, 1,14 36)."

The *Abortion Case II* of 1993 did not depart radically from the reasoning of the first case mentioned above. However, it did depart in conclusions. It said that the State had a constitutional obligation to make sure that "too little protection" was not provided to unborn life. If abortion is legalized, this would be the case. So abortion must be considered illegal, but does not need necessarily to be a criminal offence. However, the legislature can make provision for when even

an illegal abortion will not be punished. Therefore, it relaxed its view on the abortion question – and permitted abortions within the first 12 weeks as long as there was state counseling of the individual who sought the abortion. This is because the Court said the only way to make counseling effective was for the sword of criminal sanction not hanging over the heads of those seeking abortions.

28. In Germany the *Muslim Headscarf Case* of 2003 highlighted a conflict between a constitutional value and an individual's right. The decision of the Federal Constitutional Court in that case seems to suggest that where rights conflict the balancing act is to be done by the Parliament. There is, in German law, a principle of "practical concordance" when constitutional rules conflict. The name is suggestive of the exercise to be carried out in such cases.

29. In the United States of America the case law largely does not employ the kind of analysis that, for example, the Canadian Supreme Court employs. To be sure, when State action or individual rights conflict, a resolution is found – but it usually is not found by acknowledging competing rights and reconciling them. A good example is the United States Supreme Court decision on abortion: *Roe v. Wade* (No. 70-18) 410 U.S. 113. Whereas the German Constitutional Court recognized a set of competing rights the United States Supreme Court did not. Its reasoning was that there was one right involved: that of the woman, her bodily integrity and privacy. On the other hand, were not "rights" but rather two "valid state interests": the State interest to protect women's health and the State interest to foster the 'potentiality of life'. In such cases, when the government takes a measure in pursuance of a valid State interest that has the effect of infringing a fundamental right, the United States Supreme Court employs a 'strict scrutiny' test. The test is three-fold:

(i) There must be a compelling governmental interest.

(ii) The law or policy must be narrowly tailored to achieve that interest.

(iii) And it must be the least restrictive means of achieving that interest.

In the case of *Roe* a ban on abortion was under consideration and the Court held that in the first trimester the government interest was not compelling enough to interfere with the woman's right because the risk to health was minimal and potentiality of life too remote. In the third trimester the interest becomes compelling enough and, therefore, abortion can be restricted. In this way "defining away" one set of rights as a compelling interest is typical of the United States Supreme Court as is evident from the cases of *Capitol Square Review and Advisory Board v. Pinette* (515 U.S. 753) and *New York Times Co. v. United States Supreme Court* (403 U.S. 713). In the former case only Souter J. briefly followed the competing values analysis. In the United States the cases on this issue have two distinguishing factors:

(i) There are no constitutional amendments in their cases.

(ii) The case law is generally framed in the sense of a right versus a governmental interest.

The case of *Schenck v. U.S.* ((1918) 249 U.S. 47) was also an example of balancing competing rights or conflicting public interests. Even in their post 9/11 national security decisions, the key issue is the applicability of the United States Constitution on certain detainees. First, the issue was whether Guantanamo Bay detainees had the right to challenge their detention as enemy combatants. The Court said that a right had to be given to them and then, in order to do so, the government through an executive order established military commissions where the detainees could bring such a challenge and this was challenged and struck down on the ground that only the Congress could do so (and not the Executive). Thereafter the Congress enacted a similar regime and this was challenged on the ground that it was not an adequate replacement for the right of *habeas corpus* granted in the Constitution. So the question arose as to whether the constitutional right of *habeas corpus* applied to the detainees or not and the Court held that it did. However, in each of these cases a sub-constitutional instrument attempted to avoid the Constitution which factor may not be strictly relevant to the issue before this Court in the present set of petitions.

30. In the United Kingdom the case of *A.G. v. Times Newspaper* (1974) A.C. 273, in India the cases of *Chintaman Rao v. M.P.* (1950)

S.C.R. 759, *Madras v. V. G. Row* (1952) S.C.R. 597, *Ramji Lal Modi .v. U.P.* (1955) 1 S.C.R. 1004, *Babulal Parate v. Maharashtra* (1961) 3 S.C.R. 423 and *S. Rangarajan v. P. Jagjivan Ram* (1989) 2 S.C.C. 574 and in Pakistan the cases of *East and West Steamship Company v. Pakistan* (PLD 1958 SC 41), *Independent Newspaper Corporation (Pvt.) Ltd. v. Chairman Fourth Wage Board and Implementation Tribunal for Newspaper Employees* (1993 PLC 673), *Jameel Ahmed Malik v. Pakistan Ordinance Factories Board* (2004 SCMR 164) and *Pakistan Muslim League v. Federation* (PLD 2007 SC 642) are some of the cases wherein the issue dealt with by the courts was balancing competing rights or conflicting public interests. In the Pakistani context the courts have generally to tread very carefully in this kind of a situation because bringing about a balance in competing or conflicting values or principles is one thing and allowing one value or principle to trump another is a totally different thing and if the latter course is adopted in Pakistan then Islam as religion (with all its different sects and interpretations having no uniformity of thought or action) may trounce or overshadow all other values or principles and this is what was cautioned against by Nasim Hasan Shah, J. in the case of *Hakim Khan* (*supra*) when he had observed that "Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form."

31. This brings me to the issue of separation of powers and the role of the courts in respect of judicial review. Insisting upon isolation of the judicial organ of the State from the other organs some of the learned counsel for the petitioners have invoked the concept of separation of powers and have criticized inclusion of politicians in the process of appointment of judges. Clause (3) of Article 175 of the Constitution requires that the Judiciary is to be separated from the Executive but that primarily means that the Judiciary is not to perform executive functions and the Executive is not to perform judicial functions. It is important to notice that in clause (2) of Article 175 of the Constitution it had been stipulated that "No court shall

have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law" and that clause was followed by clause (3) mandating that "The Judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day". It is evident that clause (2) of Article 175 dealt with jurisdiction of the courts and clause (3) talked of the judiciary as an institution performing judicial functions and, thus, the separation being contemplated was in respect of the functions being performed by the two organs of the State in their defined spheres. Apart from that such separation was primarily intended to be achieved at the sub-constitutional level and was never meant to bring about a separation between the two organs of the State even in matters where the Constitution itself provides for collaborative and concerted action by the two in matters essentially non-judicial. In order to understand the extent and scope of the provisions of clause (3) of Article 175 of the Constitution *vis-à-vis* separation of the Judiciary from the Executive it shall be advantageous to reproduce an extract from a speech delivered by Mr. Abdul Hafeez Pirzada, one of the Founding Fathers of the Constitution of 1973, on the floor of the National Assembly on 03.09.1976 during the debate on the Constitution (Fifth Amendment) Bill, 1976 wherein he had remarked as follows:

> "We had provided in the Constitution that within a period of three years, Judiciary shall be separated from the Executive. By the separation of Judiciary we did not contemplate the superior courts of justice, the Supreme Court and the High Courts. These were courts of Magistrates."

The judgment delivered by this Court in the case of *Government of Sindh and others v. Sharaf Faridi and others* (PLD 1994 SC 105) also unmistakably shows that the separation of the Judiciary from the Executive mandated by clause (3) of Article 175 of the Constitution primarily pertained to separation regarding performance of respective functions by the two organs of the State and not to a general prohibition regarding any interaction between them whatsoever even where such interaction was contemplated or provided for by the Constitution itself in non-judicial matters. While holding in that judgment that independence of the judiciary is necessarily relatable to independence in performance of judicial functions it was observed by this Court asunder:

> "Now according to the consensus of the jurists, the independence of the judiciary means ---
>
> (a) that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and
>
> (b) that the judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."

Appointment of judges of the superior courts is essentially an executive function but the Constitution itself has always provided for effective participation of some highest members of the judiciary in the process of such appointments. It is but obvious that the specified members of the judiciary participating in the consultative and deliberative process of appointment of judges of the superior courts participate in such process as *persona designata* and they do not perform any judicial function in that capacity. Such participation of the Executive and the Judiciary in the consultative or deliberative process prior to an appointment and participation of even the Legislature in that process, thus, cannot be said to be offensive to the constitutional concept of separation of powers. There is no doubt in my mind that the separation talked about in clause (3) of Article 175 of the Constitution pertains to functional separation and not institutional isolation. This view finds support from the judgments handed down by this Court in the cases of *United Sugar Mills* (*supra*) and *Fauji Foundation* (*supra*) wherein it had clearly been recognized that separation between different organs of the State is not watertight.

32. While dwelling on the question of separation of powers some of the learned counsel for the petitioners have also referred to the provisions of Article 7 of the Constitution to maintain that while defining the 'State' in that Article the judiciary had been kept out of that definition and that too highlights that the judiciary is to be kept aloof from the other organs of the State. I have, however, remained unable to subscribe to this submission. Article 7 is placed in Part II of the Constitution and that Part of the Constitution deals with

'Fundamental Rights and Principles of Policy'. Article 7 of the Constitution reads as follows:

> "In this Part, unless the context otherwise requires, "the State" means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess."

A bare reading of this Article shows that the definition of the 'State' contained therein is restricted in its applicability to Part II of the Constitution only and the words "unless the context otherwise requires" manifest that even that definition may not apply in that Part of the Constitution itself if the context of a particular matter requires otherwise. Apart from that it is quite understandable that the judiciary could not be included in the definition of the 'State' for the purposes of that Part of the Constitution because, in terms of that Part, the State is to give effect to the Fundamental Rights contained in Chapter 1 of that Part and it is the judiciary which, in exercise of its jurisdiction under clause 1(c) of Article 199 and clause (3) of Article 184 of the Constitution, is to enforce those rights against the State in cases of their violation. In such matters the role of the judiciary is that of a monitor or an adjudicator and, therefore, it could not at the same time be clubbed together with those who are to be monitored or adjudicated against. As regards the Principles of Policy contained in Chapter 2 of Part II of the Constitution suffice it to observe that the principles of policy contained in that Chapter are meant to be adopted and followed by the executive and legislative organs of the State and not by the judiciary and by virtue of clause (2) of Article 30 of the Constitution validity of any action taken or of any law enacted in that regard is not justiciable. In this view of the matter the judiciary lacks any direct role in respect of such principles of policy and, therefore, its exclusion from the definition of the 'State' in Article 7 should not be difficult to comprehend. In the case of *Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan and another* (PLD 1989 Karachi 404) Saleem Akhtar, J. had recorded similar reasons for explaining as to why the judiciary had not been included in the definition of the 'State' in Article 7 of the Constitution. The submission made on the strength of Article 7 of the Constitution has, thus, utterly failed to impress me. It may appear to

be somewhat incongruous to point out, but sufficient to take the wind out of this submission, that in the case of *Mst. Fazal Jan v. Roshan Din and 2 others* (PLD 1990 SC 661) this Court and in the case of *Haji Nizam Khan v. Additional District Judge, Lyallpur and others* (PLD 1976 Lahore 930) the Lahore High Court had held that for the peculiar situations mentioned in those judgments the judiciary would be deemed to be included in the definition of the 'State' contained in Article 7 of the Constitution. Those judgments indicate that the words "unless the context otherwise requires" appearing in Article 7 of the Constitution have expressly kept a door open and the submission made above may be shown the door on this score as well.

33. Judicial review of executive action and judicial review of legislative action stand expressly recognized by our Constitution and it is judicial review of constitutional amendment which is at issue in the present cases. It is proverbial that judges do not make law but they only interpret it. However, while advancing their own versions of the theory of legal positivism legal philosophers like H. L. A. Hart and Ronald Dworkin had maintained that while interpreting the law judges sometimes make law and, thus, they legislate and as a sequel to that theory some legal philosophers maintain that the role of judges should be restricted to applying the law only and they should not even be interpreting the law. Justice Oliver Wendell Holmes of the Supreme Court of the United States of America had something of his own to say on the subject and according to him "Judges do and must legislate but they do so only interstitially; they are confined from molar to molecular motions". A further elaboration of that was made by Justice Cardozo of the same Court by observing that the judge legislates only between gaps. According to him "Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law." The underlying theme of the theory advanced by H. L. A. Hart and Ronald Dworkin and the filling of the

gaps by judges in terms of the "pervading spirit of the law" talked about by Justice Cardozo may be understandable but again they fall within the realm of academic theory and judicial philosophy which must, in a given case, yield to the letter of the Constitution or the law where it is clear and admits of no ambiguity. In Pakistan clause (6) of Article 239 of the Constitution clearly provides that "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" and clause (5) of the same Article goes on to mandate that "No amendment of the Constitution shall be called in question in any court on any ground whatsoever". On the strength of the theory of basic features or basic structure of the Constitution the leaned counsel for the petitioners require this Court to disregard the unambiguous provisions of Article 239 in the garb of constitutional interpretation and they want this Court to inject judicial assumptions into the Constitution not having the backing of its explicit words or provisions so that the present will of the people to be achieved through recent insertion of Article 175A in the Constitution may be thwarted and, surprisingly, they want it to be done in the name of achieving the aspirations of the people who had adopted the original Constitution way back in the year 1973! A judicial review which thwarts the present will of the people and tries to impose the past will of those who are no more may not have much to commend itself. Apart from that a judicial review which sacrifices the explicit words of a Constitution at the altar of some hypothetical judicial assumptions may also not commend itself for approval. I have found a lot of substance in the submission of the learned law officers that within our constitutional system of separation of powers the legitimate power of judicial review ought not to be confused with undertaking a constitutional review and that too on the basis of nothing but some judicial assumptions. The Judges of this Court have sworn an oath to "preserve, protect and defend the Constitution" and striking down a part of the Constitution by them may, in the words of Sir Francis Bacon in his essay 'Of Innovations', "piece not so well" with such oath. The judiciary is a creation of the Constitution and its job is to apply and interpret the Constitution and the law. It would appear to be unwise on its part to try to be

wiser than the creator. Judges are expected to be wise and it would be otherwise if they lay claim on being wiser than the whole society they are meant to serve.

34. The sum total of all the precedent cases treating the theory of basic features or basic structure favourably is that a power to amend does not include a power to destroy and, therefore, the Parliament cannot be allowed to destroy a basic feature of the Constitution or the basic structure of the Constitution through a constitutional amendment. According to the said theory the judiciary has the prerogative to interpret the Constitution and, therefore, through the means of interpretation it can stop the Parliament from destroying the Constitution. However, what this theory does not contemplate is that sovereignty of the Parliament and its power of amending of the Constitution are also fundamentals of the Constitution and in an appropriate case the Parliament may also feel that the judiciary's power to interpret also does not include a power to destroy and it cannot be allowed to destroy those fundamentals of the Constitution in the name of interpretation of the Constitution. If the power to amend the Constitution is a derivative power of the Parliament then even the power to interpret the Constitution is also a derivative power of the judiciary. The judiciary's use of the theory of basic features or basic structure in such a situation may, therefore, legitimately be perceived as self-serving and lopsided. The constitutional principle of separation of powers is based upon a balance of power and, thus, the hazards posed by any transgression by the judiciary may be as harmful to the balance as any transgression by the Parliament. If such balance is disturbed or undermined then the judiciary may claim to have the last word but the people and the Parliament may have the last laugh. Let nobody forget that if the people can adopt a Constitution then they can also overthrow or scrap the same or rewrite it. An attempt by the judiciary to overstep the prescribed limits in the name of interpretation so as to reign in the Parliament may attract or prompt a backlash from the Parliament which, by invoking sovereignty, may want to reign in the judiciary and that would be a sure recipe for destruction of the Constitution and its delicately poised system which both the institutions may ostensibly

and avowedly be attempting to avoid. The Constitution is a social contract which creates a balance of powers by placing limitations upon different organs. Overstepping of such limitations by any organ may destroy the social contact itself and may make the system collapse, leading to anarchy and free for all. The Constitution of 1973 clearly recognizes the Parliament as a legislative as well as a constituent body as it expressly allows it to amend the Constitution and places no restriction upon its powers to amend the Constitution. The Constitution also expressly ousts the jurisdiction of the judiciary from entertaining any challenge against an amendment of the Constitution brought about by the Parliament in accordance with the prescribed procedure. In view of such explicit constitutional mandates and such unequivocal constitutional prohibition any intervention in the matter by the judiciary in the name of salvaging the constitutional design would in fact have the effect of tearing down the constitutional system rather than rescuing or saving it. It is, thus, not surprising that in the cases of *Zia-ur-Rahman*, *Pir Sabir Shah* (*supra*), *Federation of Pakistan v. Saeed Ahmad Khan and others* (PLD 1974 SC 151), *Islamic Republic of Pakistan v. Abdul Wali Khan, MNA* (PLD 1976 SC 57), *Dewan Textile Mills*, *United Sugar Mills*, *Fauji Foundation*, *Hakim Khan* and *Syed Zafar Ali Shah* (*supra*) it had categorically, emphatically and unmincingly been declared that the courts in Pakistan deriving their authority and jurisdiction from a written Constitution have no jurisdiction to strike down any provision or amendment of the Constitution, except on the ground of some express internal requirement as opposed to any judicial assumption. It is of critical importance to mention here that in the above mentioned cases of *Abdul Wali Khan, Dewan Textile Mills, United Sugar Mills, Fauji Foundation, Pir Sabir Shah, Mehmood Khan Achakzai* and *Pakistan Lawyers Forum* (*supra*) the Indian cases of *Shankari Prasad*, *Sajjan Singh*, *Golak Nath*, *Kesavananda Bharati*, *Indira Nehru Gandhi*, *Minerva Mills* and *Waman Rao* (*supra*) were taken due notice of with reference to the issue of judicial review of constitutional amendments and the theory of basic features or basic structure of the Constitution and it was consciously and consistently decided not to follow the Indian judgments in that regard. To quote

only from a couple of the said judgments, in the case of *Mahmood Khan Achakzai* it was concluded by Saleem Akhtar, J. as follows:

> "It 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 has 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 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."
>
> *(italics have been supplied for emphasis)*

Similarly in the case of *Pakistan Lawyers Forum* it was observed by this Court in most categorical terms asunder:

> "56. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. *The superior Courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, i.e., the people of Pakistan.* In this context, it may be noted that while Sajjad Ali Shah, C.J. observed that "there is a basic structure of the Constitution which may not be amended by Parliament"' he nowhere observes that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. *The theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features.*
>
> 57. The conclusion which emerges from the survey is that prior to Syed Zafar Ali Shah's case, *there was almost three decades of settled law to the effect that even though there were certain salient features of the Constitution, no Constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the Courts. A Constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.*
>
> 58. *It may finally be noted that the basic structure theory, particularly as applied by the Supreme Court of India, is not a new concept so far as Pakistani jurisprudence is concerned but has been already considered and rejected after considerable reflection as discussed in the cases noted hereinabove.* It may also be noted that the basic structure theory has not found significant acceptance outside India, as also discussed and noted in the Achakzai's case. More specifically, the Supreme Court of Sri Lanka refused to apply the said theory in a case, reported as In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1990) LRC (Const.) 1. Similarly, the said theory was rejected by the

> Supreme Court of Malaysia in a case titled Phang Chin Hock v. Public Prosecutor (1980) 1 MLJ 70.
>
> 59. *The position adopted by the Indian Supreme Court in Kesavananda Bharati case is not necessarily a doctrine, which can be applied unthinkingly to Pakistan. Pakistan has its own unique political history and its own unique judicial history. It has been the consistent position of this Court ever since it first enunciated the point in Zia ur Rahman's case that the debate with respect to the substantive vires of an amendment to the Constitution is a political question to be determined by the appropriate political forum, not by the judiciary. That in the instant petitions this Court cannot abandon its well-settled jurisprudence."*
>
> *(italics have been supplied for emphasis)*

There does not appear to be any good reason at this late stage as to why the conscious approach adopted by the courts of this country in the above mentioned regard may now be reversed after about three decades of consistent practice and considered declarations. Such a reversal is most certainly going to invite a dreadful allegation that the *volte face* is motivated and self-serving because this time one of the constitutional amendments under challenge pertained to the powers of the Chief Justices themselves and that the judges had acted as judges in their own cause!

35. It must be appreciated that the people of Pakistan have given no mandate to the judges or courts *qua* judicial review of constitutional amendments and the same is evident from the provisions of clause (2) of Article 175 and clause (5) of Article 239 of the Constitution. According to clause (2) of Article 175 "No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law" and clause (5) of Article 239 stipulates that "No amendment of the Constitution shall be called in question in any court on any ground whatsoever". It may, however, be added in this context that despite the ouster of jurisdiction clause contained in clause (5) of Article 239 there may still be available a window for challenging a constitutional amendment and such window is provided by Article 238. According to Article 238 of the Constitution the power to amend the Constitution is subject to Part XI of the Constitution which comprises of Articles 238 and 239. It is noteworthy that the power to amend the Constitution is not made subject to any other Part or provision of the Constitution, not even to Article 2A or Article 8. Thus, apparently the only challenge to a constitutional amendment conceived by the Constitution is if such

amendment is not brought about in terms of the requirements of or in terms of the mechanisms provided by Articles 238 and 239 and it was on this very ground that some constitutional amendments purportedly brought about by General Pervez Musharraf, President of Pakistan, during an Emergency were set at naught by this Court in the case of *Sindh High Court Bar Association and another v. Federation of Pakistan and others* (*supra*).

36. Adverting now to the contents of the provisions of Article 175A of the Constitution brought under challenge through the present petitions I may observe that upon a careful reading and consideration of the recently introduced provisions of Article 175A I have not been able to find anything therein which may militate against independence of the judiciary. It must be stated at the outset that it would be wrong or unfair to judge the merits of the new system of appointment of judges of the superior courts introduced through Article 175A upon the yardstick of the previous system of such appointments because the new system is a totally different system, though care seems to have been taken in the new system to attend to the concerns which were the hallmarks of the previous system. I find that the provisions of Article 175A tend to expand the previous consultative process of appointment of judges of the superior courts and make the process more participatory. This Court had recognized in the case of *Al-Jehad Trust* (*supra*) that the "Act of appointment of a Chief Justice or a Judge in the superior Courts is an executive act." It is undeniable that the previous process of such appointments involved not only the Judiciary but also the Executive and the Legislature and this fact was recognized by this Court in the *President's Reference No. 2 of 1996* and *Al-Jehad Trust v. Federation of Pakistan* (PLD 1997 SC 84). In the earlier system the Judiciary was represented by the Chief Justices, the Executive was represented by the President and Governors and the Legislature was represented by the Prime Minster and the Chief Ministers. According to the *President's Reference No. 2 of 1996* and the case of *Al-Jehad Trust* (*supra*) the President was to act in the matter upon the advice of the Prime Minister and according to the later case of *Sindh High Court Bar Association* (*supra*) the Governor was to act in the matter upon

the advice of the Chief Minister. Through the freshly introduced provisions of Article 175A the representation of all these organs of the State in the process of appointment of judges of the superior courts has been expanded and now the members of the Judiciary involved in the process have been increased, participation of the Executive has been beefed up and the Legislature's involvement has been expanded through inclusion of parliamentarians belonging to the government as well as the opposition. Under the new system the Chief Justice of Pakistan, two most senior judges of the Supreme Court and a former Chief Justice or a Judge of this Court nominated by the Chief Justice of Pakistan constitute a majority in the Judicial Commission. The Parliamentary Committee comprises of eight members with equal representation of the government and the opposition and the Parliamentary Committee would not be able to stop the recommendations of the Judicial Commission provided at least six out of its eight members favour such an action. It may not be out of place to mention here that the concept of collegium of judges in the Judicial Commission introduced through Article 175A of the Constitution had already started being practised informally in this country and acknowledgment of the same is to be found in the case of *Supreme Court Bar Association v. Federation of Pakistan* (PLD 2002 SC 939). Inclusion of the Federal Minister for Law and Justice in the Judicial Commission may not be open to any serious objection because after all appointment of a judge of a superior court is an executive act and the Federal Minister for Law and Justice is the executive officer most relevant to the matter. Apart from that by virtue of the provisions of clause (1) of Article 90 of the Constitution the executive authority of the Federation is to be exercised in the name of the President by the Federal Government consisting of the Prime Minister and the Federal Ministers and on account of clause (2) of Article 90 of the Constitution the Prime Minister may perform his functions under the Constitution either directly or through the Federal Ministers. As regards inclusion of the Attorney-General for Pakistan in the Judicial Commission contemplated by Article 175A of the Constitution suffice it to observe that the Attorney-General is not only the Chairman of the Pakistan Bar Council but also the principal law officer of the country and clause (3) of Article 100 of the

Constitution provides that it is the duty of the Attorney-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of legal character, as may be referred or assigned to him by the Federal Government. In the case of *Federation of Pakistan and others v. Aftab Ahmad Khan Sherpao and others* (PLD 1992 SC 723) this Court had recognized the exalted constitutional status enjoyed by the Attorney-General and the important legal role played by him *vis-à-vis* the Executive and the Judiciary. Assigning a function to him by the Constitution itself in the matter of appointment of judges of the superior courts is, thus, not to be out of character with his job or office. Involvement of a former Chief Justice or a former Judge of this Court in the matter can bring a lot of experience and valuable input to the deliberations of the Judicial Commission and, likewise, participation of a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council in the meetings of the Judicial Commission can inject into the deliberations an assessment of a candidate by the legal fraternity. The Pakistan Bar Council is the highest statutory and representative body of the legal community in the country and being granted the status of a Senior Advocate of the Supreme Court is an honour conferred upon an Advocate of the Supreme Court by the Supreme Court of Pakistan itself on the basis of his "knowledge, ability and experience". Order IV rule 5 of the Supreme Court Rules, 1980 provides as follows:

> "*The Chief Justice and the Judges may select*, from time to time, from among those whose names are on the Roll of the Advocates, *persons who are judged, by their knowledge, ability and experience, to be worthy of being granted the status of Senior Advocate* and on signing the Roll of Senior Advocates shall assume the said status. ----- "
> *(italics have been supplied for emphasis)*

It may be interesting to point out that during the Constitutional Convention held in the United States of America in June, July, August and September of 1787 Doctor Benjamin Franklin had referred to the Scottish mode of appointment of judges "in which the nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves." Membership of some political office holders in the Judicial Commission and reference of the matter to a

Parliamentary Committee may not amount to politicizing of the judiciary because any nomination for appointment has to come through the Judicial Commission which is dominated by judges and the Parliamentary Committee cannot introduce any person for appointment on its own. While introducing the Constitution (Eighteenth Amendment) Bill, 2010 before the National Assembly on 06.04.2010 Senator Mian Raza Rabbani, Advisor to the Prime Minister and Chairman of the Special Committee of the Parliament for Constitutional Reform, had categorically assured that even under the new system of judicial appointments, as in the previous system, a name for appointment as a judge shall originate from the Chief Justice of Pakistan. It is, thus, obvious that under the new dispensation no other organ, authority or person can get anybody appointed as a judge of any superior court if the Judicial Commission dominated by judges does not nominate him for appointment. In this view of the matter participation of the people of Pakistan in the process through their chosen representatives cannot be dubbed as politicizing of the matter and dumped on the basis of mere semantics.

37. In his book titled *8th Amendment: Constitutional and Political Crisis in Pakistan* (published by Wajidalis, Lahore in 1994) Mr. Hamid Khan, Senior Advocate of the Supreme Court had decried "favourtism and nepotism" being practised in the matter of appointment of judges of the superior courts on account of lack of objective criteria for determination of relative merit amongst those who were under consideration for appointment as judges of the superior courts and had pleaded for provision of some checks on the constitutional functionaries involved in the process of judicial appointments. Mr. Hamid Khan had suggested in that book that

> "It may be useful to borrow from the U.S. Constitution by involving the Parliament in judicial appointments. Appointments of Judges of the Supreme Court of Pakistan and the Provincial High Courts should continue to be in the hands of the President in consultation of the Constitutional functionaries mentioned in the Constitution, but their confirmation should be made subject to the approval of a Parliamentary Committee drawn from the Senate and the National Assembly. The Opposition should be given due representation on such Committee which should hold public hearings in which qualifications and merit of those under consideration are openly discussed."

The pitfalls of the earlier system of appointments as well the consequences of lack of transparency therein had also been highlighted by Mr. Hamid Khan in another book of his titled *Constitutional and Political History of Pakistan* (published by Oxford University Press in 2001). In that book he had observed that the previous system of appointment of judges of the superior courts was capable of being manipulated and as a result of constant manipulations the judges of the superior courts had "become pawns on the political chess-board." The details of the instances mentioned by Mr. Hamid Khan in that respect may not be reproduced here because such details may embarrass the so-called "pawns". The system that reduced the judges to "pawns", according to Mr. Hamid Khan, needed an overhaul or a complete replacement. It is ironical that Mr. Hamid Khan happens to be one of the leading counsel appearing for different petitioners in the petitions in hand and it has not surprised me to notice that during his arguments he has not sought revival or restoration of the earlier system of appointments and has assailed only some parts of the new system. In that backdrop one of the biggest gains of the new system introduced through Article 175A of the Constitution appears to be that the role of the Prime Minister in the matter of appointment of judges of the superior courts has been marginalized. Judges becoming, in the words of Mr. Hamid Khan, "pawns on the political chess-board" was due to undue intervention of the ruling party in the affairs of the judiciary, particularly in the matter of appointments, and such intervention was mainly through the Prime Minister who is the leader of the majority in the National Assembly. The direct role of the Prime Minister in the matter of appointments and his power to block an appointment through his negative advice to the President, subsequently judicially required to be based upon recorded reasons which were justiciable, provided him a leverage which could throw a spanner in the whole consultative process and which opened a door for judicial accommodation in the matter for those candidates who were pushed for appointment upon political and extraneous considerations. In the new system introduced through Article 175A of the Constitution the Prime Minister's role has been reduced to that of a post office between the Judicial Commission/Parliamentary

Committee and the President through the necessary advice contemplated by the provisions of clause (1) of Article 48 of the Constitution. Although Article 175A does not expressly refer to that role of the Prime Minister in the matter and speaks of confirmation of the Judicial Commission's nomination by the Parliamentary Committee going to the President for appointment yet it goes without saying that in all the matters not falling in the President's discretionary powers he is bound to act upon the advice of the Prime Minister and the Rules of Business of the Federal Government would necessarily require that the Parliamentary Committee's confirmation is routed to the President through the Federal Ministry of Law and Justice and the Prime Minister. It would be nothing but misconceived to hold that in our parliamentary system of governance the office of the Prime Minister can never be reduced to that of a post office because instances to that effect can be found in the Constitution itself and a reference in this respect may be made to the provisions of Articles 56(3), 72(1), 73(1A), 75(1), 75(2), 75 (3), 77, 87(3), 160(4), 213(1), 213(2), 213(2A), 213(2B) and 234(1) of the Constitution. All those provisions of the Constitution clearly show that in some of the matters specifically provided by the Constitution the Prime Minister's role is that of nothing but a post office and he is to advise the President in those matters as a matter of course because a decision in that regard has already been taken by some other authority, body or institution specifically empowered in that respect by the Constitution. Similarities between the provisions of Article 175A and Article 213 in this particular respect are unmistakable and nobody has challenged the latter Article so far on that or any other ground. A survey of the Constitution manifests that there are matters where the Prime Minister is to apply his own mind to a particular matter before tendering an advice to the President and then there are other matters where a decision in the matter is to be taken by some other authority, body or institution which then is to be given effect to by the President upon an advice of the Prime Minister and in the latter matters the Prime Minister's advice to the President is to be nothing but a formality. It may not be out of place to mention here that even under the previous system of appointment of judges of the superior courts after the case of *Al-Jehad Trust* (*supra*) and amendment of Article 260

of the Constitution *qua* the definition of 'consultation' making the opinion of the Chief Justice of Pakistan binding the Prime Minister's advice to the President in the matter of appointment of judges of the superior courts had been reduced to a mere formality and had practically reduced the office of the Prime Minister to that of a post office in that regard. It would be anomalous to bemoan marginalizing of the Prime Minister's role in the new system of judicial appointments when in the earlier system the Prime Minister's role or advice was reduced to a mere formality by none other than this Court itself through the means of interpretation! In this view of the matter if independence of the judiciary is inextricably linked with the mode of appointment of judges then by marginalizing the role of the Prime Minister, and of the ruling party acting through him, in the matter of appointment of judges of the superior courts the freshly introduced Article 175A of the Constitution seems to have taken care of the biggest irritant in that regard. As if this were not enough, Article 175A has also ensured equal representation of the Treasury and the Opposition Benches in the Parliamentary Committee and the manifest intention in that regard is to further obviate any undue influence of the government of the day or the ruling party in the matter of appointment of judges of the superior courts. If taken in the positive spirit, the Parliament appears to have gone an extra mile by expanding the consultative process and at the same time reducing and marginalizing the roles of the President, the Prime Minister and the ruling party in such matter in order to cleanse the appointments process of undue influence of the political executive. It may be pertinent to mention here that even in the United Kingdom, which country is quite aptly described as the mother of modern parliamentary democracy, i.e. Westminster style of parliamentary democracy, through the Constitutional Reform Act of 2005 the role of the Prime Minister in the matter of appointment of judges has been reduced to that of only a post office. It, thus, cannot be argued with any degree of seriousness that marginalizing of the Prime Minister's role in the matter has the effect of adversely affecting parliamentary system of governance. Apart from that insisting upon effective judicial control over the appointments process and simultaneously bemoaning marginalizing of the Prime Minister's effective role in the

process appear to me to be a contradiction in terms which may be hard to reconcile or comprehend.

38. The learned law officers have informed us with reference to some documents that one of the main objects of bringing in the new system of appointment of judges of the superior courts was to provide for 'parliamentary oversight' of the process. In the dismal historical backdrop *qua* the earlier process of appointment if the disappointed and frustrated people of the country had decided to directly oversee the process of appointment of judges of the superior courts in future then nobody could blame them or deny them the right to do so. It may be relevant to mention here that while introducing the Constitution (Eighteenth Amendment) Bill, 2010 before the National Assembly on 06.04.2010 Senator Mian Raza Rabbani, Advisor to the Prime Minister and Chairman of the Special Committee of the Parliament for Constitutional Reform, had clarified that

> "------- the functions that were being performed by the Prime Minister in terms of the present system of appointment of Judges would be taken over by the Parliamentary Committee."

In the earlier system of appointment of judges of the superior courts the Prime Minister represented the Parliament but in the new system the Parliament has decided to reclaim that authority from the Prime Minister and has delegated it to a bipartisan committee of parliamentarians. Anybody believing in the parliamentary system of governance cannot seriously dispute the Parliament's right or power to reclaim an authority delegated by it to a body, authority or functionary under the Constitution and to delegate it again in favour of some other body, authority or functionary.

39. There are different methods of appointment of judges of the superior judiciary prevalent in different countries of the world and they include sharing of appointment powers between the executive and the judiciary, virtual control of the judiciary over judicial appointments which is also known as self-appointment process and the executive and legislative control over appointment of judges which admits of no formal role of the judiciary in this process. It has been demonstrated before us that most of the countries have adopted

procedures that provide for sharing the power of appointment of judges of the superior judiciary by the judiciary and the executive. In this method the extent of the executive's discretion in the matter varies from country to country but generally the executive is not bound to accept the recommendations of the Chief Justice. As regards the self-appointment process only a handful of countries confer an exclusive power of appointment upon the Chief Justice and his senior colleagues. In India and Pakistan this power was not explicitly recognized in the Constitution but such power was acquired by the Supreme Courts of both the countries through their judgments utilizing interpretative approach. In India the Chief Justice and some senior judges of the Supreme Court used to exercise this power whereas in Pakistan one person, the Chief Justice of Pakistan, had been exercising this power because his recommendations in the matter had been given primacy through a judgment of this Court handed down in the year 1996 and then through an amendment in Article 260 of the Constitution in the year 2002 making the opinion of the Chief Justice of Pakistan in the matter binding. We have been informed that quite recently through a constitutional amendment India has also done away with its old system of appointment of judges of the superior judiciary and a Judicial Commission, on the pattern of the new Judicial Commission of Pakistan, has been introduced for all appointments to the Supreme Court and the High Courts. The third method, adopted in the United States of America, provides for no role of the Chief Justice or other judges in the appointment of judges. In that method the President recommends the name and the Senate approves or rejects the nomination. It may be possible to suggest that one method of appointment is more suited to independence of the judiciary than the other but the fact remains that all such methods have been adopted in different countries avowedly to secure independence of the judiciary. It, thus, may not be correct to assume that independence of the judiciary would be undermined if the superior judiciary is not given the exclusive right to appoint its judges. United Kingdom, the country whose model we inherited and generally follow and where the Lord Chancellor's recommendation to the Prime Minister and then the Prime Minister's advice to the Crown was considered binding, has

also changed its appointments system since the year 2005. Through the Constitutional Reform Act, 2005 a Selection Commission and a Judicial Appointments Commission have been established in that country and roles have been provided therein to even lay persons having no direct concern with the legal profession! It has been pointed out before us that as many as one hundred and twenty-one countries of the world presently have Judicial Commissions or Judicial Councils taking care of judicial appointments, administration, transfers, promotions and discipline, etc. and in many of those countries political oversight of the matter is provided by Parliamentary Committees or their counterparts carrying different nomenclature.

40. I have found a lot of substance in the submission of the learned law officers and the learned counsel for the Federal Government that no single person should have the exclusive power to appoint judges of the superior courts. On 24.05.1949 Dr. B. R. Ambedkar, Chairman of the Constituent Assembly's Drafting Committee, had the following to say about the provisions of the proposed Indian Constitution relating to appointment of judges of the superior courts:

> "To allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the government of the day."

In his book *The English Judges* Robert Stevens had opined that

> "Judges choosing judges is the anti-thesis of democracy."

In the scheme envisaged by the original Constitution of 1973 the consultative process for appointment of judges of the superior courts in Pakistan involved the President, the Chief Justice of Pakistan, the Governors of the Provinces and the Chief Justices of the High Courts and through judicial interpretations the roles of the Prime Minister of Pakistan and the Chief Ministers of the Provinces in the process were also recognized but subsequently, as alluded to above, the recommendation of the Chief Justice of Pakistan had been given

primacy and still later the same was made binding which had the effect of reducing the consultative process to virtual nomination and appointment by the Chief Justice of Pakistan. Existence of unbridled discretion in the hands of public functionaries has consistently been disapproved by this Court and this Court has always insisted that exercise of discretion should be structured and, if possible, shared in order to make it transparent as well as fair. The latest judgment rendered by this Court on the subject is that in the case of *In re: Tariq Aziz-ud-Din and others* (2010 SCMR 1301). Becoming wiser through their experiences the people of Pakistan, acting through their chosen representatives in the Parliament, have now felt that instead of depending upon one person's choice the matter of appointment of judges of the superior courts should be a matter of shared responsibility with due weight to be given to the opinion of the Chief Justice of Pakistan and his senior colleagues and this has been achieved through introduction of Article 175A of the Constitution. The new system maintains the primacy of the judiciary in the matter of appointment of judges of the superior courts and, at the same time, it is more consultative and collective rather than being dominated by a single person. The hallmarks of the new system appear to be collective wisdom and shared responsibility. There is a need to take a long-term view and perspective on the new method of appointment and if some weaknesses in the method surface over time then the Parliament can always take an appropriate remedial action in that regard as and when required. In the case of *United States v. Wunderlich* ((1951) 342 US 98) Douglas, J. had observed that "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler. ------- Where discretion is absolute, man has always suffered."

41. The earlier process of appointment of judges of the superior courts had the Chief Justice of Pakistan as its linchpin or pivot and in one of its judgments this Court had referred to the Chief Justice of Pakistan as the *Pater Familias*. We shall be naïve if we deny that if we had some very honourable and respected *Pater Familias* in the past then there were also others who were not held by the people in that esteem. In the old process the aspiration of the people *qua* justice for

all through an impartial, independent, competent, efficient and effective judiciary, thus, depended on the luck of the people and on the integrity, independence and good choice of just one man. In that backdrop expansion of the consultative process and making of the process more participatory does not appear to be a bad idea on the part of the people. Parting with power must surely be difficult but an impression that the judges do not want to part with their exclusive or dominant role in the matter would not be a healthy impression. It may well be that to the people the matter is not of independence of the judiciary but of diminishing role of the Chief Justice of Pakistan whose opinion previously had primacy and binding effect. It may also be appreciated that in the context of independence of the judiciary the Chief Justice of Pakistan cannot be treated as the entire judiciary as an institution and, thus, some diminishing of his primacy in the matter of judicial appointments only cannot be equated with undermining independence of the judiciary as a whole. It surely is painful to let go a power which one has exercised and enjoyed for a long time but it is good to be graceful in parting with power when time for the same comes. The legendary Lord Denning, one of the greatest judicial minds in the United Kingdom in the last century and with whom I may boast of having had a personal association in my days at the Honourable Society of Lincoln's Inn, London, had decided to retire from service at the age of more than eighty-three years after serving as Master of the Rolls for over twenty years when The Times newspaper, also nicknamed The Thunderer, had criticized some observations made by him in his book *What Next in the Law* and had questioned his ability to continue discharging judicial functions. Lord Denning had described the whole episode in his last book *The Closing Chapter* which he had written after his retirement and the narrative and description is an eye-opener. The Thunderer in our case is the Parliament representing the people of this country and it has spoken in the matter with one voice. It shall be senseless not to pay heed to the unanimous voice of the people to whom the institution of judiciary is meant to serve.

42. It may also be appreciated that in the previous process there were others who also had their roles in the matter of appointment of

judges of the superior courts, i.e. Prime Minister, Governors and Chief Ministers and they have not so far claimed that diminishing or exclusion of their roles under the new process undermines independence of the judiciary. The principal criticism offered by the learned counsel for the petitioners to the new process of appointments to the superior judiciary under the provisions of Article 175A of the Constitution is that it involves politicians in the process but that cannot be accepted at its face value as it involves many assumptions including an assumption that an exclusive judicial control over the matter of appointments to the superior judiciary is imperative for independence of the judiciary, an assumption that all politicians and parliamentarians are bad and also an assumption that all politicians and parliamentarians are motivated to destroy independence of the judiciary. These assumptions are too wild and outrageous to be accepted as advanced. Let us not forget that independence of this country was brought about by a movement spearheaded by politicians, the Objectives Resolution of 1949, which has been characterized before us by some as the *grund norm*, included therein a resolve to fully secure independence of the judiciary and the same was adopted by none other than politicians and the Constitution of 1973, which has been termed before us as a sacred document, was also given to us by politicians. There are many countries in the world wherein judicial appointments are made through Judicial Commissions which have some non-judicial members and there are others wherein elected representatives of the people have a direct role in judicial appointments and such countries include the United Kingdom, the Republic of South Africa and the United States of America. In the earlier system of judicial appointments prevalent in the United Kingdom the main person responsible for judicial appointments was the Lord Chancellor who was also a member of the House of Lords. In the United States of America a nomination to a high judicial office made by the President needs confirmation from the Senate and in India it is the Parliament which can impeach a judge of the superior judiciary. Nobody has ever accused the British, the American or the Indian judiciary of lacking independence merely because politicians or elected representatives are involved in judicial appointments or removal in those countries.

Painting the politicians black as a class and tarnishing all the parliamentarians with the same brush may also not be fair or proper as, after all, it is the same parliamentarians who make laws for us which we all religiously try to obey and the Cabinet which governs the country is selected from the same parliamentarians. I may also observe that the suspicion and distrust of the politicians and parliamentarians voiced by the petitioners before us could also be turned around to maintain that the change of mode of appointments to the superior judiciary brought about by the people of this country through their elected representatives could be a reflection of gradually developed suspicion and distrust of the people in the earlier mode of 'self-appointment' whereunder judicial appointments were primarily in the hands of the judges themselves. The logic of such a contention is loaded besides being political and, therefore, the less said about the same the better. If the Parliamentary Committee's involvement in the process of appointment of judges of the superior courts is called politicizing the process then even this aspect has a silver lining. It has already been observed by me above that under the new system the Parliamentary Committee cannot introduce any person for appointment as a judge and it can only, by a three-fourth majority of its total membership, block a nomination made by the Judicial Commission. The parliamentarians becoming members of the Parliamentary Committee would be representing the people of this country and if a sizeable chunk of the population shows lack of trust *qua* a nominee then ordinarily, in the interest of a judiciary inspiring confidence of the populace, that nominee should even otherwise not be appointed as a judge. I have already noted above that while introducing the Constitution (Eighteenth Amendment) Bill, 2010 before the National Assembly on 06.04.2010 Senator Mian Raza Rabbani, Advisor to the Prime Minister and Chairman of the Special Committee of the Parliament for Constitutional Reform, had categorically assured that even under the new system of judicial appointments, as in the previous system, a name for appointment as a judge shall originate from the Chief Justice of Pakistan. Apart from that the learned Attorney-General for Pakistan appearing in these cases on Court's notice had the following to submit through his

written submissions which now form a part of the record of these cases:

> "15. I may further submit here that I have instructions to state that the names of the recommendees will be *initiated in the Judicial Commission* by the Hon'ble Chief Justice in consultation with the other Hon'ble Judges in the Commission. The Executive however, also, if need be may *suggest* names *for consideration by the Hon'ble judicial members*.
>
> 16. It is further stated that it is the stance of the Federation that in case of rejection of nomination by Parliamentary Committee, the said Committee shall have to state reasons which shall be justiciable."
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> *(italics have been supplied for emphasis)*

It is, thus, obvious that even under the new system of judicial appointments introduced through Article 175A of the Constitution the primacy of the judiciary in the matter of appointment of judges of the superior courts is to continue and, notwithstanding expansion of the consultative and deliberative process, no person would be appointed as a judge unless the highest judicial authorities initiate his nomination and no nomination would fall unless the highest judiciary, through a judicial process, agrees with non-confirmation of the nomination. This, I think, should be sufficient to allay or assuage most of the fears and apprehensions expressed before us *qua* the new system of appointments.

43. These petitions before us by and large also rest upon three other assumptions, i.e. the people were kept in the dark *vis-à-vis* the proposals for constitutional reforms in the matter of judicial appointments, the proposals were never properly or adequately debated by the parliamentarians before acceptance of the same and the parliamentarians had introduced Article 175A in the Constitution with motives other than *bona fide*. There is, however, no factual basis available for raising any such assumption and the record produced before us in fact contradicts such assumptions. In the opening paragraphs of this judgment I have already mentioned that change in the system of appointment of judges of the superior courts has been a longstanding demand of the legal fraternity as well as the public at large and the popular sentiment in that respect was reflected in the Charter of Democracy signed by the leaders of two major and most popular political parties of this country wherein concern was

expressly voiced against "lack of confidence in the judicial system" and it had been agreed *inter alia* that the method of appointment of judges of the superior courts in the country needed a substantial change. The new system of appointment of judges of the superior courts envisaged by the Charter of Democracy included nomination of a candidate by a Judicial Commission and confirmation of the nomination by a Parliamentary Committee. In the Manifestoes issued by both the said political parties before participating in the general elections held in the country on February 18, 2008 it had expressly been resolved to implement the principles agreed upon in the Charter of Democracy and "restructuring and reforming of judicial system" on the lines agreed in that Charter. Apart from a resolve to implement the Charter of Democracy the Manifesto of the Pakistan Peoples Party had expressly promised that

> "The appointments of Judges to Superior Judiciary will be made with the advice and consent of a Joint Parliamentary Committee consisting of equal representatives of the Treasury and the Opposition on the recommendation of a Commission headed by former Chief Justice, who has not taken oath under the PCO."

Likewise, the Manifesto of the Pakistan Muslim League (N) had not only resolved to implement the Charter of Democracy but had also expressly promised as follows:

> "Appoint a Judicial Commission comprising eminent jurists, Judges, parliamentarians, representatives of lawyers, and civil society to recommend and supervise restructuring and reforms of judicial system. The system of appointment of judges will be reformed to ensure appointments on merit alone and in a transparent manner."

As a result of the said general elections both the said political parties once again emerged as the most popular political parties in the country and the Pakistan Peoples Party came into power and the Pakistan Muslim League (N) became the largest party in the opposition at the Federal level and if put together the strength of those two political parties in the Parliament was a little less than two-third of its total membership. The Resolution passed by the National Assembly on 10.04.2009 as well as the Resolution passed by the Senate on 29.04.2009 seeking creation of an All Parties Special Committee for suggesting constitutional reforms had expressly referred to a general consensus that the principles contained in the

Charter of Democracy ought to be given effect to through appropriately amending the Constitution and thereafter the Speaker of the National Assembly had constituted a Special Committee of the Parliament for Constitutional Reform wherein representatives from all the political parties represented in the Parliament were included. The Special Committee had provided sufficient opportunity to the people at large to send any suggestion to the Special Committee they thought appropriate and hundreds of suggestions were in fact received by it in that regard. The proposals made unanimously by that Special Committee included a proposal to replace the existing system of appointment of judges of the superior courts with a new system and in the Statement of Objects and Reasons accompanying the Constitution (Eighteenth Amendment) Bill, 2010, through which *inter alia* Article 175A was introduced to the Parliament, had also expressly referred to the Charter of Democracy from which guidance had been sought for constitutional reforms. Finally, the Parliament had unanimously accepted the proposals for reforms forwarded to it by the Special Committee. It would, therefore, be unfair to assert that the people of this country were kept in the dark and that they had never authorized their elected representatives in the Parliament to amend the Constitution so as to bring about a new system of appointment of judges of the superior courts. Apart from that the assumption regarding keeping the people in the dark appears to me to be a dangerous assumption meant to drive a wedge between the people and the Parliament comprising of their elected representatives. It has not been disputed before us that passage of the Constitution (Eighteenth Amendment) Bill, 2010 by the Parliament was not followed by any protest from any quarter or section of the society and in fact passage of that Bill by the Parliament and assent given to it by the President were followed by widespread demonstration of jubilation and celebration by the public throughout the country. I may add that in the matter of the Parliament acting in its representative capacity and in accord with the wishes of the people the Parliament is accountable to the people whom it represents and not to any court and that any sanction against it in that regard has to be political rather than judicial.

44. In our constitutional scheme while electing their representatives the people invest such representatives with all the legislative and constituent powers to be exercised on their behalf and do not reserve any right to be consulted before exercise of such powers, irrespective of the gravity of the issue involved. Such investment and delegation of authority by the people in favour of their elected representatives is clearly borne out from the Preamble to the Constitution itself. In other words after electing their representatives the people exhaust their sovereignty and for the ensuing term of the Parliament the elected representatives are competent to exercise the people's sovereignty without consulting them and without seeking instructions from them. In the case of *Dewan Textile Mills Ltd. v. Pakistan and others* (*supra*) the relationship between the people and the Parliament and the Parliament's authority to act on behalf of the people without consulting them in the matter of amendment of the Constitution came under a detailed discussion and it was observed as follows:

> "Let me, however, indulge in the legal fiction and assume as the Preamble declares that it was the 'people' who framed the Constitution. Could it be said after the Constitution was framed that the 'people' still retain and can exercise their sovereign Constituent power to amend or modify that document by virtue of their legal sovereignty?
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> But it is difficult how the unorganised mass of people can legally be sovereign. This is only to put more explicitly what Austin meant when he said that political power must be a determinate person or body of persons, for, the people, at large, the whole people, as distinct from particular person or persons, are incapable of concerted action and hence, of exercising political power and, therefore, of legal supremacy.
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> Willoughby has said that "the sovereignty of the people, popular sovereignty and national sovereignty cannot accurately be held to mean that under an established Government, the sovereignty remains in the people. It may mean, however, that the Constitutional jurisprudence of the State to which it has applied is premeditated upon the principle that no political or individual organ of the Government is to be regarded as the source whence by delegation all the other public powers are derived, but that upon the contrary, all legal authority offends its original source in the whole citizen body or in an electorate representing the Government."
> -------
> The question may then be asked if the 'people' by designing their representatives and by transmitting to them the power to amend the Constitution, lose or give up possession of their inherent constituent power?
>
> There was great controversy among the civilians in the Middle Ages whether, after the Roman people had transferred their authority to legislate to the Emperor, they still retained it or could reclaim it. ----- -- *There is always a distinction between the possession of a right or*

power and the exercise of it. It was in the exercise of the 'constituent power' that the 'people' framed the Constitution and invested the Amending Body with the power to amend the very instrument they created. The instrument so created, by necessary implication, limits the further exercise of the power by them, though not the possession of it. The Constitution, when it exists, is supreme over the 'people', and as the 'people' have voluntarily excluded themselves from any direct or immediate participation in the process of making amendment to it and have directly placed that power in their representatives without reservation, it is difficult to understand how the 'people' can juridically resume the power to continue to exercise it. ------- It would be absurd to think that there can be two bodies for doing the same thing under the Constitution. It would be most incongruous to incorporate in the Constitution a provision for its amendment, if the constituent power to amend can also be exercised at the same time by the mass of the people, apart from the machinery provided for the amendment. *In other words, the people having delegated the power of amendment, that power cannot be exercised in any way other than that prescribed, nor by any instrumentality other than that designated for that purpose by the Constitution.* There are many Constitutions which provide for active participation of the people in the mechanism for amendment either by way of initiative or referendum as in Switzerland, Australia and Eire. *But in our Constitution there is no provision for any such popular devise and the power of amendment is vested only in the Amending Body.*

It is, however, unnecessary to enter this arid tract of what Lincoln called 'pernicious abstraction' where no green things grow, or resolve the metaphysical niceties, for, *under our Constitution, there is no scope for the constituent power of amendment being exercised by the people after they have delegated power of amendment to the Amending Body.* To what purpose did that Instrument give the Amending Body the power to amend the Instrument unless it be to confer plenary power, upon the Amending Body.

The proposition that an unlimited amending authority cannot make any basic change and that the basic change can be made only by a revolution is something extra-legal that no Court can countenance it. In other words, speaking in conventional phraseology, *the real sovereign, the hundred per cent. sovereign the people can frame a Constitution, but that sovereign can come into existence thereafter, unless otherwise provided, only by revolution. It exhausts itself by creation of minor and lesser sovereigns who can give any command.* The hundred per cent. sovereign is established only by revolution, and he can come into being again only by another revolution. ------- As Wheare clearly puts it, *once the Constitution is enacted, even when it has been submitted to the people for approval, it binds thereafter, not only the institutions which it establishes, but also the people themselves. They may amend the Constitution, if at all, only by the method which the Constitution itself provides.* ------- This is illustrated also in the case of the sovereign power of the people to make laws. When once a Constitution is framed and the power of legislation which appertains to the people is transferred or delegated to an organ constituted under the Constitution, *the people cannot thereafter exercise the power.* "The legal assumption that sovereignty is ultimately vested in the people affords no legal basis, for the direct exercise by the people of any sovereign power, whose direct exercise by them has not been expressly or impliedly reserved. Thus the people possess the power of legislation directly only if their Constitution so provides."

Our Constitution makes no provision for direct exercise by the 'people' of any sovereign power much less ordinary law making. Sovereignty, as declared in the Preamble to the Constitution, belongs to Almighty Allah alone. It is further clarified that "the State shall exercise its powers and authority through the chosen representatives of the people"."

(italics have been supplied for emphasis)

45. Only a few years ago a Bench of this Court comprising of fourteen Honourable Judges had reiterated the above position in the case of *Sindh High Court Bar Association* (*supra*) by observing as follows:

> "It may be mentioned that the power to amend the Constitution is an onerous task assigned to *the Parliament, which represents the will of the people through their chosen representatives*. It is to be carried out in accordance with the procedure prescribed in Articles 238 and 239 of the Constitution, viz. by a two-third majority of the members of both the Houses of Majlis-e-Shoora (Parliament), *and by no other means, in no other manner, and by no one else*."
> *(italics have been supplied for emphasis)*

It is pertinent to mention here that in the Constitution of 1962 clause (6) of Article 209 empowered the President to order holding of a Referendum in the country if he did not want to give assent to a constitutional amendment passed by the National Assembly. Such a Referendum was an appeal to the people against the decision of their elected representatives. The framers of the Constitution of 1973 had, however, decided not to retain the above mentioned provision of the Constitution of 1962 and the most likely reason for that omission was that the system of governance in the Constitution of 1962 was presidential whereas the Constitution of 1973 was based upon the conventional parliamentary system wherein the elected representatives of the people are the repository of all the constituent and legislative authority of the people. The above mentioned omission in the Constitution of 1973 was nothing but deliberate and the message was loud and clear, i.e. there was not to be any appeal to the people against the decision of their elected representatives in the Parliament to amend the Constitution in any manner they deemed appropriate. It may not be lost sight of that according to the Preamble to the Constitution of 1973 "------- we, the people of Pakistan; ------- Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution" which shows that if the Constitution itself could be adopted, enacted and given to the people through their elected representatives then adopting, enacting and giving to the people an amendment of the Constitution also fell within legitimate competence of the elected representatives of

the people. The concept of investment and delegation of the people's constituent and legislative authority in favour of their elected representatives also finds support from the thesis propounded by Dr. Muhammad Iqbal in *Reconstruction of Religious Thought in Islam* wherein the poet-philosopher of the East had advocated that even the function of *Ijtehad* (religious reinterpretation) is, in modern times, to be performed not by the people at large but by their elected representatives in the Parliament.

46. As regards the passage of the Constitution (Eighteenth Amendment) Bill, 2010 by the Parliament within a short period of time suffice it to observe that shortness of the debate may not necessarily be attributed to lack of proper deliberations by it and as a matter of fact the same may reflect widespread and wholehearted acceptance of the proposals for reforms forwarded to it by the Special Committee. It was observed by K. G. Balakrishnan, C.J. in the case of *Ashoka Kumar Thakur* (*supra*) that

> "One thing however needs to be noted here that mere short length of debate cannot and does not become a ground for invalidity of the decision and the reverse is also not true."

I may add that if little time consumed by the Parliament in passage of a legislative proposal is accepted as a valid ground for inferring lack of proper application of mind by it then tomorrow a similar argument that a court of law had taken very little time to decide a case shall also have to be accepted for interference in the order or judgment passed by it. The frivolity of such an argument, thus, may not detain me any further.

47. Regarding the intentions of the Parliament suffice it to observe that attributing *mala fide* to the Parliament and through it to the people of the country at large is a very serious matter and an assumption has been raised by the petitioners in that regard without laying any factual foundation for the same. In the absence of any concrete material produced in respect of ulterior motives on the part of the Parliament it may not be possible for us to undertake what Justice Robert Jackson of the United States Supreme Court had termed in the case of *United States v. Public Utilities Commission* (345

U.S. 295, 319 (1953)) as "psychoanalysis of Congress". The observations made by him are so interesting that I cannot help reproducing the same here:

> "I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute."

With reference to some unpleasant periods of our national history wherein some political elements had not remained very pleased with the performance of the superior judiciary it has been maintained by some of the petitioners that introduction of the new system of judicial appointments was a design on the part of some disgruntled elements in politics to get back at the judiciary and to take a revenge from it. I have, however, not felt persuaded to extend or attach any importance to such a wild line of arguments. It goes without saying that any grouse entertained or grumble uttered by a few individuals in the political arena could not be attributed to all the people and all the political parties and it ought not to be lost sight of that the amendments in the Constitution challenged before this Court through the present petitions had been passed by the Parliament unanimously. A gripe or grievance in the distant past attributed to a few individuals can hardly be accepted as sufficient to undo the will of the people expressed through the Parliament with one voice. I would go on to observe that raising of any such assumption by the petitioners may in fact call for introspection by the judiciary as an institution rather than showing any other reaction to such hypothesis.

48. It has also been argued by the learned counsel for the petitioners that the scheme of appointment of judges of the superior courts introduced through Article 175A of the Constitution is impracticable and unworkable. In order to support this contention the learned counsel for the petitioners have tried to stretch some of the provisions of Article 175A to some hypothetical extremes so as to

highlight that in such situations the provisions of Article 175A would have no solution to offer and would result in creating a deadlock or a vacuum. I have, however, remained unimpressed by such contentions because if hypothetical absurdities were to be accepted as a valid ground for undoing a constitutional provision or amendment then no system or document would ever be safe or immune from such a challenge or criticism. It may be pertinent to mention here that even under the previous mode of appointment of judges of the superior courts many a deadlock had occurred and many a constitutional crisis had emerged and the prescribed method offered no solution to such deadlocks or crises. For instance, in the year 1996 the political executive had practically refused to fill the vacancies in various high judicial offices and had protractedly ignored the judiciary's recommendations made in that regard and for ending that deadlock and for resolving that crisis the President had to file a Reference before this Court seeking its opinion in that connection. A reference in this respect may be made to the *President's Reference No. 2 of 1996* and *Al-Jehad Trust v. Federation of Pakistan* (*supra*). The matter of appointment of the most senior Judge of the Supreme Court as the Chief Justice of Pakistan had also rocked the constitutional arena in the year 1997 and the existing constitutional system had no clear answer to the issue. That issue was finally resolved after a messy judicial battle the scars of which still haunt the judiciary. A reference in this regard may be made to the case of *Malik Asad Ali and others v. Federation of Pakistan and others* (PLD 1998 SC 161). In the beginning of the year 2010 yet another constitutional crisis had engulfed the country when the President and the political executive had refused to abide by the binding advice of the Chief Justice of Pakistan in the matter of appointment of two judges to this Court and had instead proceeded to make some appointments without any consultation in that regard with the Chief Justice of Pakistan. This Court had then to step in for the sake of salvaging the system and while proceeding in the case of *Nadeem Ahmad, Advocate v. Federation of Pakistan and others* (2010 SCMR 563) a Bench of this Court, constituted and assembled in the darkness of a night, suspended the operation of the relevant Notification issued in that respect and also restrained the relevant

authorities as well as the concerned judges from acting upon that Notification. The deadlock and the crisis so created bedeviled the constitutional process and were finally resolved by the Prime Minister through some private overtures made at the dining tables in the Supreme Court building and the coffee table at the Prime Minister House. Even on that occasion the system of appointments prescribed by the Constitution was stretched to its limits and had resulted in a deadlock of immense and colossal proportions pitching the Chief Justice of Pakistan against the highest political executive and the President. There are many other instances where the previous system of appointment of judges of the superior courts had been found to be not free from ambiguities and such ambiguities had given rise to serious controversies which had ultimately to be resolved by this Court through judicial interventions. I may refer in this respect to the cases of *Ibrar Hussain v. Government of Pakistan* (PLD 1976 SC 315), *Muhammad Akram Sheikh, Advocate v. Federation of Pakistan* (PLD 1989 SC 229), *Al-Jehad Trust v. Federation of Pakistan* (*supra*), *Supreme Court Bar Association v. Federation of Pakistan* (*supra*), *Supreme Court Bar Association v. Federation of Pakistan* (PLD 2003 SC 82) and *Sindh High Court Bar Association v. Federation of Pakistan* (*supra*). It goes without saying that no document of human origin, be it a Constitution, legislative enactment or deed of a transaction, can ever be completely exhaustive, all-encompassing or pervasive so as to cater for all possible hypothetical situations. It may be well to remember that clauses (4) and (15) of the freshly introduced Article 175A allow rules to be framed for carrying out the purposes of the said constitutional provision and most of the hypothetical situations highlighted by the learned counsel for the petitioners may be taken care of while framing such rules. The Eighteenth Amendment of the Constitution, through which Article 175A has been introduced, has also inserted Article 267A in the Constitution which reads asunder:

> "If any difficulty arises in giving effect to the provisions of the Constitution (Eighteenth Amendment) Act, 2010, hereinafter in this Article referred to as the Act, or for bringing the provisions of the Act into effective operation, the matter shall be laid before both Houses in a joint sitting which may by a resolution direct that the provisions of the Act shall, during such period as may be specified in the resolution, have effect, subject to such adaptations, whether by way of modification, addition or omission, as may be deemed necessary or expedient:

> Provided that this power shall be available for a period of one year from the commencement of the Act."

The Parliament, thus, has taken care of resolving any immediate 'difficulty' faced in giving effect to the provisions of the Eighteenth Amendment of the Constitution or in making them operational. Apart from that any long-term serious impracticality surfacing during the operation of the relevant constitutional provisions can also be resolved through judicial interpretation or may be removed or rectified by the Parliament through exercise of its power to amend the Constitution. In case of any such difficulty or quandary resort may also be had to filing of a Reference by the President under Article 186 of the Constitution seeking opinion of this Court on the issue. A constitutional scheme or system cannot be condemned or struck down by a court of law merely on the basis of its hypothetical impracticality or conjectural absurdity. There is no precedent in the entire world where a constitutional amendment has been struck down by a court of law on such an unsure ground. No court or judge in the known history has ventured to tread on this path before and I would not like to be the reckless first in this field. Hypothetical and conjectural absurdities of Article 175A pressed into service by the learned counsel for the petitioners have, thus, not been able to persuade or compel me to plunge into such a judicial absurdity. It is everyday experience that at its inception every system of whatever kind is likely to face some practical hiccups but continued practice of the system irons out the difficulties and paves way for its smooth functioning.

49. It may also be mentioned that some of the learned counsel for the petitioners have also halfheartedly argued that grievances of different sections of the society against the superior judiciary of this country and against the process of its appointment stemmed from unsatisfactory conduct of some members of the superior judiciary in the past and that the conduct displayed by the present independent and restored superior judiciary amply demonstrates that it has turned a new leaf and, therefore, the earlier process of appointment should have been given some more chance. Such an argument, though very attractive to the restored and independent judiciary of

the present, cannot, however, be accepted as a legal argument for undoing a constitutional amendment brought about in the relevant regard unanimously by the people of the country through their elected representatives in the Parliament. The argument as advanced is persons specific and it appears that the people of the country in their generality have not felt convinced that the door to bad or unacceptable appointments to the superior courts now stands slammed for ever even if the old system of appointments is allowed to remain intact. It may not be lost sight of in this context that, as referred to in the opening paragraphs of this judgment, it was after restoration of the independent judiciary in March 2009 and after some judicial appointments had been made by it that the Democracy and Governance Panel of the Pakistan Institute of Legislative Development and Transparency (PILDAT) chaired by Justice (Retired) Saeeduzzaman Siddiqui, a former Chief Justice of Pakistan, had on 10.08.2009 proposed constitutional reforms in the field of judicial appointments, the Pakistan Bar Council had again passed a resolution on 13.03.2010 proposing a new system of appointment of judges of the superior courts and on 10.04.2010 a meeting of leaders of all the major Bar Councils and Bar Associations of the country had unanimously expressed grave concern over some fresh appointments made to different High Courts and had reiterated the need for changing the existing system of appointment of judges of the superior courts. It is obvious that the people have their eyes on the future and, taking a long-term view, through the new method of judicial appointments introduced through Article 175A of the Constitution they appear to have made an attempt to obviate or minimize the chances of bad or unacceptable appointments in the times to come. To me, given their experiences in the past, the people have reasons for making such an attempt and also a right to take a step in that direction and I would be the last person to stand between the people and the judiciary they desire. In the case of *Pakistan Lawyers Forum* (*supra*) this Court had declared that

> "This Court must have due regard for the democratic mandate given to Parliament by the people. That requires a degree of restraint when examining the vires of or interpreting statutes. It is not for this Court to substitute its views for those expressed by legislators or strike down statutes on considerations of what it deems good for the people. This Court is and always has been the judge of what is

> Constitutional but not of what is wise or good. The latter is the business of Parliament, which is accountable to the people."

My learned brother Jawwad S. Khawaja, J. had observed in the case of *Dr. Mobashir Hassan* (*supra*) that

> "If the Court veers from this course charted for it and attempts to become the arbiter of *what is good or bad for the people*, it will inevitably enter the minefield of doctrines such as the 'law' of necessity or *salus populi suprema lex,* with the same disastrous consequences which are a matter of historical record. ------- Decisions as to *what is good or bad for the people* must be left to the elected representatives of the people -------."
>
> *(italics have been supplied for emphasis)*

50. Many centuries ago Sir Francis Bacon, a Lord Chancellor of England, had observed in his essay titled 'Of Innovations' that:

> "As the births of living creatures at first are ill-shapen, so are all innovations, which are the births of time. Yet, notwithstanding, as those that first bring honour into their family are commonly more worthy than the most that succeed, so the first precedent (if it be good) is seldom attained by imitation. For Ill, to man's nature as it stands perverted, hath a natural motion, strongest in continuance; but Good, as a forced motion, strongest at first. Surely every medicine is an innovation and he that will apply new remedies must expect new evils. For time is the greatest innovator; and wisdom and counsel shall not alter them to the better, what shall be the end? It is true that what is settled by custom, though it be not good, yet at least it is fit; and those things which have long gone together, are, as it were, confederate within themselves; whereas new things piece not so well; but, though they help by their utility, yet they trouble by their inconformity. Besides, they are like strangers, more admired, and less favoured. All this is true, if time stood still; which contrariwise moveth so round that a forward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times, are but a scorn to the new.
>
> It were good, therefore, that men in their innovations, would follow the example of time itself; which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived; for otherwise, whatsoever is new is unlooked for; and ever it mends some, and pairs other; and he that is holpen takes it as a fortune, and thanks the time, and he that is hurt, for a wrong, and imputeth it to the author.
>
> It is good also not to try experiments in States, except the necessity be urgent, or the utility evident; and well to beware, that it be the reformation that draweth on the change, and not the desire of the change that pretendeth the reformation: and lastly, that the novelty, though it be not rejected, yet be held for a suspect; and, as the Scripture saith, that 'we make a stand upon the ancient way, and then look about us, and discover what is the straight and right way, and so to walk in it'."

As observed by me in the opening paragraphs of this judgment, there was a general dissatisfaction over the process of appointment of judges of the superior courts and also over many an appointment

made in the last half a century and different sections of the society had been demanding change of the process. In that backdrop change of the process brought about by the people of this country unanimously through their chosen representatives in the Parliament had its necessity urgent and its utility evident and, in the words of Bacon, it was the reformation that drew on the change and not the desire of change that pretended the reformation. Thomas Jefferson, third President of the United States of America, had written to Samuel Kercheval on July 12, 1810 asunder:

> "I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with: because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human minds. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the same coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors."

It is true that being apprehensive of an innovation or being fearful of the unknown and clinging on to the old ways to which one is accustomed is a part of human nature but for making an improvement one has to let go something of the past. Dr. Muhammad Iqbal had quite aptly summed up this predicament in the following couplet:

آئین نو سے ڈرنا، طرز کہن پہ اڑنا
منزل یہی کٹھن ہے قوموں کی زندگی میں

(Translation: *Being afraid of the new ways and clinging on to the old conduct, customs and traditions is the real challenging stage in the lives of nations*)

With a lot of hope and enthusiasm the people of my country have decided to embark upon a new journey towards fulfillment of their dreams and aspirations and I, with my heart and soul and walking with them shoulder to shoulder, would like to join them in this march towards the promised land.

51. In the context of the present petitions this Court must pay heed to the fact that the people of Pakistan have spoken in the matter and that too quite loudly and with one voice and those in the

judiciary must hearken the call. While dilating upon the constitutional powers of the judiciary Chief Justice Hamood-ur-Rehman had observed in the case of *Zia-ur-Rahman* (*supra*) that "In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will". The judiciary is, thus, only the *administrator* of the public will and it cannot arrogate to itself the role of an *adjudicator* of the public will. It would serve the judiciary well to submit to the will of the political sovereign it is created to serve lest the sovereign unleashes its wrath and power against it. According to the Preamble to the Constitution "------- we, the people of Pakistan ------- Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution". The Eighteenth Amendment of the Constitution has also been adopted, enacted and given to themselves by the people of Pakistan through their representatives in the Parliament by adopting the process provided for the purpose by the Constitution itself. It is simply not possible for this Court to declare that the people have been unwise in amending the Constitution as they wished and that they did not know what was good for them. This Court is a creation of the Constitution and the Constitution confers no such power on the Court. It has already been observed by me above that it would even otherwise be unwise on the part of this Court to try to be wiser than the fundamental law or the lawgiver. The fictional monster called Frankenstein, a creation becoming a danger to its creator, had to be dealt with not by handling or managing it but by destroying it! It shall, therefore, be advisable to pay heed in this regard to the words of wisdom expressed by Kania, C.J. and Mahajan, J. in the case of *A. K. Gopalan v. State of Madras* (AIR (37) 1950 SC 27) wherein it had been observed as follows:

> "If the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. *Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights*."
>
> *(italics have been supplied for emphasis)*

The case of *A. K. Gopalan* involved judicial review of a legislative action but in the cases in hand what has been pressed is judicial review of a constitutional amendment which amendment had been passed by the Parliament unanimously. The judiciary in Pakistan must beware, and the experiences of the recent past so demonstrate, that any perceived transgression or overreach of its defined limits may invite a backlash. A backlash from unrepresentative forces may be defended with the support of the people but a backlash from the people themselves may leave the judiciary squarely in the lurch without any defender at all. Fali S. Nariman had the following to observe in this context in his above mentioned autobiography:

> "Assumption of power by which one organ of government is enabled to control another has been characterized as political power. In asserting the basic structure theory, the Supreme Court of India has, in this sense, asserted political power – in the guise of judicial interpretation. That is why there are so many critics of the basic structure theory. By propounding it, the guardians *of* the Constitution had at one bound become guardians *over* the Constitution. Constitutional adjudicators had assumed the role of Constitutional governors. It must be admitted that the criticism is valid. But equally valid is the stark fact that Parliament in its wisdom has not sought any confrontation. If it had, the casualty would have been the Supreme Court."

In the same autobiography Fali S. Nariman had also recorded as follows:

> "In July 1986 just before his retirement, Chief Justice Warren Burger of the US Supreme Court was interviewed on television by Bill Moyers. In the course of his interview, C.J. Warren Burger said:
>
> > 'Congress (he was speaking of the US Congress) can review us and change us when we decide a statutory question, and frequently do. But when we decide a constitutional issue, right or wrong, that's it until we change it. Or, the people change it. Don't forget that. The people made it and the people can change it. The people could abolish the Supreme Court entirely.'
> >
> > 'How?' asked Bill Moyers.
> >
> > C.J. Warren Burger's answer was clear and categorical, 'By a Constitutional Amendment'."

In the end, if I may dabble a little in philosophy, I must observe that it is one of the principles of interpretation of Constitutions that if harmonizing two conflicting provisions of a Constitution is impossible then the provision carrying more weight is to be preferred over the other carrying lesser weight. To me, if in a given situation

independence of the judiciary is found to be pitched against sovereignty of the Parliament then I would lean in favour of sovereignty of the Parliament because without a sovereign Parliament there may not be true democracy and without true democracy independence of the judiciary may be nothing more than an illusion.

52. Before concluding this opinion I must observe that changing the system of appointment of judges of the superior courts through the Eighteenth Amendment of the Constitution, filing of these petitions by a cross-section of the society, rather long hearings of these matters before the Court and extensive coverage of the same by the print and electronic media have generated an atmosphere in the country which has absorbed the society as a whole and I recall the beautiful words of Justice Cardozo of the United States Supreme Court when he had observed that "The great tides and currents which engulf the rest of mankind do not turn aside in their course and pass the judges idly by" and the telling words of Justice Frankfurter of the same Court when he had remarked that the judges are "[m]en ------- not disembodied spirits, they respond to human emotions." Justice Holmes of that Court had, however, termed those tides, currents and emotions as 'some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment'. While recording his dissent in a case Justice Holmes had observed as follows:

> "I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.
>
> Great cases like hard cases make bad laws. For great cases are called great not by reason of their real importance in shaping the law of the future but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exert a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."

For the last about three decades this Court has consciously and consistently been rejecting the academic theory of basic features or basic structure of the Constitution in most categorical terms, and for valid and forceful reasons, but it appears that when the matter of appointments to the superior judiciary itself has come before it then,

in the words of Justice Holmes, the "accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment" has generated "a kind of hydraulic pressure" which I must consciously resist so as not to allow my vision to be clouded by any self-interest or fraternal prejudice detracting me from the beaten track. While on the subject of overturning a settled judicial view I am also reminded of the dissenting opinion recorded by Justice Roberts of the United States Supreme Court in the case of *Smith v. Allwright* (321 US 649 (1944)) wherein he had observed as follows:

> "In Mahnich v. Southern Steamship Co., 321 U.S. 96, 64 S.Ct. 455, I have expressed my views with respect to the present policy of the court freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency, it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. -------
>
> I believe it will not be gainsaid the case received the attention and consideration which the questions involved demanded and the opinion represented the views of all the justices. It appears that those views do not now commend themselves to the court. I shall not restate them. They are exposed in the opinion and must stand or fall on their merits. Their soundness, however, is not a matter which presently concerns me [321 U.S. 649, 669]. *The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of the current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject."*
>
> *(italics have been supplied for emphasis)*

In the context of the present petitions I may point out that the last decision in the case of *Pakistan Lawyers Forum* (*supra*) expressly, categorically and emphatically rejecting the theory of basic features or basic structure of the Constitution was rendered by this Court unanimously only a few years ago.

53. None of the petitioners has alleged that the requirements or procedures for amending the Constitution provided for in Article 239 of the Constitution had been violated at the time of passage or promulgation of the Eighteenth Amendment of the Constitution and, for the reasons detailed above, I have not been able to find any good reason for venturing to assume jurisdiction where it expressly stands ousted by clause (5) of Article 239 of the Constitution. While recognizing some salient features of the Constitution reflecting the

present aspirations of the people, which aspirations are susceptible to change if the people so wish, for the purposes of interpretation of the Constitution, particularly in the context of our present constitutional history and developments, I have also not felt persuaded to accept and apply the academic legal theory of basic features or basic structure of the Constitution whether invoked conceptually, textually or contextually. I understand that in the context of the Constitution the only limitations to the Parliament's amendatory powers are political limitations and not judicially enforceable limitations. All these petitions challenging different parts and provisions of the Constitution (Eighteenth Amendment) Act (Act X of 2010) are, therefore, dismissed.

54. Before parting with the issues relating to the Eighteenth Amendment of the Constitution I may observe by way of an addendum that during the pendency of these petitions an interim order was unanimously passed by this Court on October 21, 2010 expecting the Parliament to reconsider some of the provisions of Article 175A of the Constitution and to amend the same in the light of various issues raised and concerns voiced during the hearing of the present petitions. The expected reconsideration pertained *inter alia* to modification of composition of the Judicial Commission of Pakistan and justiciability of the reasons to be recorded by the Parliamentary Committee for rejecting a nomination made by the Judicial Commission of Pakistan.

55. That interim order was immediately hailed in the country by all and sundry as a very positive order which had averted a possible clash of institutions and had supported and bolstered democratic norms and spirit and soon after passage of that order the Special Committee of the Parliament for Constitutional Reforms started pondering over the matter of amending the Constitution further in the light of the observations made by this Court in that interim order. In the meanwhile the Judicial Commission of Pakistan created under Article 175A of the Constitution met on November 6, 2010 and framed the Judicial Commission of Pakistan Rules, 2010 as required under clause (4) of Article 175A of the Constitution. Within the next

few days the Leaders of the House and the Leaders of the Opposition in the National Assembly and the Senate nominated the requisite members of the Parliamentary Committee under Article 175A of the Constitution, the members so nominated chose a Chairman and the Parliamentary Committee framed the Parliamentary Committee on Judges Appointment in the Superior Courts Rules, 2010 as contemplated by clause (15) of Article 175A of the Constitution. The Parliament also did not lag behind and the spirit in which this Court had passed its interim order on October 21, 2010 was befittingly matched and reciprocated by the Parliament with equal accommodation and goodwill and upon unanimous recommendations made to it by the Special Committee of the Parliament for Constitutional Reforms the Parliament passed the Constitution (Nineteenth Amendment) Act, 2010 in the month of December 2010 which was assented to by the President on January 1, 2011. Through that Nineteenth Amendment of the Constitution most of the concerns voiced before this Court by the petitioners regarding Article 175A of the Constitution introduced through the Eighteenth Amendment of the Constitution were duly addressed by the Parliament and Article 175A was amended mostly in the terms hinted at by this Court through its interim order dated October 21, 2010. I am sanguine that the Rules framed by the Judicial Commission and the Parliamentary Committee and the amendments brought about in Article 175A through the Nineteenth Amendment of the Constitution shall go a long way in making the transition from the old system of appointment of judges of the superior courts to the new system quite smooth and shall also satisfy judicial concerns about 'primacy' besides ensuring 'parliamentary oversight' of the process which was the avowed main object of introduction of Article 175A of the Constitution.

56. As a result of the above mentioned developments it is now incumbent upon the Parliamentary Committee to record its reasons for not confirming a nomination made by the Judicial Commission and this Court has already held in the case of *Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another* (PLD 2011 SC 407) that such reasons recorded by the Parliamentary Committee

are justiciable before the Supreme Court of Pakistan. The said legal position was subsequently reiterated by this Court in the cases of *Federation of Pakistan through Secretary Ministry of Law v. Munir Hussain Bhatti and others* (PLD 2011 SC 752) and *Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs and Justice, Islamabad v. Sindh High Court Bar Association through President and another* (PLD 2012 SC 1067). In my view such a course would go a long way in serving the twin objects of ensuring involvement of representatives of the people in the process of appointment of judges of the superior courts and, at the same time, maintaining primacy of the judiciary in such process. Even in the earlier system of appointment of judges of the superior courts the President was judicially made obliged to record reasons for not agreeing with any recommendation made in that regard by the Chief Justice of Pakistan which reasons were declared by this Court to be justiciable. The learned Attorney-General for Pakistan appearing in these cases on Court's notice had submitted upon instructions through his written submissions that "in case of rejection of nomination by Parliamentary Committee, the said Committee shall have to state reasons which shall be justiciable". In the above quoted essay 'Of Innovations' Sir Francis Bacon had quoted the Scripture saying that "we make a stand upon the ancient way, and then look about us, and discover what is the straight and right way, and so to walk in it". It would, thus, be advisable that even when following the new process of appointment of judges of the superior courts the jurisprudence developed under the old system and the wisdom gathered from that experience ought to be utilized to the optimum, of course with the necessary adaptations, so that the new path to the old destination is made smooth and the journey less turbulent.

The Constitution (Twenty-first Amendment) Act (Act I of 2015)

&

The Pakistan Army (Amendment) Act (Act II of 2015)

57. 'Law and order' is an expression commonly used by a layman in a compact sense denoting peace and security in the society achieved through application of the law of the land but in a court of

law one needs to be careful in using the expressions 'law' and 'order' together. A more informed member of the society would know that maintaining order is the function of the executive whereas ensuring that order is achieved by the executive through proper application of the law lies in the domain of the judiciary. It is, thus, obvious to any person acquainted with the concept of trichotomy or separation of powers in the structure of the State that the judiciary's role in the society is to ensure proper application of the laws and it ought never to be expected to become a limb, extension or tool of the executive in the matter of achieving or maintaining order howsoever bad the executive's performance may be in discharging its functions in that regard. Any romance with short-circuiting the judicial process and compromising justice for the sake of order in a situation where the executive seemingly fails to properly discharge its duty to establish order in the society ought, therefore, to be looked at with suspicion and treated with caution because such romance blurs, *nay* distorts, the very essence of constitutional dispensation besides trumping constitutional principles at the altar of expedience. The long term consequences of such measures of expedience cannot be healthy for constitutionalism and democracy because giving primacy to practicality over the core value of justice tends to destroy or undermine the very fabric of the social contract. It may be well to remember that it is justice which ensures peace and tranquility in the society and any dose or measure of injustice for the sake of order is nothing but counterproductive as it feeds disorder rather than curing it.

58. Nations are defined not by the colour of their skin, the language they speak or the dress they wear but by the values they cherish and practice. Justice is a value which is not only fundamental to the life itself but the same also impacts every other value by determining and regulating how such other value is ensured and put to practice. In trying times nations are tested and they are sometimes called upon to choose between or prioritize competing vales and mature nations seldom sacrifice justice at the altar of expedience. In a World War a great nation put its trust in the justice being dispensed at the Old Bailey but when struck with a national

tragedy another great nation conveniently decided to ignore the injustice at Guantanamo Bay. Infant nations learn from the experiences of maturer nations and in their times of crises they normally choose from different models of response available on the canvas of the world. The tragic incident taking place in the Army Public School, Peshawar on December 16, 2014 wherein over 150 innocent persons including students and staff were brutally and mercilessly killed by some terrorists had shocked the society as a whole to such an extent that it decided to deviate from the constitutional norms and bypassing the normal judicial system in the country the Parliament unanimously passed the Constitution (Twenty-first Amendment) Act (Act I of 2015) and the Pakistan Army (Amendment) Act (Act II of 2015) on January 06, 2015 which were assented to by the President on January 07, 2015 and thereby opened the doors to trial of a class of civilians by military courts and purportedly provided constitutional protection to the new measures. To some such a response of the people acting through their chosen representatives in the Parliament was a befitting and appropriate response to the grave challenge to security of the populace but to others it was a kneejerk reaction of a shocked nation which in the state of immense grief had adopted an imprudent course while settling for a short-term approach. Such a situation reminds me of Justice Oliver Wendell Holmes, a Judge of the United States Supreme Court, who had, as already referred to earlier on, talked about an "accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment" and generates "a kind of hydraulic pressure". The same Justice Holmes had observed in connection with the Sherman Antitrust Act (which he personally regarded as one of the worst and certainly one of the most poorly written pieces of federal legislation to be enacted in the United States of America during his lifetime) that "Of course I know and every other sensible man knows, that the Sherman law is damned nonsense, but if my country wants to go to hell, I am here to help it." According to Justice Holmes the people, speaking through their representatives, had a constitutional right to "make asses of themselves". One of the most frequently cited comments made by Justice Holmes on the subject was made to his colleague Justice Stone, who was then sixty-

one years old: "Young man, about 75 years ago I learned that I was not God. And so, when the people ------- want to do something that I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it'." With respect to Justice Holmes I would be more charitable to the will of the people of my country whom I serve than he was to the will of the people of his country and would say that if the people of Pakistan have felt confident or convinced that through the new measures they can achieve the cherished objectives of peace and security then, notwithstanding my personal views on the issue either way, my job would be to give effect to their will expressed clearly and unanimously. To Justice Holmes wisdom and constitutionality were not related and to him and his many followers in the United States of America the Constitution required governmental obedience to its terms, not governmental wisdom. Keeping in view the provisions of Articles 175 and 239 of the Constitution of my country I find it difficult to disagree with Justice Holmes in this regard.

59. Groucho Marx had once observed that "Military justice is to justice what military music is to music". It is not for me to sit in judgment over which kind of music the people should prefer or to dictate how the people of my country should want justice to be served. I respect the choice and the will of the people as long as the choice made or the will expressed is within the bounds of the Constitution or is adequately and properly protected by it and it is here that my jurisdiction in the matter begins and ends.

60. It is not for the first time that the State of Pakistan has attempted to make it permissible for civilians to be tried by military courts for some heinous offences and acts of terrorism but on every such occasion the courts in the country have found it difficult to find an adjustment of such military courts in the judicial system envisaged and provided for by the Constitution of the country. In the case of *Muhammad Umar Khan v. The CROWN* (PLD 1953 Lahore 528) it was held by the Lahore High Court, Lahore that military courts or military tribunals "are not really courts" and that "They are essentially in the nature of executive action". It was further held that

through such courts or tribunals judicial function had been handed over to the executive which militated against the constitutionally entrenched concept of separation of powers and, therefore, the working of such courts or tribunals necessarily required validation by the Constitution itself and in the absence of such validation such courts or tribunals could not be termed or accepted as constitutional. In the case of *Abdus Sattar Khan Niazi v. The CROWN* (PLD 1954 FC 187) the Federal Court of Pakistan had held that the acts of such military courts or tribunals were acts "purporting to be acts performed in the administration of justice" and, thus, they needed proper validation so as to be accepted as constitutional. In the later case of *Darvesh M. Arbey, Advocate v. Federation of Pakistan through the Law Secretary and 2 others* (PLD 1977 Lahore 846 = PLD 1980 Lahore 206) the Lahore High Court, Lahore had categorically held and declared that "the present Constitution neither envisages the imposition of Martial Law nor the exercise by the Armed Forces of any judicial function". Somewhat similar observations had been made by the High Court of Sindh, Karachi in the case of *Niaz Ahmed Khan v. Province of Sind and others* (PLD 1977 Karachi 604). In the subsequent case of *Mehram Ali and others v. Federation of Pakistan and others* (PLD 1998 SC 1445), which was a case about special courts to try cases of terrorism, etc. and not a case pertaining to military courts, it had been declared by this Court in unambiguous terms that the constitutional framework relating to the judiciary in this country did not admit of or permit establishment of a parallel system of courts or tribunals which were not under the judicial review, administrative control and supervision of the High Courts or the Supreme Court unless the Constitution itself made special provisions for such courts or tribunals. It had clearly been declared by this Court in that case that "In the present case the establishment of the Special Courts is through an Act of the Parliament and is not founded on a constitutional provision and, therefore, if any of its provision or provisions are in conflict with the constitutional provisions, the same cannot be sustained". In the year 1998 Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 was promulgated by the Federal Government and was subsequently amended from time to time allowing establishment of Military Courts

for trial of civilians charged with the offences mentioned in section 6 thereof and the Schedule to the said Ordinance but through the judgment handed down in the case of *Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others* (PLD 1999 SC 504) this Court had declared the said Ordinance to be unconstitutional, without lawful authority and of no legal effect. It had been held by this Court in that case "that even an Act of Parliament will not enable the Armed Forces to perform the judicial functions unless it is founded on the power conferred by a Constitutional provision." It is in this backdrop that this time the Parliament has tried to plug that hole and has purported to provide "constitutional protection" to the Pakistan Army (Amendment) Act (Act II of 2015) through the Constitution (Twenty-first Amendment) Act (Act I of 2015) which were assented to by the President on January 07, 2015. I now proceed to examine as to whether the new measures are indeed constitutionally founded or protected or not and if the constitutional founding or protection is properly in place then I may have no problem with such measures but if the purported constitutional founding or protection is either incomplete or not properly in place then the fate of the new measures is not to be any different from those introduced in the year 1998.

61. Before embarking upon any discussion on the subject it may be advantageous to reproduce the full text of both the enactments in issue.

The Gazette of Pakistan

EXTRAORDINARY

PUBLISHED BY AUTHORITY

ISLAMABAD, THURSDAY, JANUARY 8, 2015

PART I

Acts, Ordinances, President's Orders and Regulations

SENATE SECRETARIAT

Islamabad, the 7th January, 2015

No. F. 9(2)/2015-Legis.—The following Act of Majlis-e-Shoora (Parliament) received the assent of the President on 7th January, 2015, is hereby published for general information: —

ACT No. I OF 2015

An Act further to amend the Constitution of the Islamic Republic of Pakistan;

WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist or terrorist group, armed group, wing and militia or their members using the name of religion or a sect;

AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constitution, from the terrorist groups by raising of arms and insurgency using the name of religion or a sect or from the foreign and locally funded anti-state elements;

AND WHEREAS it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2;

AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conferences held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan;

It is hereby enacted as follows: —

1. **Short title and commencement.**—(1) This Act may be called the Constitution (Twenty-first Amendment) Act, 2015.

(2) It shall come into force at once.

(3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.

2. **Amendment of Article 175 of the Constitution.—**In the Constitution of the Islamic Republic of Pakistan, hereinafter called the Constitution, in Article 175, in clause (3), for the full stop at the end a colon shall be substituted and thereafter, the following proviso shall be inserted, namely: —

> "Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of the sub-part III of Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.
>
> *Explanation:* In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

3. **Amendment in the First Schedule of the Constitution.**— In the Constitution, in the First Schedule, in sub-part III of Part I,

after serial No. 5, the following new entries shall be added, namely: —

"6. The Pakistan Army Act, 1952 (XXXIV of 1952).

7. The Pakistan Air Force Act, 1953 (VI of 1953).

8. The Pakistan Navy Ordinance, 1961 (XXXV of 1961).

9. The Protection of Pakistan Act, 2014 (X of 2014).".

AMJED PERVEZ,
Secretary.

The Gazette of Pakistan
EXTRAORDINARY
PUBLISHED BY AUTHORITY

ISLAMABAD, THURSDAY, JANUARY 8, 2015

PART I

Acts, Ordinances, President's Orders and Regulations

SENATE SECRETARIAT

Islamabad, the 7th January, 2015

No. F. 9(3)/2015-Legis.—The following Act of Majlis-e-Shoora (Parliament) received the assent of the President on 7th January, 2015, is hereby published for general information: —

ACT No. II OF 2015

An Act further to amend the Pakistan Army Act, 1952;

WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist group, armed group, wing and militia or their members using name of religion or a sect;

AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan by raising of arms and insurrection using name of religion or a sect by groups of foreign and locally funded elements;

AND WHEREAS it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect captured or to be captured in combat with the Armed Forces or other law enforcement agencies or otherwise are tried under this Act;

AND WHEREAS Article 245 of the Constitution of the Islamic Republic of Pakistan enjoins upon the Armed Forces to act in consonance with the provisions of the said Article.

It is hereby enacted as follows: —

1. **Short title and commencement.**—(1) This Act may be called the Pakistan Army (Amendment) Act, 2015.

(2) It shall come into force at once.

(3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement.

2. **Amendment of section 2, Act XXXIX of 1952.—**In the Pakistan Army Act, 1952 (XXXIX of 1952), hereinafter referred to as the said Act, in section 2,—

(1) in sub-section (1), in clause (d), after sub-clause (ii), the following new sub-clauses, shall be inserted, namely:—

"(iii) claiming or are known to belong to any terrorist group or organization using the name of religion or a sect; and

(a) raise arms or wage war against Pakistan, or attack the Armed Forces of Pakistan or law enforcement agencies, or attack any civil or military installations in Pakistan; or

(b) abduct any person for ransom, or cause death of any person or injury; or

(c) possess, store, fabricate or transport the explosives, fire-arms, instruments, articles, suicide jackets; or

(d) use or design vehicles for terrorist acts; or

(e) provide or receive funding from any foreign or local source for the illegal activities under this clause; or

(f) act to over-awe the state or any section of the public or sect or religious minority; or

(g) create terror or insecurity in Pakistan or attempt to commit any of the said acts within or outside Pakistan,

shall be punished under this Act; and

(iv) claiming or are known to belong to any terrorist group or organization using the name of religion or a sect and raise arms or wage war against Pakistan, commit an offence mentioned at serial Nos. (i), (ii), (iii), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xv), (xvi), (xvii) and (xx) in the Schedule to the Protection of Pakistan Act, 2014 (X of 2014)

Provided that any person who is alleged to have abetted, aided or conspired in the commission of any offence falling under sub-clause (iii) or sub-clause (iv) shall be tried under this Act wherever he may have committed that offence:

Provided further that no person accused of an offence falling under sub-clause (iii) or sub-clause (iv) shall be prosecuted without the prior sanction of the Federal Government.

Explanation: In this clause, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

(2) after sub-section (3), the following new sub-sections shall be added, namely:—

"(4) The Federal Government shall have the power to transfer any proceedings in respect of any person who is accused of any offence falling under sub-clause (iii) or sub-clause (iv) of clause (d) of sub-section (1), pending in any court for a trial under this Act.

(5) Any proceedings transferred under sub-section (4) shall be deemed to have been instituted under this Act.

(6) Where a case is transferred under sub-section (4) it shall not be necessary to recall any witness or again record any evidence that may have been recorded.".

3. **Amendment of section 60, Act XXXIX of 1952.**—In the said Act, in section 60, in clause (k), after the word "law" occurring at the end, the words "and any other law for the time being in force", shall be added.

4. **Overriding effect.**—(1) The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.

(2) In case there is any conflict between the provisions of this Act and any other law for the time being in force, the provisions of this Act shall prevail to the extent of inconsistency.

AMJED PERVEZ,
Secretary.

To start with, I find that through the above mentioned two enactments trial of civilians by military courts for some specified offences has been made permissible but the military courts' jurisdiction for such trial of civilians is not "founded" on any power conferred by any provision of the Constitution. The Pakistan Army (Amendment) Act (Act II of 2015) makes it permissible for the already established military courts to try a specified category of civilians and the Constitution (Twenty-first Amendment) Act (Act I of 2015) only refers to such trials to be conducted by the military courts under Act No. II of 2015. The Preamble to Act No. I of 2015 itself recognizes in so many words ("AND WHEREAS it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2") that the military courts to try civilians are established under the Pakistan Army Act, 1952 and that such courts are not created, constituted or established by or under the Constitution. It is, thus, obvious that the jurisdiction of military courts for trial of civilians is still not "founded" on any power conferred by any provision of the Constitution. I have

already mentioned above that in the case of *Mehram Ali* (*supra*) it had been declared by this Court in most categorical terms that a Special Court constituted by an Act of Parliament is to be unconstitutional unless its creation is "founded on a constitutional provision" and in the case of *Sh. Liaquat Hussain* (*supra*) this Court had reiterated "that even an Act of Parliament will not enable the Armed Forces to perform the judicial functions unless it is founded on the power conferred by a Constitutional provision." I, therefore, feel no hesitation in concluding that the new measures making it permissible for the military courts to try civilians are unconstitutional, without lawful authority and of no legal effect, as was the case in the case of *Sh. Liaquat Hussain* (*supra*). No effort has been made before us by any of the parties to the present set of petitions for persuading this Court to review or revisit the principles of the Constitution and law laid down in the above mentioned cases of *Mehram Ali* and *Sh. Liaquat Hussain*.

62. It appears that the learned Attorney-General for Pakistan is conscious of the above mentioned constitutional infirmity in the trial of civilians by military courts authorized in that regard by Act No. II of 2015 when such authorization is not founded on any power conferred by a constitutional provision and, therefore, the main thrust of his arguments addressed before us has been that under Article 245(1) of the Constitution the Armed Forces are under a constitutional duty to defend Pakistan against external aggression or threat of war and, thus, in matters involving internal insurrection or insurgency threatening the defence of Pakistan the military courts constituted under the Pakistan Army Act, 1952 always had the jurisdiction to try even civilians for offences relatable to the defence of the country. The learned Attorney-General has referred in this respect to the case of *Brig. (Retd.) F. B. Ali and another v. The State* (PLD 1975 SC 506) wherein it had been held by this Court that retired army officers (then treated as civilians) could validly be tried by a military court under the Pakistan Army Act, 1952 along with serving officers of the army for offences falling within the jurisdiction of a military court and that a trial by a military court met the minimum standards of a fair trial and the same could not be termed

as discriminatory. He has also cited the case of *Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others* (PLD 1996 SC 632) in support of the said argument. The learned Attorney-General has also referred to the case of *Col. (Retd.) Muhammad Akram v. Federation of Pakistan through Secretary Ministry of Defence, Rawalpindi and another* (PLD 2009 FSC 36) wherein the Federal Shariat Court had declared that the provisions of the Pakistan Army Act, 1952 were not repugnant to the Injunctions of Islam. I must admit that I have found it difficult to comprehend the relevance of such arguments based upon the provisions of Article 245(1) of the Constitution to the issue at hand which involves constitutionality or otherwise of Acts No. I and II of 2015. If the civilians purported to be brought within the net of the Pakistan Army Act, 1952 through Acts No. I and II of 2015 could otherwise be tried under the Pakistan Army Act, 1952 on the strength of the provisions of Article 245(1) of the Constitution then there was hardly any occasion for or requirement of enacting Acts No. I and II of 2015 and the very fact that the Parliament felt the necessity of introducing Act No. II of 2015 and of providing constitutional protection to the same through Act No. I of 2015 clearly shows that the views of the learned Attorney-General based upon the provisions of Article 245(1) of the Constitution were not shared by the Parliament and not even by the Federal Government whom the learned Attorney-General represents before us. Apart from that according to the provisions of Article 245(1) of the Constitution "The Armed Forces shall, under the directions of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so". We had required the learned Attorney-General to produce before us any document whereby the Federal Government had directed the Pakistan Army to set up military courts for trial of civilians because there was a "threat of war" within the contemplation of the provisions of Article 245(1) of the Constitution and independently of the power conferred in that regard under the impugned Act No. II of 2015 but no such document containing any such direction of the Federal Government has been produced by him. In the absence of any such direction of the Federal Government the Pakistan Army could not set up military courts for trial of civilians

even if it entertained any perception of a "threat of war" on its own. Apart from that the word "war" used in Article 245(1) of the Constitution is a term of art and it has to be understood in the context of the words preceding the same, i.e. "external aggression". To my mind in the context of the first part of Article 245(1) of the Constitution the words "defend Pakistan against external aggression or threat of war" are to be read together and conjunctively to cater for an actual external aggression or a threatened external aggression and the second part of Article 245(1) dealing with the Armed Forces acting "in aid of civil power" is relevant to internal disturbance, be it a civil commotion, natural or other disaster, insurrection or insurgency, etc. It is true that of late in the national and international media and politics the term "war on terrorism" has gained currency but a court of law is to exercise caution before allowing lifting the word "war" from its journalistic or political use and interpreting constitutional provisions in the light of such broad, nonspecific and generic use of that word. In Corpus Juris Secundum the definition and nature of 'War' have been detailed as follows:

> "War, in the broad sense, is a properly conducted contest of armed public forces, or in a narrower sense, a state of affairs during the continuance of which the parties to the war may legally exercise force against each other. The term "war", in the practical and realistic sense in which it is commonly used, refers to the period of hostilities and not to a technical state of war which may exist after the fighting has ended. It is not necessary, to constitute war, that both parties shall be acknowledged as independent nations or sovereign states, but war may exist where one of the belligerents claims sovereign rights as against the other. The word "war" is to be understood in its ordinary sense, and the popular connotation of the word is not limited to wars formally declared by Congress to be such. War in the material sense is to be distinguished from war in the legal sense. ------- The existence of war in the material sense is evident in the use of force by the parties. ------- War, in law, is not a mere contest of physical force, on however large a scale. War in the legal sense is the state of nations among whom there is an interruption of all pacific relations and a general contestation of arms by authority of the several sovereigns; it is not a mere contest of force, but must be an armed struggle carried on by two political bodies each of which exercises de facto authority over persons within a determinate territory, and its existence is determined by the authorized political department of the government. So, lawful war can never exist without the actual concurrence of the war-making power, but may exist prior to any contest of the armed forces. The courts are bound by a declaration or determination by the proper department of government that a war exists, but until there has been such a declaration or determination the courts cannot take judicial notice of the existence of a war by their government -----."

In the same treatise the following has been recorded in respect of insurgents:

> "Insurgents rising against an established government do not, from the mere fact of revolt, become entitled to the rights of sovereignty or to be recognized as belligerents, so as to come within the laws of war, and until some recognition, express, tacit, or implied, of new conditions has been extended by the political department of the government, there is no war of which a court can take cognizance, and no enemies, but only insurgents."

'War' has been commented upon in American Jurisprudence, Second Edition (1975) as follows:

> "War is an armed struggle or contest by force carried on for any purpose between two or more nations or states exercising at least de facto authority over persons within a given territory and commanding an army prepared to observe the ordinary laws of war. War my also be defined as consisting in the exercise of force by bodies politic against each other and under the authority of their respective governments with a purpose of coercion, and as the state in which a nation prosecutes its rights or its claims by force of arms.
>
> War is thus to be distinguished from insurrection and rebellion. The latter terms are used to describe open and active opposition of a number of citizens or subjects of a country or state to its government; neither insurrection nor rebellion constitutes war in a legal sense prior to the recognition of the participants as belligerents by the existing domestic governments or by foreign nations. Those who join in an insurrection or rebellion of major proportions may, however, be recognized by the existing government as belligerents; and when the hostilities conducted attain such dimensions as to interfere with exercise of functions of the existing government and interrupt the regular course of justice, and particularly where the existing government's jurisdiction has been entirely suspended in some of the territorial districts, a state of civil war exists, which is ordinarily accompanied by the incidents of an a international war.
>
> An armed struggle between opposing and contending factions of the state, ordinarily for the control of the state government, is termed a "civil" war; an armed struggle between two nations in external matters is a "public" war."

It is quite obvious to me that the emphasis laid by the learned Attorney-General on the word "war" appearing in Article 245(1) of the Constitution is misplaced as a journalistic or political use of that word cannot suffice for replacing the constitutional or legal meanings of the same. I may add a word of caution here that the arguments of the learned Attorney-General based upon an existing or threatened "war" in the country may embolden the captured insurgents to claim the internationally recognized status and protections available to prisoners of war under the relevant Conventions and other

instruments of international law relating to wars which status and protections, I am sure, are not attracted to our situation because the canvassed "threat of war" within the purview of Article 245(1) of the Constitution is not legally recognizable at this stage.

63. The arguments advanced by the learned Attorney-General in the context of Article 245(1) of the Constitution also overlook the fact that what is challenged before us is the *vires* of Acts No. I and II of 2015 and the issue whether military courts for trial of civilians can be set up under Article 245(1) of the Constitution or not is not germane to the challenge made before us. It may, however, be well to remember that in the context of the Armed Forces acting in aid of civil power under Article 245(1) of the Constitution it has already been held in the cases mentioned above that while acting in aid of civil power the Armed Forces cannot arrogate to themselves or cannot be permitted to exercise judicial power over civilians to the exclusion of the normal judicial hierarchy "unless it is founded on the power conferred by a Constitutional provision."

64. The Constitution (Twenty-first Amendment) Act (Act I of 2015) had purportedly protected trial of civilians by military courts under the Pakistan Army (Amendment) Act (Act II of 2015) from challenges based upon the constitutionally entrenched concept of trichotomy or separation of powers or based upon violation of the fundamental rights guaranteed by the Constitution but I find that Act No. I of 2015 had both in fact and effect failed to provide the requisite constitutional protection to the provisions of Act No. II of 2015. The Preamble to the Constitution (Twenty-first Amendment) Act (Act I of 2015) *inter alia* reads as under:

> "------- AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conferences held in the aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient <u>to provide constitutional protection to the necessary measures taken</u> hereunder in the interest of security and integrity of Pakistan; ----"
>
> (*Underlining has been supplied for emphasis*)

Act No. I of 2015 had then gone on to amend Article 175 of the Constitution and also sub-part III of Part I of the First Schedule to the Constitution in an attempt to ensure that the concept of separation of powers and the notion of judicial review, administrative control and supervision of the Supreme Court and the High Courts over all matters judicial in nature do not apply to the trial of civilians by the military courts for the offences contemplated by the Pakistan Army (Amendment) Act (Act II of 2015) and also to keep such trials by military courts away from application or enforcement of all the fundamental rights otherwise guaranteed by the Constitution. I, however, see a major problem here because to my understanding "the necessary measures taken" which were sought by Act No. I of 2015 to be provided "constitutional protection" had in fact not even been taken when the purported protection was extended to them. This is so because Act No. I of 2015 had been assented to by the President before assenting to Act No. II of 2015 and by virtue of Article 75(3) of the Constitution a Bill becomes law and it can be called an Act of Majlis-e-Shoora (Parliament) only after receiving assent of the President. The record available before us clearly establishes, and the learned Attorney-General has not been able to controvert it, that, in terms of Article 75(3) of the Constitution, Act No. II of 2015 had not even come into existence as a law till coming into existence of Act No. I of 2015 and, thus, Act No. I of 2015 could not possibly extend any constitutional or legal protection to Act No. II of 2015 which had not become law by then. The learned Attorney-General has, however, referred to the cases of *Saiyyad Abul A'la Maudoodi and others v. The Government of West Pakistan, through Secretary to Government of West Pakistan, Home Department, Lahore* (PLD 1964 Karachi 478) and *Khalid M. Ishaque, Ex-Advocate-General, Lahore v. The Hon'ble Chief Justice and the Judges of the High Court of West Pakistan, Lahore* (PLD 1966 SC 628) and to section 5(3) of the General Clauses Act, 1897 to maintain that Act No. II of 2015 is a Central Act and after assent to it by the President on January 7, 2015 it came into operation at "zero hour" during the night before and thus the same is to be deemed to be in operation when assent was given by the President to Act No. I of 2015 on January 7, 2015. I have, however, found the precedent cases referred to by the learned Attorney-

General on the issue to be hardly relevant and his reliance upon the provisions of section 5(3) of the General Clauses Act, 1897 to be quite inapt. The precedent cases referred to by him involved different issues and a reference to section 5(3) of the General Clauses Act, 1897 was made therein only by way of an analogy. Apart from that, section 5(3) of the General Clauses Act, 1897 provides that "Unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement" and in the cases of Acts No. I and II of 2015 the contrary intention was expressed loud and clear when it had been provided therein that the said enactments were to "come into force at once".

65. There is yet another angle which exposes the fallacy of the above mentioned argument of the learned Attorney-General based upon the provisions of section 5(3) of the General Clauses Act, 1897. The General Clauses Act was enacted in the year 1897 at a time when there were no fundamental rights guaranteed by a Constitution. Pakistan Penal Code is a Central Act and if through its amendment a new offence is created with assent of the President at 11.00 A.M. on a particular day then the act of a person committed in the preceding eleven hours, when the act was not an offence punishable by any law, is made punishable retrospectively by section 5(3) of the General Clauses Act, 1897 by providing that the amended law is to come into operation at zero hour during the preceding night. Article 12(1) of the Constitution of Pakistan, 1973 guarantees a fundamental right ensuring protection against retrospective punishment in the following terms:

> "12. (1) No law shall authorize the punishment of a person-
>
> (a) for an act or omission that was not punishable by law at the time of the act or omission; or
>
> (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed."

Conscious of the fact that the provisions of section 5(3) of the General Clauses Act, 1897 make retrospective punishment possible the framers of the Constitution had decided to take over this area by

providing in Article 75(3) of the Constitution that "When the President has assented or is deemed to have assented to a Bill, it shall become law and be called an Act of Majlis-e-Shoora (Parliament)" with a concomitant "inalienable right" under Article 4(1) of the Constitution to enjoy the protection of law and to be treated in accordance with law and an "inviolable obligation" under Article 5(2) of the Constitution to obey the law from the moment it becomes the law of the land under Article 75(3) of the Constitution. Article 75(3) of the Constitution covers all the Bills to be assented to by the President and, thus, it now occupies the territory previously governed by the provisions of section 5(3) of the General Clauses Act, 1897. It is not the only instance where the Constitution has taken over a field previously occupied by the General Clauses Act, 1897 and another example of the same is section 6 of the General Clauses Act, 1897 dealing with "Effect of Repeal" which field has been taken over by Article 264 of the Constitution providing for "Effect of repeal of laws". I have, therefore, found it inappropriate on the part of the learned Attorney-General to rely upon the provisions of section 5(3) of the General Clauses Act, 1897 when the field of a Bill becoming a law and coming into force at once is squarely taken over and governed by the provisions of Article 75(3) of the Constitution itself. It ought to go without saying that once the Constitution has taken over this field the provisions of the General Clauses Act, 1897 have lost their relevance to that extent and are unenforceable.

66. It has also been argued before us that giving of assent to the two Bills by the President was merely a ministerial function and, therefore, the temporal sequence of giving of assent by the President to the two Bills on the same day was hardly material or of any serious consequence. I for one, with respect, cannot subscribe to such a view. Giving of assent to a Bill by the President is a most solemn function as it is through such assent that a Bill becomes the law of the land. Apart from that the two Bills in issue were not ordinary pieces of legislation so as to minimize the importance of the Presidential assent to the same. It had repeatedly been declared by this Court in the past that trial of civilians by military courts is unconstitutional unless the jurisdiction of the military courts in that

respect is founded on some constitutional provision and through Bill No. I of 2015 a constitutional protection was sought to be afforded to the measures to be taken under Bill No. II of 2015. Such purported constitutional protection was to have a significant bearing upon lives and liberty of hundreds, if not thousands, of accused persons to be tried by the military courts under the proposed measures and their fundamental rights, along with their necks, were to be on the line and I, therefore, cannot ignore this illegality, even if termed as a mistake or a blunder, committed in the matter of the purported constitutional protection. I cannot trash the fundamental rights of such accused persons to their lives and liberty and to fair trial and allow the deeply entrenched concept of separation of powers under Article 175(3) of the Constitution to become inapplicable to trial of such accused persons by giving a premium to the executive for its *faux pas* or to look the other way when a measure otherwise declared unconstitutional by this Court is being given a constitutional protection in a manner which on the face of it is flawed. This Court is the ultimate guardian of the constitutional rights of the citizens and I have sworn an oath to preserve, protect and defend the Constitution and, therefore, it is inconceivable for me to allow the constitutional rights of the citizens to be curtailed, abridged or taken away in any manner which may have even a semblance of unconstitutionality.

67. A necessary corollary to what has been deduced above is that when Act No. I of 2015 had included The Pakistan Army Act, 1952 (Act XXXIX of 1952) in sub-part III of Part I of the First Schedule to the Constitution or had added a proviso to Article 175(3) of the Constitution it had included or referred to The Pakistan Army Act, 1952 in the form un-amended by Act No. II of 2015 and, thus, the immunity from application and enforcement of the fundamental rights and the concept of separation of powers purportedly sought to be extended to the trial of civilians under Act No. II of 2015 had not successfully been achieved by Act No. I of 2015 because Act No. II of 2015 had not even become law by then.

68. The purported inclusion of The Pakistan Army Act, 1952 (Act XXXIX of 1952) and three other laws in sub-part III of Part I of the

First Schedule to the Constitution through the Constitution (Twenty-first Amendment) Act (Act I of 2015) has been found by me to be problematic from another angle also. Part II of the Constitution deals with Fundamental Rights and Principles of Policy and Article 8 in Chapter 1 of Part II of the Constitution provides as follows:

CHAPTER 1.—FUNDAMENTAL RIGHTS

> 8. (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.
>
> (3) The Provisions of this Article shall not apply to—
>
> (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or
>
> (b) any of the -
>
> (i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;
>
> (ii) other laws specified in Part I of the First Schedule;
>
> and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.
>
> (4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in Part II of the First Schedule into conformity with the rights conferred by this Chapter:
>
> Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.
>
> *Explanation.*– If in respect of any law Majlis-e-Shoora (Parliament) is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.
>
> (5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

A plain reading of Article 8(3)(b)(i) reproduced above shows, and shows without any ambiguity, that it deals with only those laws or amendments to those laws which were in force on the commencing

day of the Constitution and such laws had been placed in the First Schedule of the Constitution at the time of commencement of the Constitution. The learned Attorney-General has conceded that the Pakistan Army Act, 1952 had not been placed in the First Schedule of the Constitution on the commencing day of the Constitution and, thus, any amendment of that law cannot be placed in the First Schedule of the Constitution by utilizing the provisions of Article 8(3)(b)(i) of the Constitution. The learned Attorney-General has, however, maintained that The Pakistan Army Act, 1952 (as amended up to date) could validly be placed in the First Schedule of the Constitution by utilizing the provisions of Article 8(3)(b)(ii) of the Constitution and this is exactly what had been achieved through the Constitution (Twenty-first Amendment) Act (Act I of 2015). This submission of the learned Attorney-General appears to be attractive at its face but, to my understanding, the same cannot withstand a deeper scrutiny. The Constitution is a social contract between the citizens and the State and on the commencing day of the Constitution some laws had expressly been excluded from application and enforcement of the fundamental rights being guaranteed by the Constitution whereas for future purposes and for the other laws it had categorically been declared by the Constitution in Article 8(2) that "The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void". The intention of the framers of the Constitution was clear that although some existing laws were being exempted from application and enforcement of the fundamental rights yet in future no such transgression would be permissible and this intention of the framers of the Constitution is manifest from the speech made by Mr. Abdul Hafeez Pirzada (the then Minister for Law) on the floor of the National Assembly on 17.02.1973 at the time of presenting the Constitution Bill. Mr. Pirzada had said: "in the First Schedule there *are* certain laws which *have been* exempted from the operation of Fundamental Rights inasmuch as on the grounds of violation of Fundamental Rights they cannot be challenged before the courts". The italics supplied by me to the words 'are' and 'have been' in that speech clearly show that the list of such exempted laws was exhausted on

the commencing day of the Constitution and that is why Article 8(2) of the Constitution closed the door upon any future law to be exempted from application and enforcement of the fundamental rights being guaranteed by the Constitution. It is true that subsequently the provisions of Article 8(3)(b)(i) of the Constitution had been amended but that amendment only allowed amendments to the already exempted laws to be also exempted and such amendment of Article 8(3)(b)(i) never allowed any other independent law to be added to the list of the already exempted laws. It is significant to note that while amending Article 8(3)(b)(i) of the Constitution no corresponding amendment was made in Article 8(3)(b)(ii) of the Constitution. It appears to me that the words "other laws specified in Part I of the First Schedule" appearing in Article 8(3)(b)(ii) of the Constitution refer to the laws specified in Part I of the First Schedule on the commencing day of the Constitution leaving no room for addition to the list of the specified laws at any future stage. The past tense used in the word "specified" in Article 8(3)(b)(ii) of the Constitution is, thus, not without any significance. If this is the true import of the provisions of Article 8(3)(b)(ii) of the Constitution then addition of The Pakistan Army Act, 1952 and three other laws to sub-part III of Part I of the First Schedule to the Constitution through the Constitution (Twenty-first Amendment) Act (Act I of 2015) appears to be a transgression with doubtful constitutional competence or validity because for proper inclusion of any other law in the First Schedule of the Constitution with reference to Article 8(3)(b)(ii) there had to be an amendment of Article 8(3)(b)(ii) in the first instance, as was done previously in the case of Article 8(3)(b)(i), but that was never done before introducing the Constitution (Twenty-first Amendment) Act (Act I of 2015). I am, therefore, convinced that the attempt made through the Constitution (Twenty-first Amendment) Act (Act I of 2015) to include The Pakistan Army Act, 1952 and three other laws in the First Schedule of the Constitution had remained abortive and unsuccessful.

69. It is also important to mention here that by virtue of the purported insertion of The Pakistan Army Act, 1952 in sub-part III of Part I of the First Schedule to the Constitution through the

Constitution (Twenty-first Amendment) Act (Act I of 2015) it is being maintained by the Federal Government that the Pakistan Army (Amendment) Act (Act II of 2015) also automatically stands inserted in sub-part III of Part I of the First Schedule to the Constitution. This assertion of the Federal Government is also difficult to accept. It has already been observed by me above that at the time of Act No. I of 2015 becoming law Act No. II of 2015 was not even in existence and, therefore, there was hardly any question of Act No. II of 2015 finding any place in the First Schedule of the Constitution through Act No. I of 2015. Apart from that, even if it is assumed for the sake of argument that Act No. I of 2015 had validly placed The Pakistan Army Act, 1952 in the First Schedule of the Constitution still any amendment of The Pakistan Army Act, 1952 through an ordinary legislation could not amend any part of the Constitution because the requisites for amending the Constitution are different. I am not ready to accept that once a law is placed in the First Schedule of the Constitution though a constitutional amendment then any amendment of such law introduced through ordinary legislation by the Parliament or through an Ordinance issued by the executive shall automatically find its place in the First Schedule of the Constitution and shall also prejudicially affect or oust application and enforceability of the fundamental rights of the citizens. The Constitution does not countenance such a mode of amendment of the Constitution and, therefore, I cannot permit this. A live example of such an unconstitutionality is the Pakistan Army (Amendment) Ordinance (Ordinance I of 2015) issued in the aftermath of Acts No. I and II of 2015 and when questioned in that regard the learned Attorney-General kept quiet and could not utter even a single word in defence of the said Ordinance. According to my understanding Act No. II of 2015 as well as Ordinance No. I of 2015 are separate laws which themselves need independent protection of the First Schedule of the Constitution through their proper insertion in that Schedule as is the case of the amending laws within the contemplation of Article 8(3)(b)(i) of the Constitution and in the absence of any independent constitutional protection they cannot be deemed to have automatically been transposed to the First Schedule of the Constitution. If this understanding of mine is not correct then an

amending Act passed by a simple majority of the Parliament or an amending Ordinance issued by the executive may automatically find its place in the Constitution and thereby impliedly amend the Constitution in violation of the procedure and process for the purpose mandated by Articles 238 and 239 of the Constitution.

70. The Preamble to Act No. I of 2015 states that

> WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist or terrorist group, armed group, wing and militia or their members using the name of religion or a sect;
>
> (*underlining has been supplied for emphasis*)

It is important to mention here that the offences relating to terrorism, waging of war or insurrection against Pakistan and acts threatening the security of Pakistan are offences recognized and catered for by the Pakistan Penal Code, Anti-Terrorism Act, 1997 and the Protection of Pakistan Act, 2014 and the only declared purpose for making it permissible for military courts constituted under the Pakistan Army Act, 1952 to try such offences is "speedy trial" of such offences. I, however, find a real problem with this declared purpose because a comparison of sections 19 and 25 of the Anti-Terrorism Act, 1997 with the relevant provisions of the Pakistan Army Act, 1952 unmistakably shows that a trial and an appeal under the Anti-Terrorism Act, 1997 are far speedier than those under the Pakistan Army Act, 1952. It is, therefore, evident that the actual purpose for making it permissible for military courts to try civilians is not "speedy trial" but something else and that undisclosed something else cannot be achieved through or delivered by the normal courts of the country which are trained to dispense and achieve nothing but justice according to law. Through some material shown to the Court the learned Attorney-General has passionately submitted that the terrorists of the kind to be dealt with and tried by the military courts are barbaric savages and, thus, denial of protection of the normal constitutional and legal rights to them through the impugned measures is amply justified. Such a submission made by the learned Attorney-General reminds me of some observations made by me as a

Judge of the Lahore High Court, Lahore in the case of *Abid Hussain and another v. Chairman, Pakistan Bait-ul-Mal and others* (PLD 2002 Lahore 482) which observations read as follows:

> "Putting a human being, the best of Almighty Allah's creations *(Al Qur'an: Sura 95: Verse 4)*, in an iron cage for the rest of his life for no other reason than his abject poverty is an idea abhorrent to the 'dignity' bestowed upon him by the Creator *(Sura 17: Verse 70)*. When the Holy Qur'an enjoins upon the believers to spend on prisoners, slaves and those in debt and for saving their necks and for lessening of their burdens *(Sura 76: Verse 8, Sura 2: Verse 177 and Sura 9: Verse 60)* it sends an unmistakable message that what is to be hated is crime and not the criminal and the unfortunate predicament of such a human being is to be visited with compassion and mercy wherever and however possible. It is manifestly in this backdrop that the Constitution of the Islamic Republic of Pakistan, 1973 ensures it as a Fundamental Right guaranteed by Article 14 thereof that the dignity of man is inviolable. In the case of *In re: Suo Motu Constitutional Petition* (1994 SCMR 1028) the Hon'ble Supreme Court of Pakistan had unequivocally declared that even the worst criminal is entitled to his dignity as a man and the crime committed by him does not denude him of such a right which is referable to his belonging to the human race and not to his belonging to the community of criminals."

In the context of the present set of petitions I may add that the State of the Islamic Republic of Pakistan has adopted Islam as its religion (Article 2 of the Constitution) and according to Article 2A of the Constitution read with the Preamble to the same and the Objectives Resolution of 1949 the chosen representatives of the people of Pakistan are to exercise Almighty Allah's sovereignty as "a sacred trust". Almighty Allah has very clearly ordained in *Verse* 8 of *Surah* 5 of the Holy Qur'an that

> "O you who believe, stand up as witnesses for God in all fairness, and do not let the hatred of a people deviate you from justice. Be just: This is closest to piety; and beware of God. Surely God is aware of all you do."
>
> *(Translation by Ahmed Ali)*

Almighty Allah has proclaimed that the balance of the entire universe has been based by Him upon the scales of justice but through the impugned measures adopted in our country an attempt appears to have been made by the trustees of Almighty Allah's sovereignty to tilt that balance by tinkering with the scales of justice only for a temporary gain. The present spate of terrorism might be a momentary phase or phenomenon on the larger canvas of history and it may, therefore, be imprudent to compromise or injure the

permanent moral, religious and constitutional value of justice for tackling this transitory menace. Hazrat Ali Ibne Abi Talib (*Karam Allah ho wajho*) had observed that a society can live with *zulm* but it cannot survive with injustice. This tragic phenomenon of terrorism might have devoured thousands of this nation's innocent citizens and brave soldiers and policemen but compromising justice for combating this menace may be a death knell for the value system of the entire nation of more than one hundred and eighty million people. The choices before us may be hard but they are otherwise quite simple: revenge or sanity, distress or patience and emotion or wisdom. It may be true that the constitutional and legal measures in issue have been adopted by the people of Pakistan through their chosen representatives in the Parliament without any registered dissent but at the same time it is equally true that even some of the stalwarts who had voted in favour of such measures have expressly been apologetic in that respect. Some of them have called it "a bitter pill", "a cup of poison" and "a dark day" for democratic constitutional dispensation and others have publically expressed "shame" and disgust over their own conduct. Some of those voting in favour of these measures have gone to the extent of terming such measures as "suicidal for democracy". A suicidal measure on the part of the society to counter suicide bombers may not be the most rational legislative step to take. Constitution is often called a social contract and the law of contract looks at the validity of a contract with doubt and suspicion where a contracting party enters into the contract involuntarily or without free consent. There might have been a *consensus* over the proposed measures but was it *ad idem* is another thing. If the measures being adopted were good and healthy then they would have been adopted on a permanent basis and introduction of a sunset clause itself indicates that those adopting these measures understood quite well that the same did not piece well with the values of the Constitution and, thus, they were to be temporary. So, the question that boils down is as to whether it was advisable that the all-important constitutional value of justice be suspended in its operation albeit temporarily or not but I must hasten to add that the said question is not for me to answer. My domain is application of the Constitution and the law and in the

preceding paragraphs I have recorded my answers to the constitutional and legal issues raised before me. I may, however, observe in this context that the passionate submission made by the learned Attorney-General asking this Court to look the other way and allow the adopted temporary measures to hold the field for a limited period in order to meet the emergent and grave threat being faced by the State of Pakistan at the hands of the terrorists obliquely and impliedly, if not explicitly, invokes the infamous doctrine of necessity. It is ironical that in the last many decades it is the judiciary of this country which was blamed and maligned for invoking the doctrine of necessity for condoning some unconstitutional measures and this time the doctrine is being invoked by the legislature and the executive and the judiciary is being asked to go along with it. A. V. Dicey, the pioneer in the field of Constitutional law, has written in his celebrated book 'Introduction to the study of the Law of the Constitution' that Martial Law is said to be imposed when a civil government is run through military courts or tribunals. It is again paradoxical that through the impugned measures martial law, in the Diceyan sense, has been imposed in the country by the legislature and the executive and validation of the said measures is being sought from this Court. Will condoning or validating of such measures by this Court not amount to reacceptance of the doctrine of necessity which this Court has been taking pride for some time in abandoning?

71. The discussion made and the conclusions reached above lead me to hold that that the Constitution (Twenty-first Amendment) Act (Act I of 2015) had failed to protect or immunize the Pakistan Army (Amendment) Act (Act II of 2015) either from the sway of Article 175 of the Constitution or from application and enforcement of the fundamental rights guaranteed by the Constitution and that the military courts for trial of civilians constituted or authorized under the Pakistan Army (Amendment) Act (Act II of 2015) have not been founded on any power conferred by a Constitutional provision and, therefore, the *ratio decidendi* of the case of *Sh. Liquat Hussain* (*supra*) is equally applicable to the case in hand rendering the Pakistan Army (Amendment) Act (Act II of 2015) pertaining to trial of civilians by military courts unconstitutional, without lawful authority and of no

legal effect and it is declared accordingly. As a consequence of this declaration all the trials conducted and the appeals heard and all the judgments delivered in the process while deriving authority for such trials and appeals from the Pakistan Army (Amendment) Act (Act II of 2015) are to be treated as *non est* and incapable of implementation and execution. A further consequence of the declaration made in respect of the Pakistan Army (Amendment) Act (Act II of 2015) is that the Constitution (Twenty-first Amendment) Act (Act I of 2015) has lost its *raison d'être*, efficacy and utility and, therefore, no determination needs to be made about its fate or continued existence.

72. Before parting with the issues raised in connection with Acts No. I and II of 2015 I may observe that none of the said enactments has expressly ousted the jurisdiction of this Court or of the High Courts to examine matters pertaining to trial of civilians by military courts and for such ouster of jurisdiction the learned Attorney-General had referred to the provisions of Article 199(3) of the Constitution. This Court has already clarified on a number of occasions that the purported ouster of jurisdiction under Article 199(3) of the Constitution is not relevant where the impugned proceeding, action or order of a military court is without jurisdiction, *coram non judice* or *mala fide* and a reference in this respect may be made to the cases of *Brig. (Retd.) F. B. Ali and another v. The State* (PLD 1975 SC 506), *Federation of Pakistan and another v. Malik Ghulam Mustafa Khar* (PLD 1989 SC 26), *Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others* (PLD 1996 SC 632), *Sabur Rehman and another v. Government of Sindh and 3 others* (PLD 1996 SC 801), *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (PLD 2000 SC 869), *Mst. Tahira Almas and another v. Islamic Republic of Pakistan through Secretary, Ministry of Interior, Islamabad and another* (PLD 2002 SC 830), *Mushtaq Ahmed and others v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others* (PLD 2007 SC 405), *Ghulam Abbas Niazi v. Federation of Pakistan and others* (PLD 2009 SC 866), *Federation of Pakistan through Secretary Defence and others v. Abdul Basit* (2012 SCMR 1229), *Rana Muhammad Naveed and another v. Federation of Pakistan through Secretary Ministry of*

Defence (2013 SCMR 596) and *Ghulam Abbas v. Federation of Pakistan through Secretary, Ministry of Defence and others* (2014 SCMR 849). As regards lack of applicability or enforceability of the fundamental rights to trial of cases before military courts it hardly needs to be stated that the basic principles of fair trial, due process and natural justice have always been insisted upon by this Court in such cases by invoking Article 4 of the Constitution even before Article 10A (entitlement to a fair trial and due process) was added to the Constitution as a fundamental right. Be that as it may, I have already declared above that the Pakistan Army (Amendment) Act (Act II of 2015) pertaining to trial of civilians by military courts is unconstitutional, without lawful authority and of no legal effect and, therefore, the question about jurisdiction of this Court or of the High Courts in respect of the proceedings, actions or orders of such courts has paled into irrelevance.

Conclusions

73. As a result of the discussion made above I have concluded as follows:

(i) In view of the clear and categorical provisions of Article 175(2) and Article 239(5) and (6) of the Constitution I have not felt persuaded to accept the academic theory of basic features or basic structure of the Constitution as conferring jurisdiction upon this Court for striking down an amendment of the Constitution.

(ii) All the Constitution Petitions challenging the Constitution (Eighteenth Amendment) Act (Act X of 2010) are dismissed.

(iii) The Constitution Petitions assailing the Constitution (Twenty-first Amendment) Act (Act I of 2015) and the Pakistan Army (Amendment) Act (Act II of 2015) are partially allowed and the Pakistan Army (Amendment) Act (Act II of 2015) is declared to be unconstitutional, without lawful authority and of no legal effect. As a consequence of this declaration all the trials conducted and the appeals decided by the military courts deriving authority from the

Pakistan Army (Amendment) Act (Act II of 2015) are to be treated as *non est* and all the judgments delivered by invoking that law are rendered incapable of implementation and execution.

(iv) As an outcome of the declaration made above in respect of the Pakistan Army (Amendment) Act (Act II of 2015) the Constitution (Twenty-first Amendment) Act (Act I of 2015) has lost its *raison d'être*, efficacy and utility and, therefore, no determination needs to be made about its fate or continued existence.

Sd/-
(Asif Saeed Khan Khosa)
Judge

Islamabad.
Dated: 14.07.2015

SARMAD JALAL OSMANY, J.:- I have gone through the Judgment proposed to be delivered by my Learned brother Sheikh Azmat Saeed, J. Whilst I fully concur with the reasoning therein and the conclusions thereof, I venture with utmost respect to add a short note as follows.

2. These Petitions assail the Constitution (Eighteenth Amendment) Act, 2010, the (Nineteenth Amendment) Act, 2010 the (Twenty First Amendment) Act, 2015 and the Pakistan Army Amendment Act, 2015 (hereinafter referred to as the "**18th Amendment**", **"19th Amendment", "21st Amendment"** and **"Pakistan Army (Amendment) Act 2015"**)

2. Essentially two issues need to be determined in these petitions which are as follows: -

a. Is there a basic structure / grund-norm/essential feature in the 1973 Constitution

which so to speak forms its core and as such inviolable?

b. If the answer to the above question is in the positive then whether above mentioned amendments to the Constitution and the Pakistan Army (Amendment) Act 2015 should be struck down as being violative of such basic structure/grund norm/essential feature?

3. Reverting to the first question, it would be seen that our Constitution is a written document and is a complete code pertaining to the establishment of the state of Pakistan, the form of Government which would administer it, the principles of policy which would be adopted by the Government to do so, the establishment of the three pillars of the state viz. Executive, Legislature and Judiciary and the manner of their functioning within there respective spheres etc. In fact the hopes, aspirations, dreams, will and the determination of the people of Pakistan to do so were firstly expressed in the Objectives Resolution which was passed by the first Constituent Assembly of Pakistan on the 7th of March 1949 by our founding fathers. Hence in my humble opinion before undertaking any judicial analysis of the aforementioned issues and the erudite arguments addressed at the bar by the Learned Counsel from both sides as well as the learned Attorney General for Pakistan, it would be expedient to reproduce the Objectives Resolution which is as under: -

The Objectives Resolution

بسم اللہ الرحمن الرحیم

(In the name of Allah, the most Beneficent, the most merciful.)

Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan;

Wherein the State shall exercise its powers and authority through the chosen representatives of the people;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah;

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

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

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

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

Wherein the independence of the Judiciary shall be fully secured;

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

So that the people of Pakistan may prosper and attain their rightful and honored place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity.

4. The Objectives Resolution means what it says; it is a statement of the objectives for which this Country was created through the

sacrifices of millions of people who wanted a separate homeland for themselves. The crux of the Objectives Resolution is firstly, a declaration that sovereignty over the entire universe belongs to Allah Almighty alone and the authority which he has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by him is a sacred trust. The meaning of these words should not be lost upon us because they are unique in the sense that Allah's sovereignty has been declared to be a sacred trust which he has delegated to the people of this Country to be exercised by them through their chosen representatives. This is the reason why so often in many a reported case we find observations to the effect that all public offices are in the nature of a trust which include those of the Judiciary, Executive and Legislative. In this regard, I am in complete agreement with the views of my learned Brother Jawwad S. Khawaja, J. per his separate opinion. The Resolution goes on to say that in the State of Pakistan sovereignty is to be exercised in a manner wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and wherein adequate provision shall be made for the minorities to profess and practice their religious and develop their cultures and wherein shall be guaranteed fundamental rights and wherein the independence of the judiciary shall be fully secured. Pakistan since independence in 1947 has been subjected to various experiments in governance i.e. parliamentary form of democracy, a presidential form of government, military dictatorship etc. Each ruler tinkered with our Constitution in order to suit his needs and in order to ensure his perpetuity, but as the saying goes the graveyards of this world are full of indispensible people. However, one thing is settled, that the Objectives Resolution,

firstly inserted in the preamble to the 1956 Constitution survived as the preamble to the 1962 and 1973 Constitutions with minor changes in the 1973 Constitution and finally it was made a part of the Constitution itself vide Article 2A added by P.O. Order No 14 of 1985..

5. Keeping in view the Objectives Resolution, I would now proceed to examine the case laws developed over the past half a century wherein to some extent the contents of the Objectives Resolution were considered or the results flowing from it examined.

(a) The first case in this connection is ***Mr. Fazlul Quader Chowdhry v. Mr. Mohd. Abdul Haque*** **(PLD 1963 Supreme Court 486)**, wherein an amendment to Article 104(1) of the 1962 Constitution was considered whereby the word 'Minister' was removed from Article 104(1) with a view to enabling ministers appointed from amongst members of the assemblies, to retain their seats after such appointment. It was held that such amendment was *ultra vires* of the Constitution. A.R. Cornelius, C.J. speaking for the Court held that the amendment in question was against the form of the government prescribed by the Constitution and militated against the concept of separation of powers between the three pillars of the State and hence struck down. It was also reiterated that the Members of the Assembly had taken an oath of preserving protecting and defending the Constitution as had the Judges of the Superior Courts and consequently their insistence upon alteration to the Constitution before they became Ministers militated against the solemnity of their oath.

(b) In the case of ***Jhamandas v. Chief Land Commr.*** **(PLD 1966 SC 229)**, the order of the Land Commissioner, depriving members of a Joint Hindu Family of their inheritance, was in issue. A.R. Cornelius, C.J. while speaking for the Court observed that Article 2 of the 1962 Constitution guaranteed equal treatment to all citizens in accordance with law and in particular that no action detrimental to the property of any person shall be taken except in accordance with law. Hence, the impugned order of the Land Commissioner was struck down as being violative of said Article which was described as the constitutional conscience of Pakistan.

(c) In the case of ***Asma Jilani v. Govt. of the Punjab*** **(PLD 1972 SC 139)**, where the martial law imposed by General Yahya Khan was proscribed, it was held by Hamood-ur-Rahman, C.J. that Pakistan's own grund-norm is enshrined in its own doctrine that the legal sovereignty over the entire universe belonged to Almighty Allah alone and the authority exercisable by the people within the limits prescribed by him is a sacred trust. This was held to be an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed, it cannot be, for, it is one of the fundamental principles inscribed in the Holy Quran. Consequently, the martial law imposed by General Yahya Khan was set aside and the principle set down in the case of ***State v. Dosso*** **(PLD 1958 SC 533)** disapproved, which had sanctified the martial law of General Ayub Khan on the principle of state necessity relying upon Kelsen's theory to that effect.

(d) However, in the case of ***State v. Zia-ur-Rahman*** **(PLD 1973 SC 49)**, Hamood-ur-Rahman, C.J. held that the Supreme Court was a creature of the Constitution and can neither claim nor has the right to strike down any provision of the Constitution of Pakistan. The Court did claim, however, the right to interpret the Constitution even if a provision in the Constitution ousted the jurisdiction of the Court. It was further held that the Objectives Resolution of 1949 is a document which has been generally accepted and has never been repealed or renounced but it does not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it. Explaining his observations in ***Asma Jilani's case***, Hamood ur Rahman, C.J. stated that therein it had not been laid down that the Objectives Resolution is the grund-norm of the Constitution but that the grund-norm is the doctrine of legal sovereignty of Allah accepted by the people of Pakistan and the consequences that flow from it and it does not describe the Objectives Resolution as the cornerstone of Pakistan's legal edifice. Hence, the grund-norm referred to by the Supreme Court in Asma Jilani's case was even above the Objectives Resolution which "embodies the spirit and the fundamental norms of the constitutional concept of Pakistan". Consequently, the Objectives Resolution could not stand on a higher pedestal than the Constitution itself as it is a preamble only and cannot control the substantive parts of the Constitution.

(e) In the case of ***Federation of Pakistan v. United Sugar Mills Ltd*** **(PLD 1977 SC 397)**, the amendment made in Article 199 of the Constitution by adding sub-clause 4-A through the 4th amendment was upheld. It was also observed that as held in the case of ***Zia-ur-Rahman*** a constitutional provision cannot be challenged on the

ground of being repugnant to what are sometimes stated as "national aspirations" 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 or a supra constitutional instrument.

(f) In the case of ***Begum Nusrat Bhutto v. Chief of Army Staff Etc*****. (PLD 1977 SC 657)** per the majority, martial law imposed by General Zia-ul-Haq, was upheld on the ground of state necessity. The case of ***Asma Jilani*** to the contrary was distinguished and in a manner of speaking overruled. It was held that the Constitution could be amended or suspended.

(g) In the case of ***Hakim Khan v. Government of Pakistan*** **(PLD 1992 SC 595)**, it was held that by virtue of Article 2A, the Objectives Resolution had become a substantial part of the Constitution. However, it was not a supra-Constitutional provision and hence carried the same weight and status as other Articles of the Constitution which were already a substantive part thereof. Consequently, amendment to the Constitution cannot be tested on the touchstone of Article 2A, which was purely an Objectives Resolution, whereby the people of Pakistan had laid down how they would be governed and what the system of government would be and how the power was to be shared between the three pillars of the government.

(h) In the case of ***Al-Jehad Trust v. Federation of Pakistan*** **(PLD 1996 SC 324)**, vide short order *inter alia* it was held that Pakistan is governed by the Constitution of the Islamic Republic of Pakistan, 1973, preamble of which says that the principles of democracy,

freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed and independence of Judiciary fully secured. It also provided that the Muslims shall be enabled to ordain their lives in their individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah. The preamble is a reflection of the Objectives Resolution which was inserted in the Constitution as Article 2A as a substantive part of the Constitution by P.O. No.14 of 1985. Article 2 of the Constitution states in unequivocal terms that Islam shall be the State religion of Pakistan. Part IX of the Constitution contains Islamic Provisions in which Article 227 envisages that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. The Institution of Judiciary in Islam enjoys the highest respect and this proposition is beyond any dispute. The appointments of Judges and the manner in which they are made have close nexus with independence of Judiciary.

(i) In the case of ***Mahmood Khan Achakzai v. Federation of Pakistan*** **(PLD 1997 SC 426)**, it was held by majority *inter alia* that the question as to the basic structure of the Constitution of Pakistan (1973), is a question of an academic nature which cannot be answered authoritatively with a touch of finality. Basic structure as such is not specifically mentioned in the Constitution but the Objectives Resolution when read with other provisions of the Constitution reflects salient features of the Constitution highlighting Federalism and Parliamentary form of Government blended with Islamic provisions.

(j) In the case of ***Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*** **(PLD 1998 SC 1263)**, it was held that the basic structure of the Constitution was a representative form of Government, Islamic concept of democracy and independence of judiciary. However, this theory could not be adopted to declare any provision of the Constitution as being *ultra vires* of any of the fundamental rights. On the contrary, it was observed that when there is a conflict between two Articles of the Constitution, efforts should be made to resolve the same by reconciling them and that interpretation should be accepted, which is closest to the basic structure i.e. independence of judiciary etc.

(k) In the case of ***Zafar Ali Shah v. Pervez Musharaf, Chief Executive of Pakistan*** **(PLD 2000 SC 869)**, it was held *inter alia* that the salient features of the Constitution were independence of the Judiciary, federalism, parliamentary form of Government blended with Islamic provisions.

(l) In the case of ***Pakistan Lawyers Forum v. Federation of Pakistan*** **(PLD 2005 SC 719)**, it was held that although it was recognized that there were certain salient features of the Constitution, no constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process and hence the appeal in such cases was to be made to the people and not the Courts, since the Constitutional amendment in issue posed a political question which could be resolved only through the normal mechanism of parliamentary democracy and free elections.

6. An overview of the aforementioned cases would establish that initially in the cases of ***Mr. Fazlul Quader Chowdhry*** *and* ***Jhamandas*** the principle of separation of powers between three pillars of the State was recognized and so also the equality clause respectively as contained presently in Article 4 of the Constitution which was described as the Constitutional conscience of Pakistan. Thereafter very visibly in **Asma Jilani's** case this Court accepted the Objectives Resolution as the grund-norm of the Constitution particularly the declaration that sovereignty over the entire universe belongs to almighty Allah alone and the same was to be exercised by the people as a sacred trust which did not condone the imposition of martial law by General Yahya Khan which was accordingly declared to be unconstitutional. However strangely enough in the case of **Zia-ur-Rehman** it was observed that in Asma Jilani's case the Objectives Resolution itself was not the grund-norm but the doctrine of Allah's sovereignty accepted by the people of Pakistan and the consequences that flow from it i.e. such grund-norm was even above the Objective Resolution and embodies the spirit and the fundamental norms of the constitutional concept of Pakistan. In the cases of **United Sugar Mills** and **Begum Nusrat Bhutto**, the case of **Zia-ur-Rehman** was followed. Again in the case of **Hakim Khan** it was held that although by virtue of Article 2A to the Constitution, the Objectives Resolution had become a substantial part of the Constitution, yet, it was not a supra Constitutional provision and hence any amendment to the Constitution could not be tested on its touchstone. Again in the case of **Al-Jehad Trust** it was held that the preamble to the Constitution is a reflection of the Objectives Resolution which was inserted as Article 2A as a substantive part of the same and since Article 2 of the

Constitution says that Islam shall be the state religion of Pakistan and since the institution of Judiciary in Islam enjoys the highest respect and hence the appointment of Judges has a close nexus with the independence of judiciary. Finally in the case of **Mahmood Khan Achakzai** again by majority it was held that the Objective Resolution when read with other provisions of the Constitution reflects its salient features highlighting Federalism and Parliamentary form of Government blended with Islamic provisions. But in **Wukala Mahaz Barai Tahafaz Dastoor (Supra)** although it was recognized that the basic structure of the Constitution was a representative form of Government, Islamic concept of democracy and independence of judiciary however this theory could not be adopted to declare any provisions of the Constitution as being ultra vires of any of the fundamental rights. Yet again in the case of **Zafar Ali Shah** it was held inter alia that salient features of the Constitution were independence of judiciary, federalism, parliamentary form of Government blended with Islamic provisions but in the case of **Pakistan Lawyers Forum** (a five members bench) it was held that no constitutional amendment could be struck down by the superior judiciary as being violative of these features.

7. It would therefore be seen that perhaps for the first time it was recognized by this Court in the case of **Asma Jilani** that per the Objectives Resolution sovereignty over the entire universe belonged to Almighty Allah alone and he has delegated the same to the people of Pakistan as a sacred trust which yet again is to be exercised through the elected representatives of the people and this is reflected in the enactment of the 1973 Constitution by such elected representatives which prescribed a parliamentary form of

Government etc.. In my humble opinion the case of **Asma Jilani** indeed broke new ground in the constitutional history of this country and the judicial interpretation of the same when the concept of a trust in between the people and their chosen representatives was firstly recognized. Although in the case of **Zia-ur-Rehman** this declaration viz the Objectives Resolution was watered down in the sense that therein it was held that the grund-norm referred to in the case of **Asma Jilani** was even above the Objectives Resolution i.e. something ethereal embodying the spirit and the fundamental norms of the concept of Pakistan, in subsequent cases particularly in **Muhammad Khan Achakzai** by majority of six to one, it has been accepted by this Court that there are some salient features i.e. federalism and parliamentary form of Government blended with Islamic provisions. To the contrary, in the case of **Wukala Mahaz Barai Tahafaz Dastoor**, by majority of six to one, the basic structure theory was not accepted. However in the case of **Zafar Ali Shah**, the full Court consisting of 12 members, accepted the salient features of the Constitution as being independence of judiciary, federalism, parliamentary form of Government blended with Islamic provisions. Consequently in my opinion the defining decision in the matter is the case of **Zafar Ali Shah** in which it has in no uncertain terms been declared that the salient features of the Constitution were independence of the judiciary, federalism, parliamentary form of Government blended with Islamic provisions and this was by a Twelve Members Bench of the Court i.e. full Court at that time. Although the case of **Zafar Ali Shah** has been much criticized as having been upheld the martial law imposed by General Pervez Musharaf, yet the fact remains that it did otherwise declare the

salient features of the Constitution as reproduced above. Seen in this context as well as in the context of the theory of Trust the only conclusion therefore is that the Objectives Resolution which is now a substantial part of the Constitution by virtue of Article 2A embodies the will of the people which is a sacred trust unto the elected representatives of the people which yet again represents the sovereignty of Almighty Allah over the entire universe and is to be exercised within the limits prescribed by him per Islamic doctrines. This country was achieved in the name of Islam. Our founding fathers realized as far ago as in 1940 when the Pakistan Resolution was tabled at Lahore that the two communities viz Muslims and Hindus could not live together as they had separate identities, cultures, customs, languages etc. and this was again highlighted in the Objectives Resolution. Consequently in my humble opinion concurring with the views of my Learned Brother Sheikh Azmat Saeed, J. it would be seen that any amendment to the Constitution which would deny the people of this country their freedom per their fundamental rights or the form of Government which they had chosen or the independence of the judiciary could never be condoned. We may look for our philosophies, our existence and our way of life here and there but it is all embodied in the Constitution of which the objective resolution, so to speak, is in short form its crux.

8. Having opined that indeed there is a basic structure/grund-norm/salient feature or whatever other term may be used i.e. the constitutional conscience etc. which is embodied in the Objectives Resolution particularly the declaration that sovereignty over the entire universe belongs to Almighty Allah alone, now I would examine whether the Constitution 18th Amendment, 19th Amendment, 21st

Amendment and the Pakistan Army Amendment Act 2015 violates the same and to that extent should be struck down.

9. Reverting firstly to the 18th Amendment it would be seen that a number of provisions of the Constitution have been amended by the same but the challenge basically thrown at the bar was in terms of Article 63A which provides for disqualification of members of Parliament on the grounds of defection etc. and the addition of Article 175A providing for the appointment of persons to the superior judiciary of Pakistan.

(a) Insofar as Article 63A is concerned it would be seen that originally the 1973 Constitution did not have any provision in respect of disqualification of a member on the ground of defection from his or her political party. This was introduced via the Constitutional 14th Amendment 1977 whereby Article 63A was introduced which provided for such disqualification. Article 63A was upheld by this Court in the case of **Wukala Mahaz** and held to be intra vires of the Constitution. It was observed therein that Article 63A as it originally stood brings stability in the polity of the country as it would be instrumental in eradicating the cancerous vice of floor crossing. It is also in consonance with the Quran and Sunnah as the same enjoin its believers to honour their commitments if they are not in conflict with the teachings of the former. In its present shape vide the 18th Amendment there is no significant change to the original Article 63A other than the scope of the directions in specific matters mentioned in sub paragraphs 1 to 3 of paragraph "b" of clause "1" of Article 63A has been enhanced. I concur with my Learned Brother Sheikh Azmat Saeed, J. that they appear to be reasonable and also necessary for the maintenance of party discipline, stability and smooth functioning

of democracy in Parliament. So also it would be seen that there is an inbuilt safeguard mechanism afforded to a Member before he is disqualified since there is an opportunity to show cause why a declaration that he/she be has defected from the party may not be made. This declaration is then sent to the Presiding Officer of the concerned House and copied to the Election Commission and finally the Election Commission is required to decide the same which is justiciable before this Court. In our opinion such safeguards adequately protect a party member from being disqualified if he merely debates or raises a point of order in the house against a particular issue being discussed in the Parliament and even if he does decide to vote against his party as a matter of conscience, as stated above, he has legal redress up to this Court. Hence whilst concurring with my Learned Brother Sheikh Azmat Saeed, J., in my opinion the newly amended provisions of Article 63A will not in any manner undermine or are violative of the basic structure of the Constitution as described above.

(b) The next change brought about in the Constitution vide the 18th Amendment is the introduction of Article 175A providing for the procedure whereby the Judges of the superior courts of this Country are to be appointed. In this regard it would be seen that two collegiums have been created, the Judicial Commission and the Parliamentary Committee. For appointment of the Judges of the Supreme Court, the Judicial Commission is composed of the Hon'ble Chief Justice of Pakistan as a Chairman, four senior most Judges of the Supreme Court as Members, a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Hon'ble Chief Justice of Pakistan, the Federal Minister for Law and

Justice, the Attorney General for Pakistan and a senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years. For appointment to the Judges of the High Court, the Commission would also include the Chief Justice of the relevant High Court along with the senior Puisne Judge of that Court, the Provincial Minster for Law and an Advocate having not less than fifteen years of practice at the High Court to be nominated by the concerned bar council. The same is the case for appointment of the Judges to the Islamabad High Court whereas for appointment of Judges in the Federal Shariat Court, Commission shall also include the Chief Justice of the Federal Shariat Court and the senior most Judge of that Court as its members. Once a person has been nominated by majority by the Judicial Commission, his name is sent to the Parliamentary Committee which consists of four members of the Senate and four members of the National Assembly out of which four shall be from the treasury benches two from each house and four from the opposition benches, two from each house to be nominated by the leader of the House and the Opposition. Where the Committee on receipt of nomination by ¾ majority approves it the same is to be sent to the Prime Minster who shall forward it to the President of Pakistan for appointment. However where the Committee decides not to nominate a person by three quarter majority, its decision is to be forwarded to the Commission through the Prime Minster who would thereafter nominate another person. In my opinion the inclusion of persons other than the Judges of the superior Courts in the appointment of Judges is a salutary provision. We as Judges cannot claim to be the repository of all wisdom insofar as the antecedents of a candidate are concerned. Of course we can

evaluate the professional worth of a nominee i.e. his knowledge of the law, his grasp of legal principles and his acumen as a lawyer but the other qualities required of a judge which are his impeccable integrity, character and reputation etc. can perhaps best be ascertained by non-judicial members of the Commission as well as the Committee who so to speak are not as aloof from society as Judges are supposed to be. Hence I do not see as to how in any manner the process of appointment of Judges to the superior Courts militates against the independence of the judiciary or for that matter any other provision of the Constitution. It would be seen that where the Committee does not endorses the nomination of the Commission the same is justiciable as decided in the case of **Munir Hussain Bhatti Vs. Federation of Pakistan (PLD 2011 SC 308)**.

10. Now I would examine the 21st Amendment (which adds a proviso to Article 175 and amends the First Schedule to the Constitution) and the Pakistan Army Amendment Act, 2015 in order to ascertain whether they are violative of any of the essential features or basic structure of the Constitution.

(a) It will be appropriate to reproduce Article 175 as it existed prior to the amendment and the additions made thereto pursuant to the 21st Amendment:

> *175:. (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.*
>
> *Explanation.---- Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court".*
>
> *(2) No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*

> *(3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day."*

The 21st Amendment introduced a proviso to Article 175 which reads as follows: -

> *"Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.*
> *Explanation:- In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.*

(b) So also vide the 21st Amendment the Pakistan Army Act 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 have been added in the First Schedule in Sub-Part III of part I thereof after Sl. No. 5.

(c) Consequently what the 21st Amendment achieves is firstly by virtue of the proviso to Article 175 it exempts the trial of such persons under the Pakistan Army Act 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 who are known to belong to any terrorist organization using the name of a religion or a sect. from the rigors of Article 175. In my humble opinion therefore the said amendment does not set up such Courts which are already in existence by virtue of their separate enactments but only tries to obviate a challenge to such Courts to the trial of the persons mentioned therein by such Courts. Article 175 (1) clearly provides that there shall be a Supreme Court of Pakistan, High Court of each Province and High Court for Islamabad Capital Territory and such other Courts as may be established by law. ***(Emphasis is supplied).*** It is

nobody's case that the Army, Navy or Air Force Courts are not established by law as indeed they have been established by their respective enactments. Consequently I do not see as to how the amendment in question by virtue of addition of a proviso to Article 175 in any manner effects the establishment of such Courts. Article 175 is a very important Article of the Constitution as it deals with establishment of the Courts of law in Pakistan which means civilian Courts which are to be graced by such persons as are appointed to the superior Courts by virtue of the Constitution and to the other Courts by virtue of the law. On the other hand the Army, Air Force and the Navy Courts are established by virtue of their separate enactments and for persons who are subject to the jurisdiction of such Courts as defined therein. In fact the Army Act has been amended separately to extend its jurisdiction for the purpose of trial of any persons claiming or are known to belong to any terrorist group or an organization using the names of a religion or a sect and raise arms or wage war against Pakistan etc., or attack the armed forces of Pakistan or law enforcement agencies or attack any civil or military establishment of Pakistan etc.. Hence in my opinion the proviso to Article 175 is more or less insignificant.

(d) I would now consider the affect of including in the First Schedule to the Constitution the Pakistan Army Act 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014. This Schedule i.e. sub part 3 of Part 1 pertains to Article 8 of the Constitution which provides as under: -

> ***"Article 8. Laws inconsistent with or in derogation of Fundamental Rights to be void.***

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(3) The provisions of this Article shall not apply to—

(a) Any law relating to members of the Armed Forces, or the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or

(b) any of the-

(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) other laws specified in, Part I of the First Schedule;

and no such law nor any provisions thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

(4) Notwithstanding anything contained in paragraph (b) of clause (3) within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in Part II of the First Schedule into conformity with the rights conferred by this Chapter:

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

Explanation.- If in respect of any law Majlis-e-Shoora (Parliament) is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution."

(i) Consequently the intent of adding the aforesaid enactment viz Pakistan Army Act 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 (the last of which creates special Courts) is to obviate any challenge thrown to the trial of the accused by such Courts on the ground that it is violative of their fundamental rights. Hence now I would examine whether the trial of such accused who allegedly claim or are known to belong to any terrorist group or organization using the name or religion or sect. is violative of such rights. Before attempting to do so it would be instructive to examine the current law and order condition prevailing in Pakistan in the backdrop of which the 21st Amendment to the Constitution was enacted. In this regard I can do no better than to reproduce the preamble to Act 1 of 2015 viz 21st Amendment: -

Act No. I of 2015
An act further to amend the Constitution of the Islamic Republic of Pakistan

WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist group, armed group, wing and militia or their members using the name of religion or a sect;

AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constitution, from the terrorist groups by raising of arms and insurgency using the name of religion or a sect or from the foreign and locally funded anti-state elements;

AND WHEREAS it is expedient that the said terrorist groups including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2;

AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties

conferences held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan;

It is hereby enacted as follows: ----

1. ***Short title and commencement****----(1) This Act may be called the Constitution (Twenty-first Amendment) Act, 2015.*
2. *It shall come into force at once.*
3. *The provisions of this Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.*

2. *Amendment of Article 175 of the Constitution.---- In the Constitution of the Islamic Republic of Pakistan, hereinafter called the Constitution, in Article 175, in clause (3), for the full stop at the end a colon shall be substituted and thereafter, the following proviso shall be inserted, namely: ---*

> *"Provided that the provisions of this Article shall have no application to the trial of persons under any of 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 of organization using the name of religion or a sect.*

Explanation: In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

3. Amendment in the First Schedule of the Constitution.—In the Constitution, in the First Schedule, in sub-part III of Part I, after serial No. 5, the following new entries shall be added, namely:----

6. The Pakistan Army Act, 1952 (XXXIX of 1952)

7. The Pakistan Air Force Act, 1953 (VI OF 1953)

8. The Pakistan Navy Ordinance, 1961 (XXXV OF 1961)

9. The Protection of Pakistan Act, 2014 (X of 2014)

(ii) A similar preamble is available in Article 2 of the Act 2015 by virtue of which the Pakistan Army Act 1952 has been amended to give the jurisdiction to the Army Courts for the trial of such persons who claim or are known to belong to any terrorist group or organization using the name of a religion or a sect. etc.. It is no any longer a secret that we are a nation at war as persons who claim to belong to different religious organizations or sects are engaged in an insurgency in order to propagate their own view of religion. Their objectives are no secret and in short these are to grab political and economic power of the state through force of arms. We have seen how these insurgents operate in the name of religion the manner in which they murder, decapitate, torture and otherwise end the lives of innocent people whom they perceive to be their enemies only because they do not subscribe to their particular brand of religion. We have seen the terrible atrocities carried out by such people in the Peshawar Army Public School massacre where more than 140 innocent children and staff members of the school were mercilessly shot for no other reason that the school was being run by the Army and the Army was carrying out an operation against such insurgents. This shows the absolute desperation of these insurgents as they did not even spare women and children while carrying out their agenda of challenging the writ of the state of Pakistan. Hence in my opinion the extension of the Army Courts jurisdiction over such terrorist elements would not in any manner militate against the independence of judiciary as desperate times call for desperate measures. In this context it would be seen that vide Article 4 of the Constitution all persons are to be dealt with in accordance with law. Such Article has been interpreted in the case of **Government of Balochistan through**

Additional Chief Secretary Vs. Azizullah Memon and 16 others (PLD 1993 SC 341) and has been categorized as the equal protection of law and held that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances but it contemplate such persons similarly situated or similarly placed are to be treated alike. By no stretch of imagination can it be said that these insurgents/desperadoes are ordinary criminals because they are waging a war against the State of Pakistan and hence they cannot claim protection of Article 4. Similarly insofar as Article 8 is concerned again it would be seen that this categorically states that any law or custom or usage having force of law insofar it is consistent with the rights conferred by this chapter (fundamental rights) shall to the extent of such inconsistency be void. However vide sub Article 3 which is an exception to sub article 1 the provisions of the article are not to apply to the members of the armed forces or any of the law specified in the First Schedule being part 1 thereof which now has been amended by the 21st Amendment to include The Pakistan Army Act, 1952, The Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014. So the question arises whether the Pakistan Army Act does not contain any fundamental rights for an accused before it. It is settled law that in a criminal trial the basic rights of an accused are firstly to be apprised of the charge against him, the right to counsel of his choice, the right to cross examine the prosecution witnesses and the right to lead his own evidence. In the case of **Brig. (Retd.) F.B. Ali and another Vs. The State (PLD 1975 SC 506)** it was held that all these rights are available to an accused before a military Court. No doubt in the case of **Mehram Ali (PLD 1988 SC 1445)** it was stated that the

constitutional framework relating to the judiciary does not admit/permit the establishment of a parallel system of Courts or Tribunals which are not under the judicial review and administrative control and supervision of the High Court. So also in the case of **Sh. Liaquat Hussain and others Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1999 SC 504)** the trial of civilians by military Courts for criminal offences was set aside and it was held that under Article 245 the Army's role is very limited i.e. in aid of civil power and it disqualifies the army to act in supersession of the civil Courts and even an Act of the Parliament cannot enable them to perform such judicial functions. However as stated above we are passing through difficult times, the terrorists/insurgents who are to face their trials before the military courts are desperate persons whose avowed objective is to destabilize the Government and the State of Pakistan and to establish their own writ based upon their own interpretation of religion. Such persons can certainly be subjected to a more stringent/strict regime of trial. In the end it may also be seen that as per settled law, even those persons who are convicted by the military courts can approach the superior courts if they can establish that either the trial was malafide or without jurisdiction or quorum non-judice. Consequently in my opinion the 21st Amendment to the Constitution of the Pakistan Army (Amendment) Act 2015 does not militate against the essential features of the Constitution and neither does the Pakistan Army (Amendment) Act 2015.

Sd/-
(Sarmad Jalal Osmany)

EJAZ AFZAL KHAN, J.- By this single judgment we propose to decide Constitution Petitions No. 12/2010, 13/2010, 18/2010, 20/2010, 21/2010, 22/2010, 30/2010, 35/2010, 36/2010, 39/2010, 40/2010, 42/2010, 43/2010, 44/2010, 1901/201 and H.R.C. No. 22753-K/2010 challenging the vires of the Constitution (Eighteenth Amendment) Act, 2010, and Constitution Petitions No. 99/2014, 2/2015, 4/2015, 5/2015, 6/2015, 7/2015, 8/2015, 9/2015, 10/2015, 11/2015, 12/2015, 23/2015 and 24/2015 challenging the vires of the Constitution (Twenty First Amendment) Act, 2015. However, Constitution Petition No. 13/2015 was filed in support of the 21st Amendment praying for validation of the 21st Amendment Act, 2015.

2. Mr. Hamid Khan, the learned Sr. ASC appearing for Lahore High Court Bar Association in Constitution Petition No. 18 of 2010 was first to break the ice. He after citing a string of judgments from Indian and Pakistani jurisdiction enunciating the doctrine of basic structure sought to canvass at the bar that the salient features of the Constitution cannot be altered and that the 18th Amendment altering many of them cannot stand. The main thrust of his argument was that intervention of Parliamentary Committee in the appointment of Judges would tend to politicize the process which is against the letter and spirit of the preamble and Article 175 of the Constitution. When told that the provision relating to the role and Constitution of Parliamentary Committee is more democratic than ever before as it decentralized the power of the President among eight Members of the Committee, four from the treasury and four from the opposition benches, he could not advance any argument justifying its elimination from the process. When asked as to how the Parliamentary

Committee can influence the process or politicize the appointment of judges when its decision has been made justiciable in view of the verdict rendered in the case of **Munir Bhatti and others v. Federation of Pakistan** (PLD 2011 SC 407), the learned Sr. ASC again could not say anything convincing against the 18th Amendment except that something even worse is in the offing in the form of the 22nd Amendment. This argument being speculative cannot be addressed at this stage. In case any amendment comes on the surface it can well be dealt with at that time and not now.

3. Challenging the vires of the 21st amendment, Mr. Hamid Khan, the learned Sr. ASC contended that the Military Courts set up pursuant to the said amendment are worst ever, therefore, their comparison with any Court set up in the past would be rather ominous and misleading. With the rise of terrorism, the learned Sr. ASC maintained, everybody has become insecure in every part of the country but that in no way calls for compounding the standards of proof which have been in vogue since time immemorial. Due process, the learned ASC added, has to be observed regardless of the magnitude and heinousness of the crime. The learned ASC in support of his contention placed reliance on the case of **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others** (supra). The learned ASC by referring to the case of **Darwesh M. Arbey, Advocate v. Federation of Pakistan through the Law Secretary and 2 others** (PLD 1980 Lahore 206) contended that enforcement of fundamental rights shall be just inconceivable if the provisions securing the independence of judiciary are tampered with.

4. Mr. A.K. Dogar, Sr. ASC contended that the Basic Structure theory indeed emerged from the case of **Mr. Fazlul Quader Chowdhry v. Mr. Muhammad Abdul Haque** (PLD 1963 SC 486) wherein the law enabling the Ministers to retain their Membership in the Assembly was declared void on account of its being against the basic structure of the Constitution of 1962. Islam, he contended, is a structural base of the homeland founded for Muslims on the basis of the Two Nation Theory, therefore, its substitution by secularism is unthinkable. The learned ASC next contended that once democracy is accepted to be one of the salient features of the Constitution, deletion of Clause (4) of Article 17 providing for holding intra party election to elect its office bearers and party's leaders is violative of the salient features of the Constitution. While commenting on Article 63(g) and (h), the learned ASC contended that lapse of five years cannot transform a convict into sagacious, righteous, non-profligate, honest and Ameen, therefore, they be struck down. But when told that due to lapse of time and conviction in the crime the convict could shrug off the rust and dust of his past, therefore, it would be rather harsh to debar him from taking part in the electoral process, the learned ASC did not press this argument anymore. Taking strong exception to the method of nomination for appointment of judges, the learned ASC contended that we could not so far evolve an adequate method of nomination for appointment of Judges on merit which is one of the causes for the deteriorating State of rule of law.

5. Mr. Abdul Hafeez Pirzada, Sr. ASC argued that like all other Constitutions, the Constitution of 1973 has a basic structure and that as the basic structure of Constitutions, more often than not, is

beyond the amendatory power of the Parliament so is that of the Constitution of 1973. He next contended that the basic structure is fully reflected in the preamble and the other provisions of the Constitution which has to be protected without being swayed by the doctrine of sovereignty of Parliament which is no longer accepted even in the UK. He went on to argue that Article 8 of the Constitution guards against any inroad into fundamental rights whether it appears in the garb of amendment in law or the Constitution. When told that amendment in law cannot be held synonymous with amendment in the Constitution in view of the dicta laid down in the cases of **Shankari Prasad Deo v. Union of India** and **Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others** (*Supra*), the learned Sr. ASC stated straight off that he is not inclined to recognize the distinction thus drawn in the aforesaid judgments.

6. Mr. Ibrar Hassan, ASC appearing on behalf of Pakistan Bar Council contended that he may not support the basic structure theory and hold any part of the Constitution beyond the amendatory power of the Parliament, all the same any amendment in law or the Constitution abridging Fundamental Rights or impinging on the independence of judiciary cannot be made immune from challenge. He next contended that amendment in the Constitution as well as the Army Act is discriminatory because only a special class of terrorists had been picked up for stringent trial and stringent punishment, notwithstanding terrorists of every cult and creed deserve alike treatment.

7. Ms. Asma Jehangir, learned Sr. ASC appearing on behalf of Supreme Court Bar Association in Constitution Petition No. 10 of

2015 contended that every amendment in the Constitution is to be judged on its own merits without reference to the basic structure as there is nothing in the Constitution of 1973 which could be termed as such. Objectives Resolution, she contended, cannot be held to be a consensus document when the non-Muslim members of the Constituent Assembly voiced apprehensions about some of its clauses which were proved to be true by the events taking place in 80's. She sounded antithetical and even ambivalent when she sought annulment of the amendment and at the same time stressed the sovereignty of Parliament. She then sought refuge in the argument that since the amendment in the Constitution was made first and amendment in the Army Act was made later, the latter will have no effect. Any Constitutional amendment, she maintained, cutting deep into the fundamental rights has to be read down under the mandate of Article 8 of the Constitution. Trial of the persons under the Army Act etc, she maintained, cannot be immune from judicial review if it is held in derogation of Article 4, 9, 10 and 10-A of the Constitution. She blamed the Court for justifying honor killing without adverting to the judgment if at all there is any and its nexus with the case in hand, little knowing that in the case of **Abdul Zahir and another v. The State** (2000 SCMR 406), a seven member Bench of this Court held that an accused killing his wife, sister or other close female relatives on the ground of honor cannot bring his case within the purview of section 302(c) PPC.

8. Mr. Khalid Anwar, learned Sr. ASC while defending the 21st Amendment in the Constitution contended that there is nothing like the basic structure in the Constitution of 1973. Article 239 of the Constitution, the learned Senior ASC argued, projects supremacy of

the Parliament which being the hub of democracy does not admit of any fetter on its constituent power. He, by elaborating his argument, contended that when Clause 5 of Article 239 provides that no amendment of the Constitution shall be called in question by any Court, Supreme Court cannot be an exception to that. He next contended that Supreme Court of India in the case of **Kesavananda Bharati. Vs. State of Kerala** and **Indira Nehru Gandhi. Vs. Raj Narain (supra)** despite espousing the doctrine of the basic structure or the salient features could not enunciate in definitive terms as to what the basic structure and the salient features of the Constitution are. The basic structure or the salient features, the learned Sr. ASC argued, cannot be made a basis for striking down any amendment in the Constitution. Article 3, learned ASC contended, projects socialistic rather than Islamic polity as its latter part is a replica of Article 12 of the Constitution of the USSR, 1936. He next contended that the Criminal Justice System in place has failed to deliver goods as many criminals despite having been hooked were let off at the end of the day with the result that every part of the country is now in the grip of terrorism. He next contended that had the measures proposed in the case of **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1999 SC 503),** been taken note of the situation would not have worsened. 21st Amendment, he maintained, is the only effective weapon to fight the rapidly spreading menace of terrorism, therefore, it be looked at in that context.

9. Mr. Abid S. Zubairi, ASC appearing on behalf of Sindh High Court Bar Association, contended that a law legislated under the

sword of Article 63A of the Constitution cannot be said to be representative of the free will of the people when Members of the Parliament had no choice but to vote according to the direction of the Parliamentary Party they belonged to; and that before striking down any other amendment, the amendment inserting Article 63-A be struck down first. When we asked to name any of the members of the Parliament who said anywhere that he voted in favour of the bill against his conscience, the learned ASC could not name any. The learned ASC also could not give any satisfactory reply when told that the aforesaid amendment has treated the malaise of horse trading which had virtually retarded the growth of democratic culture in the polity. Even otherwise, a person contesting election for the membership of the Parliament on the ticket of a party is supposed to consider its implications at the time of asking for it. Once he contests the election on the ticket of the party and is elected as such he has to abide by the party's line of action. In case he has any qualms about the decision of the party he can well leave and quit it.

10. Mr. Iftikhar Hussain Gillani, Sr. ASC appearing for the Government of KPK contended that where the Parliament has power to amend the Constitution, it can do so as long as it is in accordance with the provisions of Article 239; that any amendment thus made cannot be questioned in any Court of law on any ground whatsoever; that amendment in law is not synonymous with amendment in the Constitution, therefore, the latter cannot be tested on the touchstone of Article 8 of the Constitution of Pakistan; that fundamental rights can be abridged through constitutional amendment and that neither High Court nor this Court can step in to undo such abridgement or

amendment in the law. No restriction, the learned Sr. ASC added, could be placed on the constituent power of the Parliament and that appeal to the electorate would, however, be imperative where the main constitutional principles are sought to be altered. The learned ASC by referring to the cases of ***"Wukala Mahaz Barai Tahafaz Dastoor and another vs. Federation of Pakistan and others"*** and ***"Pakistan Lawyers Forum and others vs. Federation of Pakistan and others"*** (Supra) sought to canvass at the bar that neither the basic structure theory nor fundamental rights have been recognized as a touchstone for striking down any amendment in the Constitution. When asked if Constitutional fundamentals like fundamental rights, independence of judiciary, separation of power and power of judicial review are not beyond the amendatory power of the Parliament, would it not mean that the Constitution could be changed beyond recognition, the reply of the learned ASC was that it could be, provided on appeal to the electorate the members of the Parliament have been given such mandate.

11. Mr. Shahid Orakzai, appearing in Constitution Petition No. 22 of 2010 and Civil Petition No. 1901 of 2010 questioning the 18th Amendment mainly focused on the change of the name of KPK as this name being specific only to one of the agencies cannot be said to represent all parts of the Province. He, however, could not advance any convincing reason as could call for its substitution by this Court in exercise of its jurisdiction under Article 184(3) of the Constitution. He next contended that where jurisdiction and powers of the Supreme Court cannot be curtailed in view of entry No. 55 of the Federal

Legislative List, any amendment curtailing its jurisdiction and powers being ultra vires would be non-est.

12. Mr. Muhammad Ikram Ch., the learned Sr. ASC appearing on behalf of District Bar Association, Rawalpindi also questioned the vires of Article 175-A of the Constitution mainly on the ground that it tends to impinge upon the independence of judiciary. Article 63 and 63-A, he contended, are ultra vires inasmuch as they impose limitations on the exercise of fundamental rights. While questioning the vires of the 21st Amendment, the learned ASC contended that what was undone by this Court in the cases of **Mehram Ali and others. Vs. Federation of Pakistan and others** and **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others** (supra) has been done once again by giving it a different hue and color. He next contended that where the amendment tends to take away the rights guaranteed by Article 4, 5, 8, 9, 10, 10-A and 25 of the Constitution of Pakistan without any intelligible justification it cannot be allowed to stay under any cannons of jurisprudence.

13. Mr. Zulfiqar Ahmed Bhutta, learned ASC appearing for petitioner in Constitution Petition No. 43 of 2010 mainly contended that election of the members to the seats reserved for non-Muslims through proportional representation is not only against the fundamental rights of the minorities but the basic structure of the Constitution. When asked as to how the election of the members to the seats reserved for non-Muslims through proportional representation is against fundamental rights or the basic structure of the Constitution when any of the non-Muslims over and above that has a right to contest election

on general seats and as such is doubly advantaged, the learned ASC could not give any satisfactory reply.

14. The learned Attorney General for Pakistan appearing for the Federation contended that trial of a special class of terrorists by Field General Court Martial is not unprecedented as even in the past, they had been tried by such Courts; that a person acting against the defence of Pakistan or raising arms or waging war against Pakistan can be tried by the Courts under the Pakistan Army Act; that the trial of special class of terrorists under the Pakistan Army Act pursuant to amendments is perfectly in accordance with law; that where Pakistan Army Act 1952 and three other enactments have been added in First Schedule of the Constitution through 21st Amendment, neither Article 8 nor Article 199 of the Constitution of Pakistan could be invoked; that the word "specified" used in Article 8(3)(b)(ii) cannot be restricted to past as it would include future as well; and that trial of the class of terrorists specified in section 2(1)(iii) of the Pakistan Army Act by the Military Court is neither against law nor the Constitution. This classification, he added, is not only based on *intelligible differentia* but has nexus with the purpose sought to be achieved. The learned Attorney General to support his contention placed reliance on the judgment rendered in the case of **Brig. (Retd). F.B. Ali and another v. The State** (PLD 1975 SC 506). The learned Attorney General contended that the Courts under the Acts listed at Srl. Nos. 6 to 9 in sub-part-III of part-I of the First Schedule are the Courts already established, therefore, their establishment is not an issue. We asked him well! establishments of the courts under the Acts may not be an issue but how jurisdiction on such Courts could be conferred in a vacuum when

the provision conferring jurisdiction on them has been practically nullified by the addition of the proviso. The learned Attorney General just parried the question with the promise to deal with it at a later stage which never came. He lastly argued that when at no stage of trial, the Courts, mentioned above depart from the due process of law, the apprehension that the trial would not be fair is wholly misconceived.

15. We have heard the learned Sr. ASCs, ASCs for the parties and Attorney General for Pakistan, Advocates General of the Provinces and considered their arguments.

16. Before we discuss the arguments addressed at the bar, it is worth while to know what the Constitution is, what does it stand for, why does it reign supreme in the Scheme of the State, why does it need amendment, and where does it transcend amendment?

17. Constitution, as far as we know, is an organic and fundamental law of a State. It may be written or unwritten. It establishes the character and conception of its government, laying the basic principles regulating its affairs in almost every sphere of its existence. It is a charter defining and delineating the present and future course of a State. Since it is not a holy scripture or a document framed by a divinely inspired person, it cannot be perfect. Since it cannot be perfect, it changes with a change in attending circumstances. At any rate, growth of a Constitution coincides with the growth of a State. It survives if it dynamically assimilates changes around. If it does not, it is doomed to extinction. Amendment is one of the ways and means which not only revamps and updates the Constitution but keeps it going and growing. Amendment in a Constitution according to the

changing conditions in the domain of politics is as essential for its survival as adaptation to the changing conditions for the survival of a creature in the domain of biology. It is against this backdrop that every law and Constitution have been made amenable to amendment by their framers.

18. The Constitution of the Islamic Republic of Pakistan is not an exception to that. It too is amenable to amendment so long as the amendment sought to be made does not alter the parts forming its basic structure. What are the parts forming the basic structure of the Constitution need not be explored as it is writ large on the face of the Objectives Resolution which reads as under:-

> *"Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;*
>
> *And whereas it is the will of the people of Pakistan to establish an order;*
>
> *Wherein the State shall exercise its powers and authority through the chosen representatives of the people;*
>
> *Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;*
>
> *Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;*
>
> *Wherein adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;*
>
> *Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;*

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

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

Wherein the independence of the judiciary shall be fully secured;

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

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity;

Now, therefore, we, the people of Pakistan;

Conscious of our responsibility before Almighty Allah and men; Cognizant of the sacrifices made by the people in the cause of Pakistan;

Faithful to the declaration made by the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice;

Dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny;

Inspired by the resolve to protect our national and political unity and solidarity by creating an egalitarian society through a new order;

Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution."

19. The Resolution reproduced above was adopted by the Constituent Assembly on 12th March, 1949. It was more or less a

consensus document inasmuch as it was accepted as such by almost all the Muslim Members of the Constituent Assembly. It was opposed by the Non-Muslim Members of the Constituent Assembly, who belonged to Pakistan National Congress having its roots in Indian National Congress. They, as per their party programme, stood for secularism. They, quite obviously, had an agenda of their own. They, with that background, expressed reservations about the inclusion of Islamic principles in the resolution, as religion and politics, according to them, are two different domains. The speech delivered by Maulana Shabbir Ahmed Osmani was a befitting rejoinder to their reservations, which reads as under :-

> *"Islam has never accepted the view that religion is a private affair between man and his creator and as such has no bearing upon the social or political relations of human beings. Some other religious systems may expound this theory and may, incidentally, be too idealistic to possess a comprehensive and all-embracing code of life. But Islam has no use for such false notions and its teachings are in direct contradiction to them. The late Quaid-i-Azam made the following observations in the letter he wrote to Gandhiji in August, 1944:*
>
> *'The Quran is a complete code of life. It provides for all matters, religious or social, civil or criminal, military or penal, economic or commercial. It regulates every act, speech and movement from the ceremonies of religion to those of daily life, from the salvation of the soul to the health of the body; from the rights of all to those of such individual, from the punishment here to that in the life to come. Therefore, when I say that the Muslims are a nation, I have in my mind all physical and metaphysical standards and values.'*
>
> *In 1945, Jinnah observed in an Eid Day message to the Muslims :*
>
> *Every Mussalman knows that the Quran is not confined to religious and moral duties. The Quran is the dearest possession of the Muslims and their general code of life a religious, social, civil, commercial, military, judicial, criminal and penal Code. Our Prophet has enjoined on us that every Mussalman should possess a copy of the*

Quran and study it carefully so that it may promote our material as well as individual welfare.

The Quaid-i-Azam gave frequent expression to such ideas. In the face of such unequivocal and repeated declarations, is it not fit to say that religion has got nothing to do with politics or that if the Quaid-i-Azam had been alive, the Resolution would not have come up before this House. The Quaid-i-Azam too was referring to the basic principle of our constitution when he observed in the course of his presidential address delivered at a conference of the All-India Students Federation at Jalandhar in 1943: 'In my opinion our system of government was determined by the Quran some 1,350 years ago.' In his letter to the Pir Sahib of Manki Sharif in November 1945, he clearly stated :

It is needless to emphasize that the Constituent Assembly which would be predominantly Muslim in its composition, would be able to enact laws for Muslims, not inconsistent with the Shariat laws and the Muslims will no longer be obliged to abide by the un-Islamic laws."

20. Liaquat Ali Khan while winding up the debate repelled the apprehensions of non-Muslims about the misuse of certain clauses of the Objectives Resolution in the words as follows :-

"Sir, my Honourable friends, the Leader of the Congress Party had a visit from some ulemas. He did not tell us whether it was that they had come in search of knowledge to him or whether he had gone in search of knowledge to them. But I presume that this visit was paid by certain ulemas according to him from Lahore on their own initiative and they left certain literature with him, which seems to have upset my Honourable friend, who is very seldom upset. I can quite understand why this visit and why these handing over of this literature was done. There are some people here who are out to disrupt and destroy Pakistan and these so-called ulemas who have come to you they have come with that particular mission of creating doubts in your mind regarding the bonafides of the Mussalmans of Pakistan. Do not, for God's sake, lend your ear to such mischievous propaganda.

I want to say and give a warning to this element which is out to disrupt Pakistan, that we shall not brook it any longer. They have misrepresented the whole ideology of Islam to you. They are in fact enemies of Islam while posing as friends and supporters of Islam.

Sir, let me tell my Honourable friend that the greatest guarantee that the non-Muslims can have, they will get only through this Resolution and through no other manner and, therefore, I would request him not to be misled by interested persons and do not think for a moment that this Resolution is really intended or will really result, in driving out the non-Muslims from Pakistan or reducing them to the position of as he described hewers of wood and drawers of water. In a real Islamic society, let me tell you, Mr. President, there are no classes of hewers of wood and drawers of water. The humblest can rise to the highest position. As a matter of fact, let me tell you, Mr. President, what we have provided here for minorities I only wish that the sister dominion of India had provided similar concessions and similar safeguards for the minorities in India. Here, we are guaranteeing you your religious freedom, advancement of your culture, sanctity of your personal laws, and equal opportunities, as well as equality in the eye of the law. What have they done on the other side ? No question of culture. As a matter of fact, the personal law of Muslims is not to be recognized in India. That is the position.

Sir, my Honourable friend, Mr. B. C. Mandal, told me that posterity will curse me for bringing forward this Resolution. Let me tell my friend, if we succeed in building Pakistan on the basis of this Resolution, we shall be able to create conditions that posterity instead of cursing me, will bless me.

Sir, I would just once again tell my friends, on the other side, that whether you believe us or whether you do not believe us; whether you desire it or whether you do not desire it, as long as you are citizens of Pakistan, we are determined to do the right thing by you for the simple reason that our religion tells us to do so; for the simple reason that we are trying to build up this state on morality and on higher values of life than what materialism can provide."

21. Having adopted the Objectives Resolution the Constituent Assembly proceeded to frame the Constitution. It eventually framed the Constitution which became effective on 23rd March 1956. It could hardly work for two and a half years that a military adventurer took over. He realized that the country could not be run on day to day orders without a Constitution. He gave another Constitution to the people in 1962. It worked for some time, but before

the people could evolve a culture to be run by the Constitution, another adventurer took over in the garb of a savior. He, too, played fast and loose with the destiny of the people for a couple of years. He, however, held an election in the country. The result was that Awami League led by Sheikh Mujeeb ur Rehman in the East Wing and Pakistan Peoples' Party led by Zulfiqar Ali Bhutto in the West Wing secured majority. Parliament was to be convened for framing a Constitution. Intransigence of Mujeeb ur Rehman, intrigue of internal and external forces and unpardonable follies of the leadership after the assassination of Liaqat Ali Khan resulted in the dismemberment of Pakistan. Parliament convened after the dismemberment of Pakistan became a Constituent Assembly as it had to frame a Constitution first. Conscious, conscientious and collective efforts of the members of the Parliament succeeded in framing the Constitution of 1973 which is a unanimous document on all accounts. It by incorporating the Objectives Resolution in the Preamble of the Constitution with minor additions enacted almost all of its provisions in line with the Preamble. Democracy, Fundamental Rights, independence of judiciary, separation of powers, federal character of the Constitution, protection of the rights of minorities and the declaration that any law or any custom or usage having the force of law, insofar as it is inconsistent with the rights conferred by Chapter 1 of Part II of the Constitution shall to the extent of such inconsistency be void; that State shall not make any law which takes away or abridges the rights so conferred; that any law made in contravention of Article 8(2) shall to the extent of such contravention be void; that all the existing laws shall be brought in conformity with the injunctions of Islam and no law shall be enacted

which is repugnant to such injunctions are the parts forming the basic structure of the Constitution. Any effort to replace, impair or alter any of them would lead to anarchy and even annihilation of the Islamic Republic of Pakistan.

22. We, therefore, don't agree with the arguments of Mr. Iftikhar Hussain Gillani, learned Sr. ASC for the Government of KPK, addressed on the strength of the judgment rendered in the case of **Wukala Mahaz Barai Tahafaz Dastoor and another. Vs. Federation of Pakistan and others** (supra) that neither the basic structure theory nor the fundamental rights have been recognized as a touchstone for striking down any amendment in the Constitution. We also don't agree with Mr. Khalid Anwar, learned Sr. ASC when he contended that the basic structure or the salient features of the Constitution cannot be made basis for striking down any amendment in the Constitution, because without the basic structure, it would be a voyage across the unchartered sea of life, without a sense of direction. Where would the whims of the Parliament like the winds of the sea take its people is any body's guess. It is thus as indispensable as a linchpin to keep a wheel in place.

23. Question arises whether the Parliament, in view of the arguments addressed by the learned Sr. ASCs for the Federation and the Province of the KPK, can replace Islam with secularism and the Federation with a confederation? To answer this question we will have to go back to the latter half of the 19th century where Syed Ahmed Khan appeared as an ambassador of Hindu-Muslim Unity, who day in and day out struggled for the uplift of Hindus and Muslims alike. He inspired them to study science and other branches of knowledge and

the languages they are written in. This, according to him, was the only way to come at par with the advanced nations of the world. But the procession taken out by the Hindus of Banaras in 1867 to replace Urdu with Hindi, to his dismay and surprise, convinced him that Hindus and Muslims would never join whole-heartedly in anything. This change of mind is evident from a conversation Syed Ahmed Khan is reported to have had with Mr. Shakespeare the Commissioner of Banaras in 1887. His biographer Moulana Hali recalls in the words as follows:-

> *"During these days, when Hindi-Urdu controversy was going on in Benares, one day I met Mr. Shakespeare who was posted there as the Divisional Commissioner. I was saying something about the education of Muslims, and Mr. Shakespeare was listening with an expression of amazement, when, at length, he said: 'This is the first occasion when I have heard you speak about the progress of the Muslims alone. Before this you were always keen about the welfare of your countrymen in general.' I said, 'Now I am convinced that both these nations will not join wholeheartedly in anything. At present there is no open hostility between the two communities, but on account of the so-called educated people it will increase immediately in future. He who lives will see.' Mr. Shakespeare thereupon said, 'I am also extremely sorry but I am confident about the accuracy of this prophecy.'*

24. What would be the fate of Muslims in a democratic India has been reflected in one of his speeches he delivered in 1883, ten years before the Bombay riots. He said :

> *"Now suppose that all the English…..were to leave India…. Then who would be the rulers of India? Is it possible that under these circumstances, two nations--- the Mohammedan and Hindu---could sit on the same throne and remain equal in power? Most certainly not. It is necessary that one of them should conquer the other and thrust it down. To hope that both could remain equal is to desire the impossible and the inconceivable."*

In another historic speech on December 28, 1887 at Lucknow Annual Session of the Mohamedan Education Conference Sir Syed said as under:-

> "They want to copy the British House of Lords and the House of Commons. Now let us imagine the Viceroy's Council made in this manner, And let us suppose that all the Muslim electors vote for a Muslim member and all the Hindu voters vote for a Hindu member and now count how many votes the Muslim members will have, and how many the Hindu. It is certain that the Hindu members will have four times as many because their population is four times as numerous. Therefore, we can prove by mathematics that there will be four votes for the Hindu to every one vote for the Muslim. And now how can the Muslim guard his interests ? It will be like a game of dice, in which one main had four dice and the other only one."

25. Dr. Mohammad Iqbal who studied this phenomena for a considerably long time dismissed the Hindu-Muslim unity as impossible. "To base a constitution, he said, *on the conception of a homogeneous India, or to apply to India the principles dictated by British democratic sentiments, is unwittingly to prepare her for a civil war.*" He thus advocated partition. *He even demanded, and defined the frontiers of a proposed 'consolidated Muslim State', which, he believed would be 'in the best interests of India and Islam.'* He said, *'I would like to see the Punjab, the North-West Frontier Province, Sind and Baluchistan, amalgamated into a single state…..the formation of a consolidated North-West Indian Muslim State appears to be the final destiny of the Muslims, at least of North-West India.'* In one of his letters of 28th May, 1937 addressed to Jinnah, he stated as under :-

> *"…..After a long and careful study of Islamic Law, I have come to the conclusion that if this system of Law is properly understood and applied, at least the right to subsistence is secured to*

> *everybody. But the enforcement and development of the Shariat of Islam is impossible in this country without a free Muslim State or States. This has been my honest conviction for many years and I still believe this to be the only way to solve the problem of bread of Muslims as well as to secure a peaceful India. If such a thing is impossible in India the only other alternative is a civil war which as a matter of fact has been going on for some time in the shape of Hindu-Muslim riots. I fear that in certain parts of the country, e.g., N.-W. India, Palestine may be repeated. Also the insertion of Jawaharlal's socialism into the body-politic of Hinduism is likely to cause much bloodshed among the Hindus themselves. The issue between social democracy and Brahaminism is not dissimilar to the one between Brahaminism and Buddhism. Whether the fate of socialism will be the same as the fate of Buddhism in India I cannot say. But it is clear to my mind that if Hinduism accepts social democracy it must necessarily cease to be Hinduism.* ***For Islam the acceptance of social democracy in some suitable form and consistent with the legal principles of Islam is not a revolution but a return to the original purity of Islam. The modern problems, therefore, are far more easy to solve for the Muslims than for the Hindus. But as I have said above in order to make it possible for Muslim India to solve the problems it is necessary to redistribute the country and to prove one or more Muslim States with absolute majorities. Don't you think that the time for such a demand has already arrived? Perhaps this is the best reply you can give to the atheistic socialism of Jawaharlal Nehru****."*

26. How did Quaid-e-Azam Muhammad Ali Jinnah view this phenomenon is overwhelmingly clear from one of his Articles in Time and Tide. He said :

> *"What is the political future of India? The declared aim of the British Government is that India should enjoy Dominion Status in accordance with the Statute of Westminster in the shortest practicable time. In order that this end should be brought about, the British Government, very naturally, would like to see in India the form of democratic constitution it knows best and thinks best, under which the Government of the country is entrusted*

> *to one or other political Party in accordance with the turn of the elections*
>
> *Such, however, is the ignorance about Indian conditions among even the members of the British Parliament that, in spite of all the experience of the past, it is even yet not realized that this form of Government is totally unsuited to India. Democratic system based on the concept of a homogeneous nation such as England are very definitely not applicable to heterogeneous countries such as India, and this simple fact is the root cause of India's constitutional ills"*

27. On 23rd March, 1940, Mr. Jinnah presided over the All India Muslim League Session at Lahore where the Pakistan Resolution was passed. A few days before '*Sir Percival Griffiths' dined with Jinnah*. During Dinner, Jinnah "*declared that at the stage of imperial rule where self-government was not in sight, the British were the finest administrators known to history, but when politics and national feeling had begun to count, they completely failed to understand the mentality of subject races.* He said :

> *"You talk of the unity of India, but you ought to know that it is a chimera, existing nowhere except in your minds and in the external unity which you wisely forced on the country. You go on to talk of parliamentary democracy and you fail to realize that the assumptions on which it depends have no application at all to Indian conditions."*

28. While responding to one of the letters written by '*GANDHI*' Jinnah said as under:-

> *"We maintain that Muslims and Hindus are two major nations by any definition or test as a nation. We are a nation of a hundred million, and what is more, we are a nation with our own distinctive culture and civilization, language and literature, art and architecture, names and nomenclature, sense of values and proportion, legal laws and moral codes, customs and calendar, history and traditions, aptitudes and ambitions; in short, we have our own*

> *distinctive outlook on life and of life. By all the canons of international Law, we are a nation."*

29. Democracy, no doubt, is the best possible system ever invented by human mind but decidedly it had no application to the conditions then prevailing in India. To live in the United Democratic India was to live under the Hindu Raj. A way out of this dilemma was suggested through the Cabinet Mission Plan. Quaid-i-Azam Muhammad Ali Jinnah agreed to the Plan. Maulana Abul Kalam Azad in the concluding part of Chapter 11 of his book 'India Wins Freedom' comments on the agreement as under:-

> *"The acceptance of Cabinet Mission Plan by both the Congress and the Muslim League was a glorious event in the history of the freedom movement in India. It meant that the difficult question of Indian freedom had been settled by negotiation and agreement and not by methods of violence and conflict. It also seemed that the communal difficulties had been finally left behind. Throughout the country there was a sense of jubilation and all the people were united in their demand for freedom. We rejoiced but we did not then know that our joy was premature and bitter disappointment awaited us."*

30. Impolitic and indiscrete behavior of the Hindu leadership resulted in the loss of the last opportunity for Hindus and Muslims to live together. What turned out to be the immediate cause of that has been better illustrated in Chapter 12 of the said Book in the words reading as under:-

> *"Now happened one of those unfortunate events which change the course of history. On 10 July, Jawaharlal held a press conference in Bombay in which he made an astonishing statement. Some press representatives*

asked him whether, with the passing of the Resolution by the AICC, the Congress had accepted the Plan in toto, including the composition of the Interim Government.

Jawaharlal in reply stated that Congress would enter the Constituent Assembly 'completely unfettered by agreements and free to meet all situations as they arise.'

Press representatives further asked if this meant that the Cabinet Mission Plan could be modified.

Jawaharlal replied emphatically that the Congress had agreed only to participate in the Constituent Assembly and regarded itself free to change or modify the Cabinet Mission Plan as it thought best.

The Muslim League had accepted the Cabinet Mission Plan only under duress. Naturally, Mr. Jinnah was not very happy about it. In his speech to the League Council, he had clearly stated that he recommended acceptance only because nothing better could be obtained. His political adversaries started to criticize him by saying that he had failed to deliver the goods. They accused him that he had given up the idea of an independent Islamic State. They also taunted him that if the League was willing to accept the Cabinet Mission Plan----which denied the right of the Muslims to form a separate State-----why had Mr. Jinnah made so much fuss about an independent Islamic State?

Mr. Jinnah was thus not all happy about the outcome of the negotiations with the Cabinet Mission. Jawaharlal's statement came to him as a bombshell. He immediately issued a statement that this declaration by the Congress President demanded a review of the whole situation. He accordingly asked Liaqat Ali Khan to call a meeting of the League Council and issued a statement to the following effect. The Muslim League Council had accepted the Cabinet Mission Plan in Delhi as it was assured that the Congress also had accepted the scheme and the Plan would be the basis of the future constitution of India. Now that the Congress President had declared that the Congress could change the scheme through its majority in the Constituent Assembly, this would mean that the minorities would be placed at the mercy of the majority. His view was that Jawaharlal's declaration meant that the Congress had rejected the Cabinet Mission Plan and as such the Viceroy should call upon the Muslim League, which had accepted the Plan, to form the Government.

The Muslim League Council met at Bombay on 27 July. Mr. Jinnah in his opening speech reiterated the demand

> *for Pakistan as the only course left open to the Muslim League. After three days' discussion, the Council passed a resolution rejecting the Cabinet Mission Plan. It also decided to resort to direct action for the achievement of Pakistan."*

31. Many other factors and interrelated events inspired the quest of a separate homeland, which included subjugation of Muslims and their exploitation by Hindus ever since the middle of the 19th Century. Every passing day worsened their lot. Fall of Mughal Empire precipitated their fall on all fronts. They lost everything. They lost even the sense of direction. Syed Ahmed Khan lit the candle of hope, held it high and thereby inspired the Muslims to equip and empower themselves with modern education but this course being evolutionary could not bring Muslims at par with Hindus overnight when the latter's monopoly in the economic, political and educational spheres went unchallenged. The overlords ruling the subcontinent also preferred Hindus over Muslims. Future of Muslims in the United Democratic India became increasingly bleak. They, thus, needed a homeland where they could live according to their traditions. They under no circumstances could live under the yoke of Hinduism after being freed from the yoke of Colonialism. The creation of a separate homeland became an ideological, political, economic, social, cultural and civilizational imperative. This aspect has been elaborately dealt with in a conversation between Mr. Jinnah and the British author Beverely Nichols:

> *"SELF [Nichols] The first is economic. Are the Muslims likely to be richer or poorer under Pakistan? And would you set up tariffs against the rest of India?*
> *JINNAH I'll ask you a question for a change. Supposing you were asked which you would prefer ... a rich England under Germany or a poor England free, what would your answer be?*

SELF It's hardly necessary to say.
JINNAH Quite. Well, doesn't that make your question look a little shoddy? This great ideal rises far above mere questions of personal comfort or temporary convenience. The Muslims are a tough people, lean and hardy. If Pakistan means that they will have to be a little tougher, they will not complain. But why should it mean that? What conceivable reason is there to suppose that the gift of nationality is going to be an economic liability? A sovereign nation of a hundred million people—even if they are not immediately self-supporting and even if they are industrially backward—is hardly likely to be in a worse economic position than if its members are scattered and disorganized, under the dominance of two hundred and fifty million Hindus whose one idea is to exploit them. How any European can get up and say that Pakistan is 'economically impossible' after the Treaty of Versailles is really beyond my comprehension. The great brains who cut Europe into a ridiculous patchwork of conflicting and artificial boundaries are hardly the people to talk economics to us, particularly as our problem happens to be far simpler.
SELF And does that also apply to defence?
JINNAH Of course it applies to defence. Once again I will ask you a question. How is Afghanistan defended? Well? The answer is not very complicated. By the Afghans. Just that. We are a brave and united people who are prepared to work and, if necessary, fight. So how does the question of defence present any peculiar difficulties? In what way do we differ from other nations? From Iran, for example? Obviously, there will have to be a transition period. . . .
JINNAH You will remember I said, a moment ago, that the British would have to do a lot of hard thinking. It's a habit they don't find very congenial; they prefer to be comfortable, to wait and see, trusting that everything will come right in the end. However, when they do take the trouble to think, they think as clearly and creatively as any people in the world. And one of their best thinkers—at least on the Indian problem—was old John Bright. Have you ever read any of his speeches?
SELF Not since I left school.
JINNAH Well, take a look at this. I found it by chance the other day.
He handed me the book. It was a faded old volume, The Speeches of
John Bright, and the date of the page at which it was opened was June 4th, 1858. This is what the greatest orator in the House of Commons said on that occasion:
'How long does England propose to govern India? Nobody can answer this question. But be it 50 or 100 or 500 years, does any man with the smallest glimmering of common sense believe that so great a country, with its

20 different nationalities and its 20 different languages, can ever be bounded up and consolidated into one compact and enduring empire confine? I believe such a thing to be utterly impossible.'

JINNAH What Bright said then is true today ... In fact, it's far more true— though, of course, the emphasis is not so much on the 20 nationalities as on the 2 ... the Muslim and the Hindu. And why is it more true? Why hasn't time brought us together? Because the Muslims are awake . . . because they've learnt, through bitter experience, the sort of treatment they may expect from the Hindus in a 'United India'. A 'United India' means a Hindu-dominated India. It means that and nothing else. Any other meaning you attempt to impose on it is mythical. 'India' is a British creation . . . it is merely a single administrative unit governed by a bureaucracy under the sanction of the sword. That is all. It is a paper creation, it has no basis in flesh and blood.

SELF The ironical thing is that your critics say that Pakistan itself is a British creation—that it is an example of our genius for applying the principle of 'divide and rule'.

JINNAH (with some heat) The man who makes such a suggestion must have a very poor opinion of British intelligence, apart from his opinion of my own integrity. The one thing which keeps the British in India is the false idea of a United India, as preached by Gandhi. A United India, I repeat, is a British creation—a myth, and a very dangerous myth, which will cause endless strife. As long as that strife exists, the British have an excuse for remaining. For once in a way, 'divide and rule' does not apply.

SELF What you want is 'divide and quit'?

JINNAH You have put it very neatly.

SELF You realize that all this will come as something of a shock to the British electorate?

JINNAH Truth is often shocking. But why this truth in particular?

SELF Because the average, decent, liberal-minded voter, who wishes Britain to fulfill her pledges, and grant independence to India, has heard nothing but the Congress point of view. The Muslims have hardly a single spokesman in the West.

JINNAH (bitterly) I am well aware of that. The Hindus have organized a powerful Press and Congress—Mahasabha are backed up by Hindu capitalists and industrialists with finance which we have not got.

SELF As a result they believe that Congress is 'India', and since Congress never tires of repeating that India is one and indivisible, they imagine that any attempt to divide it is illiberal, reactionary, and generally sinister. They seriously do believe this. I know that it is muddle-headed, but then a democracy such as ours, which has to make up its mind on an incredible number of complicated

issues, usually is muddle-headed. What they have to learn is that the only liberal course, the only generous course, the only course compatible with a sincere intention to quit India and hand over the reins of government . . .

JINNAH And the only safe course, you might add, is ...

SELF Pakistan!

JINNAH

The essence of Pakistan—at least of its spirit—is found in the foregoing dialogue. To give a complete exposition of the details of the plan, in a book of this size, would be quite impossible. It would need a sheaf of maps and pages of statistics, and it would carry us far afield, over the borders of India, and involve us in a great deal of unprofitable speculation. It is fairly certain, however, that the reader who takes the trouble to go really deeply into the matter, with a mind unwrapped by prejudice, will come to the conclusion that Pakistan offers no insuperable difficulties, economic, ethnographic, political or strategic and is likely, indeed, to prove a good deal easier of attainment than a large number of similar problems which the world has successfully resolved in the past fifty years. It is, of course, a major surgical operation, but unfortunately there are occasions in the lives of nations, as of individuals, when major surgical operations are not only desirable but vitally necessary. And this is one of those occasions. The constant friction between the Hindu and Muslim nations has produced something which strongly resembles a cancer in the body politic. There is only one remedy for a cancer, in its advanced stages, and that is the knife. Gandhi's faith cures, British soothing syrup, the ingenious nostrums which are proffered by eager hands throughout the world—all these are useless. They only aggravate the patient's condition and make his ultimate cure more difficult. To the knife it will have to come in the end, and surely one knife, used swiftly and with precision, is better than a million knives, hacking in blind anarchy in the dark? What is strange, in the whole Pakistan controversy, is not the support which it is slowly gaining among all realistic men but the opposition which it still evokes from sincere well-wishers of India. This is, of course, due to the strength and persistence of Congress propaganda, backed by Hindu big business. The Hindus have almost a monopoly of propaganda. By subtle and persistent suggestion they have managed to persuade the world that they are 'India' and that any attempt to divide 'India' is a wicked 'plot on the part of the British, acting on the well-established principle of divide and rule'. Most liberals of the West have fallen for this propaganda, hook, line and sinker. Consequently, we have the extraordinary spectacle of 'advanced' British politicians rising to their feet in the House of Commons,

> *and solemnly and sincerely pleading the cause of Indian 'Unity' in the joint cause of Indian independence— sublimely ignorant of the fact that their insistence on this so-called 'unity' is the one and only thing that keeps the British in the saddle!"*

32. Incessant recurrence of anti-Muslim riots in India and atrocities committed against the Muslims in occupied Kashmir by the Security Forces at the instance of the Dehli backed government with unabated continuity also leave little doubt that the demand for a separate homeland on the basis of the Two Nation Theory was perfectly justified from whatever angle it is looked at. Islam, as aptly put by Mr. A. K. Dogar, petitioner in Constitution Petition No. 20 of 2010 is a structural base of the homeland founded for Muslims on the basis of the Two Nation Theory. Therefore, the Parliament cannot replace Islam with secularism nor can it replace the Federation with a confederation. This is what the Muslims of the subcontinent aspired and endeavored for. This is in essence the *raison d'etre* for the establishment of the separate homeland.

33. Let us now see how the terms like basic structure, fundamental framework, grund-norm or cornerstone have been looked at in the Constitutional history of Pakistan. In the case of ***Miss Asma Jilani vs. The Government of the Punjab and another"*** (PLD 1972 SC 139) this Court while dealing with this aspect of the Constitution held as under:-

> *"In any event, if a grund-norm is necessary for us I do not have to look to the Western legal theorists to discover one. Our own grund-norm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent*

> *Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "corner stone of Pakistan's legal edifice" and recognised even by the learned Attorney-General himself "as the bond which binds the nation" and as a document from which the Constitution of Pakistan "must draw its inspiration". This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or Civil.*
>
> *The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and has the right to remove the functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust. The functional Head of the State is chosen by the community and has to be assisted by a Council which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for, no one is above the law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system "the law rules through the utterance of justice, and the power of the Governor carries out the utterance of it."*

34. In the case of ***"The State vs.Zia-ur-Rehman and others"*** (PLD 1973 SC 49), this Court while discussing the scope of objective resolution and preamble of the Constitution held as under:-

> *"I for my part cannot conceive a situation, in which, after a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation. Therefore, in my view, however solemn or sacrosanct the document, if it is not incorporated in the Constitution or does not form a part thereof it cannot control the Constitution. At any rate, the Courts created under the Constitution will not have the power to declare any Provision of the constitution itself as being in violation of such a document. If in fact that document contains the expression of the will of the vast majority of the people, then the remedy for correcting such a violation will lie with the people and not with the*

> *judiciary. It follows from this that under our own system too the Objectives Resolution of 1949, even though it is a document which has been generally accepted and has never been repealed or renounced, will not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it. If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof. --- "*

35. The above quoted paragraph of the judgment cannot be construed to dilute the value of the Objectives Resolution or even the preamble of the Constitution of 1973 as it was announced before the framing of the Constitution.

36. In the case of ***"Hakim Khan and 3 others vs. Government of Pakistan through Secretary Interior and others"*** (PLD 1992 SC 595), this Court while dealing with the scope of Objective Resolution, preamble and Article 2-A of the Constitution observed as under:-

> *"This rule of interpretation does not appear to have been given effect to in the judgment of the High Court on its view that Article 2A is a supra- Constitutional provision. Because, if this be its true status then the above- quoted clause would require the framing of an entirely new Constitution. And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution. According to the opening clause of this Resolution the authority which Almighty Allah has delegated to the State of Pakistan is to be exercised through its people only "within the limits prescribed by Him". Thus all the provisions of the existing Constitution will be challengeable before Courts of law on the ground that these provisions are not "within the limits of Allah" and are in transgression thereof. Thus, the law regarding political parties, mode of election, the entire structure of Government as embodied in the Constitution, the powers and privileges of the President and other functionaries of the Government will be open to question. Indeed, the very basis on which the Constitution is founded namely the*

trichotomy of powers i.e. that the three great organs of the State have their own particular spheres of authority wherein they exercise their respective powers or the system of checks and balances could be challenged, alongwith all the ancillary provisions embodied in the 1973-Constitution in relation thereto. Thus, instead of making the 1973-Constitution more purposeful, such an interpretation of Article 2A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form. This presumably was not the intention of General Muhammad Ziaul Haq while adding Article 2A in the Constitution under the Revival of the Constitution Order, 1985 (President's Order No.14/1985). It certainly was not the intention of the law-makers who enacted Article 270-A (vide section 19 of the Constitution (Eighth Amendment) Act, 1985] which provision affirmed and adopted, inter alia, P.0.14/1985 (whereby Article 2A was inserted in the Constitution). Their intention simply was that the Objectives Resolution should no longer be treated merely as a declaration of intent but should enjoy the status of a substantive provision and become equal in weight and status as the other substantive provisions of the Constitution. In case any inconsistency was found to exist between the provisions of the 1973-Constitution and those' of the Objectives Resolution would, they expected, be harmonized by the Courts in accordance with the well-established rules of interpretation of the Constitutional documents already mentioned. Being creatures of the Constitution it was not visualized that they could not annul any existing Constitutional provisions (on the plea of its repugnancy with the provisions of Article 2A) as no Court, operating under a Constitution, can do so. To use the picturesque words of Mr. Justice (Rtd.) Sh. Aftab Hussain, former Chief Justice of the Federal Shariat Court, in his discourse on the subject of "the Shariat Bill and its implications" PLD 1986 Journal 327, "The Courts are the creation of the Constitution and on no principle of law can they be allowed to cut the tree on which they arc perched". The learned Chief Justice, in the same discourse, in which he made the above observation, proceeded to observe that "the objection in respect of the un-Islamic character of the Constitution is more ill-advised. It was passed by a Parliament consisting of renowned Ulema representing all our ' politico religious organizations all of whom approved it. This is sufficient certificate for its Islamic character. If someone thinks that some of its provisions are contrary to Sharia, he should raise the issue in the Majlis-i-Shoora (Parliament)"

37. Another paragraph of the said judgment is also relevant in this connection which reads as under:-

> *"The role of the Objectives Resolution, accordingly in my humble view, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein. Thus, whereas after the adoption of the Objectives resolution on 12th March, 1949, the Constitution-makers were expected to draft such provisions for the Constitution which were to conform to its directives and the ideals enunciated by them in the Objectives Resolution and in case of any deviation from these directives, while drafting the proposed provisions for the Constitution the Constituent Assembly, before whom these draft provisions were to be placed, would take the necessary remedial steps itself to ensure compliance with the principles laid down in the Objectives Resolution. However, when a Constitution already stands framed (itt 1973) by the National Assembly of Pakistan exercising plenary powers in this behalf wherein detailed provisions in respect .of all matters referred to in the Objectives Resolution have already been made and Article 2A was made a mandatory part thereof much later i.e. after 1985 accordingly now when a question arises whether any of the provisions of the 1973-Constitution exceeds to any particular respect, the limits prescribed by Allah Almighty (within which His people alone can act) and some inconsistency is shown to exist between the existing provision of the Constitution and the limits to which the man made law can extend; this inconsistency will be resolved in the same manner as was originally envisaged by the authors and movers of the Objectives Resolution namely by the National Assembly itself. In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself."*

In the paragraphs reproduced above, his lordship Mr. Justice Nasim Hassan Shah as he then was while speaking for the bench commented on the Objectives Resolution, preamble and Article 2-A of the Constitution but what his lordship lost sight of was that

the framers of the Constitution while framing it not only incorporated the Objectives Resolution in its preamble but framed all of its provisions in general and those of Part-I, Part-II, Part-VII and Part-IX in particular in line with the preamble. Insertion of Article 2-A in the Constitution after its having been framed, in our view, was neither called for, nor could be said to have much effect.

38. In the case of ***"Mst. Kaneez Fatima vs. Wali Muhammad and another"*** (PLD 1993 SC 901), his lordship Mr. Justice Saleem Akhtar as he then was also looked at the Objectives Resolution, preamble and Article 2-A of the Constitution from the same angle of vision as was done in the case of ***"Hakim Khan and 3 others vs. Government of Pakistan through Secretary Interior and others"*** *(Supra)* as is evident from the paragraph reading as under:-

> *"5. The question arises whether the principles of Hakim Khan's case (supra) can be applied to cases where the provision of any enactment and not the Constitution is to be considered and challenged on the plea that it is hit by Article 2A. As is obvious from the afore stated weighty observations Article 2A cannot be pressed into service for striking down any provision of the Constitution on the grounds that it is not self executory and also that another provision of the Constitution cannot be struck down being in conflict with any other provision of the Constitution. The last principle enunciated may not be applicable while dealing with the provisions of any enactment which may be in conflict with the provisions of the Constitution. The different Constitutional provisions which are not self executing and which are self executing has been laid down by our learned brother Shafiur Rahman, J., iii Hakim Khan's case and reliance has been placed on Bindra's Interpretation of Statutes, 7th Edition. The self executing provision not only confers a right but it provides for its protection and a further duty is cast to enforce it without the aid of legislative enactment. There may be supporting legislative enactment which may flow from such self executing provisions of the Constitution, but they will not change the character of the self executing provisions of*

the Constitution nor will they be dependent upon such supporting legislation. But where merely a "policy has been laid down or some guidelines have been provided", they are dependent upon supporting legislations and enactments because without them the same cannot be enforced by themselves. Sometimes, as in our Constitution, procedure is provided for enforcing or making such non self executing provisions operative. Therefore, in such circumstances, the non self executing provisions of the Constitution serve as a beacon light for the enactment of laws by the legislature and also for making rules and regulations which have the force of law.ves Resolution namely by the National Assembly itself. In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself."

39. In the case of ***"Mahmood Khan Achakzai vs. Federation of Pakistan and others"*** (PLD 1997 SC 426), Mr. Justice Sajjad Ali Shah while considering the scope of Objectives Resolution and its place in the scheme of the Constitution held as under:-

"23. It therefore, appears from what is stated in the above paragraph that within a period of 50 years history of Pakistan is that we have had three Constitutions and three complete Martial Laws and in-between we have been struggling to make up our mind whether Presidential or Parliamentary Form of Government suits us. One thing is beyond dispute that in all the three Constitutions Objectives Resolution is common and the same has been incorporated as preamble in all the three Constitutions including the Constitution of 1973. ***Since this Objectives Resolution is very important and is the sheetanchor of our Constitution because it reflects aspirations of the people of Pakistan as to what they want and how they want to be governed."***

"26. It is not necessary to dilate upon the case of Ziaur Rahman any further for the reason that at present we are concerned only with Objectives Resolution in the Constitution appended as preamble. Even in that capacity it invariably has remained preamble in all the four Constitutions including the Interim Constitution of 1972 and therefore, it has to be read for the purpose of proper interpretation in order to find out as to what scheme of governance has been contemplated. Let us assume that it does not authoritatively provide grund norm and also it does not describe specifically the basic

structure of the Constitution, even then also it does help in interpreting and understanding the scheme of governance and salient features of the Constitution which are described therein including Islamic provisions, federalism and parliamentary form of Government and fully securing independence of judiciary. Islamic provisions are very much embedded in the Constitution of 1973 as Article 2 thereof envisages that Islam shall be the State, religion of Pakistan and Article 227 provides that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. Further. Article 228 provides for setting up Council of Islamic Ideology. Similar provisions existed in Articles 197 and 198 of the Constitution of 1956 and Articles 199 to 207 of the Constitution of 1962. Similar, Islamic provisions existed in the Interim Constitution of 1972 from Articles 251 to 259. In nutshell it can be said that basic structure as such is not specifically mentioned in the Constitution of 1973 but Objectives Resolution as preamble of the Constitution and now inserted as the substantive part in the shape of Article 2A when read with other provisions of the Constitution reflects salient features of the Constitution highlighting federalism, parliamentary form of Government blended with Islamic provisions."

40. Mr. Justice Saleem Akhtar having discussed the Objectives Resolution, Preamble and Article 2-A of the Constitution observed as under :-

11. The political history of the Constitution is checkered and marred by deviations and Constitutional breakdowns which bayoneted two Constitutions and the third one remained suspended for nine years. The dark shadows of military intervention had become a common phenomenon which has cast its influence on the death and birth of the Constitutions. The history does not speak of consistent adoption of any basic structure for the Constitution."

19. In order to ascertain whether there exists an inviolable basic structure of the Constitution, Mr. Khalid Anwar has taken us to the Constitutional and legal history leading up to the formation of the Constitution of 1973'. Before we embark upon this exercise, it may be noted that the Objectives Resolution states that sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust; State shall exercise its powers and authority through the chosen representatives of the people; the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be observed. It contemplates a Federal form of Government with

autonomous units, guarantees fundamental rights including "equality of status, of opportunity and before law, social economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality". The independence of judiciary has been fully secured. It also confirms its faith to the declaration made by the Founder of Pakistan, Quaid-eAzam Muhammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice. In this context Mr. Ismail Qureshi, Advocate has referred to a speech made by Quaid-e-Azam Muhammad Ali Jinnah reported in the "Pakistan Times" dated 26-1-1948, which reads as follows:--

> *"Freedom and its idealism have taught democracy. Islam has taught equality, justice and fairplay to everybody. But reason is there for anyone to fear democracy, equality, freedom on the highest standard of integrity and to the basis of fairplay and justice for everybody."*

The Objectives Resolution and the speech of Quaid-e-Azam quoted above clearly show that the Constitution was to be based on Islamic principles of democracy, equality, freedom, justice and fairplay. These were the guiding principles which were to be moulded in the form of Constitution. These were inter alia the basic features on which the Constitution was to be framed."

34. It 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 has 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 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."

"35. Mr. Ismail Qureshi contended that-the Objectives Resolution which was included in the 1956 Constitution as a Preamble is the key to the Constitution. This Resolution was a moved in the First Constituent Assembly and has continued to be adopted as a. Preamble to the Constitution. By Eighth Amendment, Article 2A was added, which has made the Objectives Resolution a substantive part of the Constitution, but to say that it is the basic structure in the sense the Indian Supreme Court has adopted, does not hold force. Mr. Ismail Qureshi Iran contended that every building has a structure. He has referred to the meaning of structure as given in Black's Law Dictionary and contended that structural alteration or change affects the vital anti substantial portion of a thing which changes its characteristics which destroys the fundamental purpose of its erection and contemplated uses. As observed earlier, there are some characteristic features in

every Constitution which are embedded in the historical, religious and social background of the people for whom it is framed. It cannot be denied that every Constitution has prominent features, characteristics and picture-frame studded with public aspiration, historical inspiration, geographical recognition, political formulations and people's expectation. These winding paths which roll into the stream, with the passage of time and tide do affect the flow in their own perspective which to the rigid theory would amount to unpardonable change but to a flexible theory it would be a natural result of such confluence and influence.

Doubtless, Pakistan owes its creation to ideological belief which is so manifestly reflected in the Objectives Resolution that it has always remained the Preamble of almost all our Constitutions and has been a source of guidance to all. The provisions of the Constitution though not rigidly encircled by it, always remain within its horizon subject to all such changes which manifest different shades of the same colour. A Constitution is the aspiration of the people. It is the experience of the past, the desires of the present nation and last but not the least a hope for the future. A Constitution is a document for all times to come. It cannot be made rigid because such rigidity if confronted with the social and political needs of the time is likely to create cracks in it. The consistent view of the superior Courts of Pakistan is more real and should be followed and maintained."

In the paragraphs quoted above his lordship Mr. Justice Saleem Akhtar despite recognizing the salient features of the Constitution proceeded to reject the theory of the basic structure by holding that the Constitution being a document for all times to come cannot be made rigid. But what his lordship omitted to consider was that the parts forming the basic structure of the Constitution are based on eternal and unalterable values which do not change with the changes around. Independence of judiciary, for instance, is one of the values which does not change with the efflux of time. Sanctity of fundamental rights has been inviolable throughout and shall remain as such tomorrow. Islam, as a system of life, has the capacity to guide us today and in all times to come as it had fourteenth century before. Time in terms of past, present and future cannot have any impact much less adverse on these values.

41. In the case of ***"Wukala Mahaz Barai Tahafaz Dastoor and another vs. Federation of Pakistan and others"*** (PLD 1998 SC 1263), almost each member of the bench hearing the case after considering the theory of basic structure from different angles observed differently. His lordship Mr. Justice Ajmal Mian, CJ as the then was after examining different judgments of this Court and Foreign Courts concluded the paragraph by posing a rhetorical question which reads as under:-

> *"12. From the above case-law, it is evident that in Pakistan the basic structure theory consistently had not been accepted. However, it may be pointed out that in none of the above reports the impugned Article was such which could have been treated as altering the basic feature/structure of the Constitution. If the Parliament by a Constitutional Amendment makes Pakistan as a secular State, though Pakistan is founded as an Islamic Ideological State, can it be argued that this Court will have no power to examine the vires of such an amendment."*

42. His lordship Mr. Justice Saeed-uz-Zaman Siddiqui in his separate note after analyzing the views expressed in different judgments and separate notes desisted from defining the basic structure of the Constitution as such attempt, in his view, was more likely to confuse the issue. He, however, observed that a political party voted to power cannot bring about a change in the salient features of the Constitution if it did not seek a mandate to do so from the electorate. A reference to the relevant paragraph would, thus, be advantageous which reads as under :-

> *"The decision in Ziaur Rehman's case was delivered by this Court on 8-1-1973 when the Constitution had not come into force. In Saeed Ahmad's case this Court though gave its judgment on a date when the Constitution had come into force, but it considered the amendment of Article 281 of the Interim Constitution of 1972 by the President in exercise of his power under*

Article 279(1)(c) of the Interim Constitution. In Wali Khan's case this Court after referring to the decision of Indian Supreme Court in Kesvananda's case, which propounded the theory of basic structure of Constitution, refused to go into the controversy any further and reiterated its earlier view expressed in Ziaur-Rehman's case, but one of the reasons stated by the Court for not examining this aspect of the case any further was, that the amendment made in Article 17 of the Constitution in 1974 neither amounted to total abrogation of the right to form a political party nor in any manner an unreasonable restriction of such a right. The observations of this Court in United Sugar Mills Ltd.'s case will show that the two amendments of Constitution in that case, were not questioned for want of competency or any other formal defect. The decision in Fauji Foundation's case related to the question of legislative mala fides. Sharaf Faradi's case did not involve any amendment of the Constitution. Mahmood Khan Achakzai's case, was, therefore, the first case in which the amendment made in the Constitution through the Constitution (Eighth Amendment) Act XVIII of 1985 was examined at some length. The Bench in Mahmood Khan Achakzai's case consisted of seven learned Judges of this Court. The short order which was signed by all the learned seven learned Judges of the Bench, shows that the question relating to basic structure of the Constitution was not answered authoritatively and finally as it was considered to be academic in nature but salient features of the Constitution reflected in Article 2A were pointed out as Federalism and Parliamentary form of Government blended with Islamic provisions.

In detailed reasons recorded in support of the short order in Achakzai's case which reflected the majority opinion in the case, Sajjad Ali Shah, C.J. (as he then was) however, observed that after incorporation of Article 2A in the Constitution, the salient and basic features of the Constitution, namely; federalism, Parliamentary democracy and Islamic provisions cannot be touched with by the Parliament while amending the Constitution. Saleem Akhtar, J. another learned Judge of the Bench in Achakzai's case who recorded separate opinion in support of the short order and which also formed part of the majority view in that case, though did not accept the basic structure theory of the Constitution and referred to the views of this Court in earlier cases as realistic but in the final analysis also observed as follows:--

"However there are factors which restrict the power of the Legislature to amend the Constitution. It is the moral or political sentiment, which binds the barriers of Legislature and forms the Constitutional understandings.

The pressure of public opinion is another factor which restricts and resists the unlimited power to amend the Constitution. In Pakistan although Article 239 confers unlimited power to the Legislature, yet it cannot by sheer force of morality 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 can perish only with the Constitution. "

Apart from the reasons given in the majority opinion in Achakzai's case in support of the conclusion that power of the Parliament to amend the Constitution did extend to change or destroy the basic and salient features of the Constitution, I 'am of the view that the political parties take part in the process of election on the basis of their election manifesto or the programme given out by them during election campaign. A political party. elected to power on the basis of its election manifesto or the programme given out by it to the electorate during the election campaign has the mandate of the political sovereign only to give effect to those programmes and promises which it committed to the electorates in the election manifesto or in the form of promises given out during the election campaign. Therefore, a political party voted to power, if during its election campaign, or in its election manifesto, did not seek mandate from the electorate to bring about changes in the essential and basic features of the Constitution, it would lack necessary authority to bring about those changes in the Constitution by moving amendments in the Parliament I may, however, state that no attempt should be made to define and lay down with precision the basic and salient features of the Constitution. Any attempt in this regard in my opinion is more likely to confuse the issue than to define it. ***Reference in this behalf may be made to Kesavananda's case where the Supreme Court of India attempted to define the basic structure of Indian Constitution, but the learned Judges failed to evolve a consensus definition of basic structure of Indian Constitution, and as such each learned Judge of the Bench forming the majority in the case provided the definition of basic structure of Indian Constitution, according to his own perception. I am, therefore, of the view that as and when any amendment in the Constitution is challenged on the ground that it affected or altered any of the basic feature of the Constitution, such feature of the Constitution may be examined individually to determine its place in the Scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's***

governance, as observed by Chandrachud, J. in Kesavananda's case".

43. Mr. Justice Irshad Hassan Khan as the then was after examining the judgments of Indian and Pakistani jurisdictions as to the doctrine of basic structure held as under :-

> *"25. As to applicability of the doctrine of "basic structure" in Pakistan the learned Chief Justice has taken great pains in pointing out relevant passages from various decisions of this Court in this behalf viz. The State v. Zia-ur-Rehman (PLD 1973 SC 49), Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151), Islamic Republic of Pakistan v. Wali Khan, M.N.A. (PLD 1976 SC 57), Federation of Pakistan through the Secretary, Ministry of Finance, Government of Pakistan, Islamabad, etc. v. United Sugar Mills Ltd., Karachi (PLD 1977 SC 397), Fauji Foundation and another v. Shamimur Rehman (PLD 1983 SC 457), Khawaja Muhammad Sharif v. Federation of Pakistan through Secretary, Cabinet Division, Government of Pakistan, Islamabad (PLD 1988 Lah. 725), Sharaf Faridi v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan (PLD 1989 Kar. 404), Pir Sabir Shah v. Federation of Pakistan (PLD 1994 SC 738) and Federation of Pakistan v. Ghulam Mustafa Khar (PLD 1989 SC 26), vide paragraphs 11 and 12 of the proposed judgment to show that the "basic structure" theory consistently had not been accepted. I am in respectful agreement with him on this issue".*

44. Mr. Justice Raja Afrasiab Khan after examining the Objectives Resolution, and preamble of the Constitution of 1973 in their historical perspective and recounting the events leading to the partition of India held as under :-

> *"10. The very basis for creation of Pakistan is, therefore, Islam. Islam cannot be divorced/separated from the idea of Pakistan. If there were no Muslims in the sub-continent, no question for creation of Pakistan could have arisen in this part of the world. This being so, provision of Articles 2, 2A and others will reflect the historical background of the creation of Pakistan. In other words, the sub-continent has been divided on the basis of two-nation theory which even today is very much important and relevant for all intents and purposes. Likewise, the territories which have been included (vide Article 1) in the Islamic Republic of Pakistan cannot be excluded by any amendment to the*

Constitution. Apart from the above, a specific Article 257 has been enacted by the Parliament which relates to the people of State of Jammu and Kashmir. Article 1 has to be read with Article 257 of the Constitution. In case, people of the State of Jammu and Kashmir decide to accede to Pakistan the relationship between Pakistan and that State shall have to be determined in accordance with the wishes of the people of that State. Pakistan is the champion for the cause of liberation of the people of Jammu and Kashmir primarily on the basis of two nation theory. In these circumstances, the Parliament of Pakistan shall not be competent to change/amend the aforesaid provisions of the Constitution for the reason that, in case, it is allowed to do so, the very foundation of Pakistan shall altogether be shaken. The whole superstructure having been raised on the strength of Pakistan Resolution adopted on 23rd of March, 1940 may collapse like a house of cards. Apart from the above, Article 3 has forbidden all forms of exploitation. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen under Article 4. In return, every citizen is bound to be loyal to the State under Article 5. Our Constitution has given guarantee under Article 9 that no citizen shall be deprived of his life or liberty save in accordance with law. In any form, slavery and forced labour have been forbidden under Article 11. The dignity of man, of course, subject to law and the privacy of home, shall be inviolable under Article 14. This right that all are equal before law has been given to all citizens on the basis of Article 25. These provisions alongwith the above noted 'Islamic provisions are the very foundation on which the Constitutional structure has been raised. In my humble view, the Parliament has no powers to repeal or alter these provisions because of their importance, especially, keeping in view the background of Pakistan Movement and thinking on human rights in the modern world".

45. In the case of ***"Pakistan Lawyers Forum and others vs. Federation of Pakistan and others"*** (PLD 2005 SC 719), this Court having discussed salient features of the Constitution reiterated the view that no Constitutional amendment could be struck down by the superior judiciary as being violative of the said features and that the remedy lay in the political and not the judicial process. The relevant paragraph reads as under:-

"56. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior Courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic 'structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic,. i.e., the people of Pakistan. In this context, it may be noted that while Sajjad Ali Shah, C.J. observed that "there is a basic structure of the Constitution which may not be amended by Parliament", he nowhere observes that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. The theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features.

57. The conclusion which emerges from the above survey is that prior to Syed Zafar Ali Shah's case, there was almost three decades of settled law to the effect that even though there were certain salient features of the Constitution, no Constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the Courts. A Constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.

58. It may finally be noted that the basic structure theory, particularly as applied by the Supreme Court of India, is not a new concept so far as Pakistani jurisprudence is concerned but has been already considered and rejected after considerable reflection as discussed in the cases noted hereinabove. It may also be noted that the basic structure theory has not found significant acceptance outside India, as also discussed and noted in the Achakzai's case. More specifically, the Supreme Court of Sri Lanka refused to apply the said. theory in a case, reported as In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1990) LRC (Const.) 1. Similarly, the said theory was rejected by the Supreme Court of Malaysia in a case title Phang Chin Hock v. Public Prosecutor (1980) 1 MLJ 70."

In the paragraph quoted above, what escaped the attention of his lordship was that rule of law without basic structure is just inconceivable.

46. In the case of ***"Watan Party and another vs. Federation of Pakistan and others"*** (PLD 2011 SC 997), this Court also shed light on the preamble of the Constitution in the words running below:

> *"2. This aspect of the Islamic teachings, as well finds its reflection in the Constitution of the Islamic Republic of Pakistan 1973. The Constitution, in its very Preamble, postulates that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed and the fundamental rights, including equality of status, of opportunity and before the law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality; shall be fully guaranteed. These very principles have been made a substantive part of the Constitution under Article 2A. Thus, it is the duty of the State to protect and safeguard all these Fundamental Rights including the right to life and liberty as envisaged by Article 9 of the Constitution, which has been interpreted by this Court in Shehla Zia's case (PLD 1994 SC 693) as under:--*
>
> > *"Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word "life" is very significant as it covers all facts of human existence. The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice to say that a person is entitled to protection of-law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person- in the*

> *neighbourhood or at a far off place, he is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward."*

47. In the case of ***"Watan Party and others vs. Federation of Pakistan and others"*** (PLD 2012 SC 292), this Court while throwing light on the preamble observed as under:-

> *"38. It is observed that the preamble which is now the substantive part of the Constitution by means of Article 2A, commands that it is the will of the people of Pakistan to establish an order wherein the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded; so that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and made their full contribution towards international peace and progress and happiness of humanity. These words of the Constitution comprehensively define the stature of an independent Pakistan where the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world. Undoubtedly, this provision of Constitution has overwhelming nexus with the fundamental rights of the citizens of Pakistan (people) specifically guaranteed under Articles 9 and 14 of Chapter 1, Part-II of the Constitution."*

48. How does the Supreme Court of India look at the basic structure or salient features of the Constitution and their immunity from being altered is also an interesting reading. In the case of **Shankari Prasad Singh Deo. Vs. Union of India (supra)** amendment in the Constitution was not treated as amendment in law in terms of Article 13 of the Constitution of India. In the case of **Sajjan Singh. Vs. State of Rajasthan, (supra)** the decision given in **Shankari Prasad Singh Deo. Vs. Union of India (supra)** was approved. With the insertion of clause (4) in Article 13, providing that nothing in this Article shall apply to any amendment of the Constitution under Article 368 and insertion of Clause (3) in Article 368 providing that nothing in Article 13 shall apply to any amendment made under this Article, through the Constitution (Twenty-fourth Amendment) Act, 1971, a clear line of distinction was drawn between amendment in law and amendment in the Constitution. Notwithstanding amendment in Article 13 and Article 368, the ratio of **Golak Nath. Vs. State of Punjab (supra),** still holds the field in so far as it held that the Parliament has no power to take away or abridge the fundamental rights enshrined in part III of the Constitution as this could be done only by the Constituent Assembly. The relevant paragraph of the judgment deserves a look which runs as under:-

> *"(1) The power of the Parliament to amend the Constitution is derived from Arts. 245, 246 and 248 of the Constitution and not from Art. 368 thereof which only deals with procedure. Amendment is a legislative process.*
>
> *(2) Amendment is 'law' within the meaning of Art. 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.*
>
> *(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and,the Constitution*

(Seventeenth Amendment) Act, 1964, abridge the scope. of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein."

49. Another paragraph which is also relevant reads as under:-

"We have not said that the provisions of the Constitution cannot be amended but what we have said is that they cannot be amended so as to take away or abridge the fundamental rights. Nor can we appreciate the argument that all the agrarian reforms which the Parliament in power wants to effectuate cannot be brought about without amending the fundamental rights. It was exactly to prevent this attitude and to project the rights of the people that the fundamental rights were inserted in the Constitution. If it is the duty of the Parliament to enforce the directive principles, it is equally its duty to enforce them without infringing the fundamental rights."

50. In yet another paragraph of the judgment Hidayatullah J. observed as under:

"My conclusions are

(i) that the Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(ii) that Shankari Prasad's case (and Sajjan Singh's case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of Arts. 13(2) and 368;

(iii) that the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;

(iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of

amendatory process in Art. 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and Art.

13(2) in particular,

(v) that for abridging or taking away Fundamental Rights, a Constituent body will have to be, convoked; and ---"

51. In the case of **Kesavananda Bharati. Vs. State of Kerala (Supra),** it was held that there are implied limitations on the power of the Parliament and that every provision of the Constitution can be amended provided that such amendment does not upset its basic structure. The relevant paragraphs read as under:

"*292. It seems to me that reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.*

293. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

294. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.

302. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place

every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government.

(3) Secular character of the Constitution;

(4) Separation of powers between the Legislature, the executive and the judiciary;

(5) Federal character of the Constitution.."

Another paragraph is also relevant which reads as under:-

"692. It was contended that by means of the 24th Amendment Parliament intended to and in fact purported to enlarge its amending power. In this connection reliance was placed on the statement of objects and reasons attached to the Bill which resulted in the 24th Amendment. The power of Parliament does not rest upon its professed intention. It cannot acquire a power which it otherwise did not possess. We are unable to accept the contention that Clause (e) to the proviso to Article 368 confers power on Parliament to enlarge its own power. In our judgment the power to amend the Constitution as well as the ordinary procedure to amend any part of the Constitution was and is contained in the main part of the Article. The proviso merely places further restrictions on the procedure to amend the articles mentioned therein. Clause (e) to the proviso stipulates that Article 368 cannot be amended except in the manner provided in the proviso. In the absence of that clause, Article 368 could have been amended by following the procedure laid down in the main part. At best Clause (e) of the proviso merely indicates that Article 368 itself comes within its own purview. As we have already seen, the main part of Article 368 as it stood earlier, expressly lays down only the procedure to be followed in amending the Constitution. The power to amend is only implied therein."

Khanna J. in another paragraph which is also relevant held as under:-

"1437. We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word "amendment". Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, "howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368."

He further observed as under:

1441. It has not been disputed during the course of arguments that the power of amendment under Article 368 does not carry within itself the power to repeal the entire Constitution and replace it by a new Constitution. If the power of amendment does not comprehend the doing away of the entire Constitution but postulates retention or continuity of the existing Constitution, though in an amended form, question arises as to what is the minimum of the existing Constitution which should be left intact in order to hold that the existing Constitution has been retained in an amended form and not done away with. In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic

> *structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues and survives.*

52. How this aspect is looked at in the United Kingdom where, according to A. V. Dicey, who is the chief exponent of the doctrine of supremacy of Parliament, "the Parliament has the right to make or unmake any law whatsoever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of the Parliament". In the case of "**Stella Madzimbamuto. Vs. D. W. Lardner-Burke and Another (Privy Council Appeal No. 13 of 1968)**, Lord Reid identified the conspicuous aspect of the Parliamentary sovereignty that laid down the foundation of the British Political system. He stated as follows :-

> *"It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If parliament chose to do any of them the Courts would not hold the act of Parliament invalid."*

In marked contrast to that Lord Woolf (the then Chief Justice of England and Wales) had written that "if Parliament did the unthinkable, then I would say that courts would also be required to act in a manner which was without precedent".

Lord Steyn in the case of **Jackson and others v. Her Majesty's Attorney General** [2005] UKHL 56, while acknowledging that "the supremacy of Parliament is still the general principle of our

constitution", labeled it "*a construct of the common law*". Relevant paragraph reads as under:-

> *"Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion"*

Lord Hope followed on from Lord Steyn by observing as under :-

> *"Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute…It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament...is being qualified…The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in*

> *defining the limits of Parliament's legislative sovereignty."*

Baroness Hale in her separate note, in the same case, suggested that there may be limits to Parliament's legislative competence by observing as under :-

> *"The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny. Parliament has also, for the time being at least, limited its own powers by the European Communities Act 1972 and, in a different way, by the Human Rights Act 1998. It is possible that other qualifications may emerge in due course. In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional."*

Lord Coke at the advent of 17th century in Bonham's case pronounced that *'in many cases the common law will control acts of Parliament and sometime adjudge them to be utterly void: for when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void.'* What can thus be deduced from the foregoing discussion, is that sovereignty of Parliament even in the U.K. is not as absolute as has been thought. We, thus, while interpreting our Constitution need not be swayed by the doctrine of sovereignty of Parliament which, as pointed out by Mr. Abdul Hafeez Pirzada, the learned Sr. ASC, is no longer accepted in the U.K.

53. What is the mode of amending the Constitution, how far can the parts forming its basic structure restrict the amendatory power of the Parliament and how far can clauses 5 and 6 of Article 239

curtail the power of this Court to examine the vires and validity of an amendment to the Constitution? Before we deal with these questions, it is worthwhile to refer to the relevant provisions which read as under :-

> *"238. Amendment of Constitution.----Subject to this Part, the Constitution may be amended by Act of Parliament."*
> *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.*
> *(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 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 of that Province passed by the votes of not less than two-thirds of the total membership of that Assembly."*

54. The aforesaid Articles were amended by the Constitution (Second Amendment Order 1985) and after amendment they read as under :-

> *"Amendment of Constitution*
>
> *238. Subject to this Part, the Constitution may be amended by Act of 1 [Majlis-e-Shoora (Parliament)].*

239. (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 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."

55. Article 368 of the Constitution of India is almost in *pari materia* with Article 239 of the Constitution of Pakistan which as it stood in the original Constitution reads as under:-

"368. *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 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 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 :*

Provided that if such amendment seeks to make any change in ---
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 one-half of the States specified in Parts A and B of the First Schedule by resolutions to the effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

This Article was amended through various amendments and it as it stands today reads as under :-

"***368. Power of Parliament to amend the Constitution and procedure therefor.*** *___ (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 amended in accordance with the terms of the Bill :
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 Legislature 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, 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."

56. There is, of course, a difference between the amending Articles of the Constitution of Pakistan and those of the Constitution of India as in Clause 6 of the former the words "Power of the Parliament" have been used while in clause 4 of the latter the words "Constituent power of the Parliament" have been used with the addition of the clause defining the expression "amendment" as addition, variation or repeal of the provisions of the Constitution, but a review of the judgments rendered in the cases of **Shankari Prasad Singh Deo. Vs. Union of India (AIR 1951 S.C. 458), Sajjan Singh. Vs. State of Rajasthan, (AIR 1965 S.C. 845), Kesavananda Bharati. Vs. State of Kerala (AIR 1973 S.C. 1461) and Indira Nehru Gandhi. Vs. Raj Narain (AIR 1975 S.C. 2299)** shows that there is practically no difference between Power and Constituent Power as neither the Parliament under the Constitution nor the Parliament under the Constitution of India provides for appeal to the electorate for amendment in either of the Constitutions. The Constitution of Pakistan, however, after 18th Amendment stands on a different pedestal as it has now provided for Referendum to cater for a situation of this type.

57. Let us see what is the origin of clauses 5 and 6 of Article 239 of the Constitution of Pakistan and how far do they curtail the power of this Court to examine the vires and validity of an amendment altering the basic structure of the Constitution? These

clauses as is evident from the footnotes were inserted by the Constitution (Second Amendment) Order, 1985 by a party less house whose members never went to the electorate to seek a mandate in this behalf. They, as a matter of fact, were elected on account of either their influence in the Constituency or performance in the local councils. They never canvassed their programme before the people nor did they have any even in their minds while canvassing for their election. What they canvassed for during their election was to be elected as members of the Parliament. They as such had no mandate to amend the Constitution or bring about any structural change therein or to make it immune from being challenged. Such amendment can neither impair any of the parts forming the basic structure of the Constitution nor can it override any of its provisions enacted by the original framers of the Constitution especially when it is in conflict with the latter. This Court in the case of **Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others** (*Supra*) while dealing with an identical proposition reiterated the view expressed in the case of **Al-Jehad Trust. Vs. Federation of Pakistan (PLD 1996 S.C. 324)** by holding as under :-

> *"16. We may observe that in Pakistan instead of adopting the basic structure theory or declaring a provision of the Constitution as ultra vires to any of the Fundamental Rights, this Court has pressed into service the rule of interpretation that if there is a conflict between the two provisions of the Constitution which is not reconcilable, the provision which contains lesser right must yield in favour of a provision which provides higher rights. This was adopted first time by me in the case of Al-Jehad Trust (PLD 1996 SC 324) wherein the following was held with reference to conflict between Article 203-C and Article 209(7) of the Constitution:*

"Since there is a conflict between the above two Articles, efforts are to be made to resolve the same by reconciling it. The Constitution is to be read as a whole as an organic document. A close scrutiny of the various provisions of the Constitution highlights that it envisages that the independence of Judiciary should be secured as provided by the founder father of the country by passing Objectives Resolution and by providing security of tenure. The Constitution also envisages separation of Judiciary from the Executive. Keeping in view the various provisions of the Constitution, it is not possible to' reconcile the above provisions of Article 203-C and Article 209. In such a situation, the question arises, which of the Articles should prevail. One view can be that since Article 203-C was incorporated subsequent to Article 209, the former should prevail. The other view can be that since Article 209 was incorporated by consensus by the framers of the Constitution and whereas Article 203-C was incorporated by the then Chief Martial Law Administrator and as the same is detrimental to the basic concept of independence of Judiciary and the separation of Judiciary, the former should prevail. I am inclined to prefer the latter interpretation as it will be more in consonance with the various provisions of the Constitution and in accord with justice and fair play. A person cannot be appointed on adverse terms in a new Court without his consent.

The same was explained by me in the case of Shahid Nabi Malik v. Chief Election Commissioner, Islamabad and 7 others (PLD 1997 SC 32).1 after quoting the following extracts from Corpus Juris Secundum, Vol. 16, page 97; and Halsbury's Laws of England, Fourth Edition, Vol. 44, page 532, para. 872:

His lordship in support of his view also cited from **Corpus**

Juris Secundum. Vol. 16, nape 97:

24. Conflicting provisions in general. ---Although apparently conflicting provisions will be reconciled wherever possible, in case of a conflict in the provisions of a Constitution,, if one or the other must yield, the one which, under the law, is the lesser right will yield. ,

With respect to Constitutional construction, distinct Constitutional provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. While apparently conflicting provisions of a Constitution will be reconciled wherever possible, if one or the other must yield, that one which, under the law, is the lesser right will yield to the other."

And then from **Halsbury's Laws of England Fourth Edition, Vo1.44, 12.532**:

"872. Statute to be construed as a whole.---For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute.

Thus a statute should be construed as a whole so as, so far as possible, to avoid any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute. The literal meaning of a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute. Where the meaning of sweeping general words is in dispute, and it is found that similar expressions in other parts of the statute have all to be subjected to a particular limitation or qualification, it is a strong argument for subjecting the expression in dispute to the same limitation or qualification.

It is sometimes said that where there is an irreconcilable inconsistency between two provisions in the same statute, the latter prevails; but this is doubtful, and the better view appears to .be that the Courts must determine which is the leading provision and which the subordinate provision, and which must give way to the other. "

58. In the case of ***"Mahmood Khan Achakzai vs. Federation of Pakistan and others"*** (supra) his lordship Mr. Justice Sajjad Ali Shah also dealt with this issue in paragraph No. 27 of the judgment which is reproduced as below :-

27. In the Constitution of 1973 in its original form Article 238 provides for amendment of the Constitution and Article 239 lays down the procedure for such amendment and is composed of seven clauses. Clause (7) provided that a Bill to amend the "Constitution which would have effect of altering the limits of a Province could not tie passed by the National Assembly unless approved by resolution of Provincial Assembly of that Province by votes of not less than two thirds of total membership of that Assembly. This shows anxiety of the Constitution-makers of that time not to make it easy to alter the limits or boundaries of a Province unless Assembly of that Province consented with votes of not less than two-thirds of the total membership of that Assembly. This anxiety was justified in the aftermath of loss of East Pakistan. Article 239 was amended by P.O. No. 20 of 1985

and substituted by P.O. No. 14 of 1985 which are protected for validity by Constitution (Eighth Amendment) Act No.XVIII of 1985. Apart from other amendments in Article 239, the major amendment is in clause (6) which is substituted by fresh provision providing that for removal of doubts, it is hereby declared that there is no limitation whatever on the power of Majlis-e-Shoora (Parliament) to amend any provision of the Constitution. We are going into the question of validity of the Constitution (Eighth Amendment) Act, 1985, later but for the time being it would suffice to say that freedom, bestowed upon the parliament in clause, (6) of Article 239 after amendment 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 these 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."

59. How far can the jurisdiction and power of the Supreme Court be curtailed and where does the amendment curtailing such jurisdiction and power stand in view of entry No. 55 of the Federal Legislative List, which provides for enlargement and not curtailment thereof, was also addressed in the case of **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others** (supra) in the following words :-

"The perusal of the above-quoted Entry No. 1 indicates that none of the items mentioned therein can justify the legislation of a statute for setting up or ~!, convening the Military Courts for the trial of civilians for civil offences. The residuary Entry No. 59 also quoted hereinabove providing for matters incidental and ancillary to any matter enumerated in the above part cannot be treated as a, source of power conferring competency on the Legislature to legislate the impugned Ordinance. It may be pointed out that factually Entry No. 55 in the above Federal Legislative List deals with the subject of Courts by providing that "Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.

The above entry indicates that the Parliament can legislate in respect of jurisdiction and power of all Courts except the Supreme Court with respect to any of the matters in the aforesaid list but to such extent as is expressly authorised by or under the Constitution. It also indicates that the jurisdiction of the Supreme Court can be enlarged but it cannot be curtailed".

60. In the case of **Indira Nehru Gandhi. Vs. Raj Narain (supra)**, the Supreme Court of India struck down clause 4 of Article 329A of the Constitution of India even in the presence of clause 4 and 5 of the Article 368 of the Constitution of India when found that it violated the principle of free and fair elections, by holding as under :-

210. It has been argued in support of the constitutional validity of clause (4) that as a result of this amendment, the validity of one election has been preserved. Since the basic structure of the Constitution, according to the submission, continues to be the same, clause (4) cannot be said to be an impermissible piece of constitutional amendment. The argument has a seeming plausibility about it, but a deeper reflection would show that it is vitiated by a basic fallacy. Law normally connotes a rule or norm which is of general application. It may apply to all the persons or class of persons or even individuals of a particular description. Law prescribes the abstract principles by the application of which individual cases are decided. Law, however, is not what Blackstone called "a sentence". According to Roscoe Pound, law, as distinguished from laws, is the system of authoritative materials for grounding or guiding judicial and administrative action recognized or established in a politically organized society (see page 106 Jurisprudence, Vol. III). Law is not the same as judgment. Law lays down the norm in abstract terms with a coercive power and sanction against those guilty of violating the norm, while judgment represents the decision arrived at by the application of law to the concrete facts of a case. Constitutional law relates to the various organs of a State; it deals with the structure of the government, the extent of distribution of its powers and the modes and principles of its operation. The Constitution of India is so detailed that some of the matters which in a brief constitution like that of the United States of America are dealt with by statutes form the subject-matter of various Articles of our Constitution. There is, however, in a constitutional law, as there is in the very idea of law, some element of generality or general application. If also carries with it a concept of its

applicability in future to situations which may arise in that context. If there is amendment of some provision of the Constitution and the amendment deals with matters which constitute constitutional law in the normally accepted sense, the court while deciding the question of the validity of the amendment would have to find out, in view of the majority opinion in Kesavananda Bharati's case (AIR 1973 SC 1461) (supra), as to whether the amendment affects the basic structure of the Constitution. The Constitutional amendment contained in Clause (4) with which we are concerned in the present case is, however, of an altogether different nature. Its avowed object is to confer validity on the election of the appellant to the Lok Sabha in 1971 after that election had been declared to be void by the High Court and an appeal against the judgment of the High Court was pending in. this Court. In spite of our query, we were not referred to any precedent of a similar amendment of any Constitution of the world. The uniqueness of the impugned Constitutional amendment would not, however, affect its validity. If the constituent authority in its wisdom has chosen the validity of a disputed election as the subject-matter of a Constitutional amendment, this Court cannot go behind that wisdom. All that this Court is concerned with is the validity of the amendment. I need not go into the question as to whether such a matter, in view of the normal concept of Constitutional law, can strictly be the subject of a Constitutional amendment. I shall for the purpose of this case assume that such a matter can validly be the subject-matter of a Constitutional amendment. The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases. If an amendment striking at the basic structure of the Constitution is not permissible, it would not acquire validity by being related only to one case. To accede to the argument advanced in support of the validity of the amendment would be tantamount to holding that even though it is not permissible to change the basic structure of the Constitution, whenever the authority concerned deems it proper to make such an amendment, it can do so and circumvent the bar to the making of such an amendment by confining it to one case. What is prohibited cannot

become permissible because of its being confined to one matter."

Two other paragraphs relevant in this behalf are also useful which read as under:-

264. In His Holiness Kesawananda Bharati Sripadagalavaru v. State of Kerala (hereinafter referred to as 'Bharati's case'), a majority of seven judges held that the power conferred under Article 368 of the Constitution was not absolute. They took the view that, by an amendment, the basic structure of the Constitution cannot be damaged or destroyed. And, as to what are the basic structures of the Constitution, illustrations have been given by each of these judges. They include supremacy of the Constitution, democratic republican form of government, secular character of the Constitution, separation of powers among the Legislature, Executive and Judiciary, the federal character of the Constitution, rule of law, equality of status and of opportunity; justice, social, economic and political; unity and integrity of the nation and the dignity of the individual secured by the various provisions of the Constitution. There was consensus among these judges that democracy is a basic structure of the Constitution. I proceed on the assumption that the law as laid down by the majority in that case should govern the decision here, although I did not share the view of the majority."

347. I think the inhibition to destroy or damage the basic structure by an amendment of the Constitution flows from the limitation on the power of amendment under Article 368 read into it by the majority in Bharati's case AIR1973SC1461 because of their assumption that there are certain fundamental features in the Constitution which its makers intended to remain there in perpetuity. But I do not find any such inhibition so far as the power of parliament or state legislatures to pass laws is concerned. Articles 245 and 246 give the power and also provide the limitation upon the power of these organs to pass laws. It is only the specific provisions enacted in the Constitution which could operate as limitation upon that power. The preamble, though a part of the Constitution, is neither a source of power nor a limitation upon that power. The preamble sets out the ideological aspirations of the people. The essential features of the great concepts set out in the preamble are delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established, the quality and nature of justice, political, social and economic which was their desideratum, the

content of liberty of thought and expression which they entrenched in that document, the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution as established. These specific provisions, either separately or in combination determine the content of the great concepts set out in the preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven. The argument of counsel for the respondent proceeded on the assumption that there are certain norms for free and fair election in an ideal democracy and the law laid down by parliament or state legislatures must be tested on those norms and, if found wanting, must be struck down. The norms of election set out by parliament or state legislatures tested in the light of the provisions of the Constitution or necessary implications therefrom constitute the law of the land. That law cannot be subject to any other test, like the test of free and fair election in an ideal democracy."

61. In the case of **Minerva Mills Ltd. Vs. Union of India (AIR 1980 S.C. 1789),** the Supreme Court of India struck down clauses 4 and 5 of Article 368 of the Constitution of India when found that they turned a limited power of the Parliament into an absolute power, by holding as under :-

"Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

The very 42nd Amendment which introduced clauses 4 and 5 in Article 368 made amendments to the preamble to which no exception can be taken. Those amendments are not only within the framework of the Constitution but they give vitality to its philosophy they afford strength and succor to its foundation. By the aforesaid amendments, what was originally described as a 'Sovereign Democratic Republic' became a "Sovereign Socialist Secular Democratic Republic" and the resolution to promote the `unity of the Nation' was elevated into a promise to promote the "unity and integrity of the Nation". These amendments furnish the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution. They offer promise of more, they do not scuttle a precious heritage.

Since, for the reasons above mentioned, clause 5 of Article 368 , transgresses the limitations on the amending power, it must be held to be unconstitutional.

The newly introduced clause 4 of Article 368 must suffer the same fate as clause 5 because the two clauses are inter-linked. Clause 5 purports to remove all limitations on the amending power while clause 4 deprives the courts of their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the

> *provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power.*
>
> *If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge.*
>
> *Clause 4 of Article 368 is in one sense an appendage of Clause 5, though we do not like to describe it as a logical consequence of Clause 5. If it be true, as stated in clause 5, that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as unconstitutional. Clause 4, therefore, says nothing more or less than what clause 5 postulates. If clause 5 is beyond the amending power of the Parliament, clause 4 must be equally beyond that power and must be struck down as such".*

We, therefore, hold that we have jurisdiction to examine the vires of any amendment in the Constitution and annul it, if it impairs, undermines or alters any of the parts forming basic structure of the Constitution and that clauses 5 and 6 of Article 239 of the Constitution cannot curtail such power and jurisdiction of this Court.

62. Now we are to see how far do the amendments under challenge impinge upon the independence of judiciary or impair any

of the parts forming the basic structure of the Constitution. The first in the sequence is the 18th Amendment. The learned ASC challenging it could not point out anything in the amendment as could either impinge upon the independence of judiciary or impair any of the parts forming the basic structure of the Constitution, therefore, we don't think it merits annulment on any of the grounds mentioned by the learned ASCs for the petitioners in their arguments addressed at the bar.

63. The next in the sequence is the 21st Amendment which reads as under :-

"Constitution (Twenty-First Amendment) Act, 2015

Passed by the National Assembly: January 6, 2015

Passed by the Senate: January 6, 2015

Presidential Assent Received: January 7, 2015

An Act further to amend the Constitution of the Islamic Republic of Pakistan;

WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relative to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by the terrorist groups using the name of religion or a sect and also by the members of armed groups, wings and militas;

AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constitution, from the terrorist groups by raising of arms and insurgency using the name of religion or a sect, or from the foreign and locally funded anti-state elements;

AND WHEREAS it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2;

AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conferences held in aftermath of the sad and terrible terrorist attack

on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan;

It is hereby enacted as follows:-

1. Short title and commencement:

(1) This Act may be called the Constitution (Twenty-First Amendment) Act, 2015.

(2) It shall come into force at once.

(3) The provisions of this Amendment Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.

2. Amendment of Article 175 of the Constitution:

In the Constitution of the Islamic Republic of Pakistan, hereinafter called the Constitution, in Article 175, in clause (3), for the full stop at the end a colon shall be substituted and thereafter, the following proviso shall be inserted, namely:-

Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.

Explanation:- In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

***3. Amendment of First Schedule of the Constitution**:*

In the Constitution, in the First Schedule, in sub-part III of Part I, after entry 5, the following new entries shall be added, namely:-

6. The Pakistan Army Act, 1952 (XXXXIX of 1952).

7. The Pakistan Air Force Act, 1953 (VI of 1953).

8. The Pakistan Navy Ordinance, 1961 (XXXV of 1961).

9. The Protection of Pakistan Act, 2014 (X of 2014)."

64. A look at the amendment reproduced above shows that it in the first instance added proviso to Article 175 of the Constitution and then the following entries after Sr. No. 5:

> *"6. The Pakistan Army Act, 1952 (XXXXIX of 1952).*
>
> *7. The Pakistan Air Force Act, 1953 (VI of 1953).*
>
> *8. The Pakistan Navy Ordinance, 1961 (XXXV of 1961).*
>
> *9. The Protection of Pakistan Act, 2014 (X of 2014)."*

to sub-part-III of part-I of the First Schedule of the Constitution. How far the proviso added to Article 175 of the Constitution justifies trial of the persons under the Acts listed above; whether the expression "specified" in Article 8(3)(a)(b)(ii) could be extended to include a law to be specified in future and whether such law can be held to be immune from being declared void in terms of Clause (3)(a)(b)(ii) of Article 8 are the questions underlying the vires or otherwise of the amendment in question.

65. Before we deal with the question, it is worthwhile to refer to Article 175 of the Constitution which reads as under :-

"**Part VII: The Judicature**

Chapter 1: The Courts.

"175 Establishment and Jurisdiction of Courts.

(1) There shall be a Supreme Court of Pakistan, a High Court for

> each Province [and a High Court for the Islamabad Capital Territory] and such other courts as may be established by law.
> [Explanation.- Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court.]
>
> (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.
>
> (3) The Judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day.
>
> [**Provided** that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.
> Explanation:- In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

66. The Article reproduced above, deals with establishment of the Supreme Court, High Courts and other Courts, conferment of jurisdiction and restraint on exercise of jurisdiction not conferred on them. It is this provision which ensures Independence of judiciary, its separation from the executive and thereby lays basis for tricotomy of power. It is this provision which provides an impenetrable bulwark against assumption of power by the executive and the legislature outside their respective domains. A proviso has been added to the aforesaid provision by the Constitution (Twenty First Amendment) Act, 2015 which seeks to exclude the latter's application to the trial of the person who belongs to any terrorist group or organization using the name of religion "hereinafter called the person" under the Acts listed at Srl. No. 6 to 9 of sub-part III of Part I of the First Schedule "hereinafter called the Acts". But how the Courts constituted under the Acts can try the person when no jurisdiction has been conferred on them in terms of Article 175 of the Constitution? How can such Courts be said

to have been founded in the provisions of the Constitution when the provision dealing with the establishment of Courts and conferment of jurisdiction by the Constitution or by or under any law has been rendered nugatory by the addition of the proviso thereto? Does this mean that henceforth any forum bearing the form or pretence of a Court can try any person and decide any lis without being established and without being vested with the requisite jurisdiction by the Constitution or by or under the law? Where will the independence of judiciary and separation of power go when the executive is again dragged in to share judicial power with the Courts mentioned in Article 175 and 203 of the Constitution of Pakistan. Won't the rule of law in such a state of things be reduced to just a myth especially when the provision of the Constitution regulating the establishment of Courts and conferment of jurisdiction has been put on the back burner? Is it not an anathema and affront to the rule of law and an outright departure from the course set out by the preamble and mandatory provisions of the Constitution? Is it a step forward or a giant stride backward and an attempt to take the State towards lawlessness in the garb of amendments in the law and the Constitution? Is it not an attempt to turn a democratic State into a monarchy of medieval times? Is it not an attempt to destroy what we have achieved through the centuries old struggle? Are we not like the old woman who, in the words of Holy Quran, laboured hard to spin a yarn and then pulled it into pieces? True that according to the dictum rendered in the case of **"Mehram Ali and others. Vs. Federation of Pakistan and others (PLD 1998 S.C. 1445),** no parallel Judicial System could be created in violation of Article 175, 202 and 203 of the Constitution. And according

to the dictum laid down in the case of **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others** (supra), no Court or Tribunal can lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution unless founded on the provisions of the Constitution. But does this mean that the Courts be founded by nullifying the provision of the Constitution which is the bedrock of the rule of law? If Courts are allowed to be founded in derogation of Article 175 of the Constitution the superstructure together with the infrastructure of rule of law would inevitably crumble into ruins. No amount of human effort or ingenuity would be able to repair and re-erect the same. It would be worse than the fall of the Humpty Dumpty, as referred to by Lord Atkin in the case of **Liversidge. Vs. Anderson (1942 A.C. 206),** where all the King's horses and all the King's men could not put Humpty Dumpty together again. We, therefore, hold that addition of the proviso to Article 175 of the Constitution excluding its application to the trial of the person by the Courts under the Acts is against the basic structure of the Constitution and the dicta of this Court rendered in the cases of **"Mehram Ali and others. Vs. Federation of Pakistan and others** (supra) and **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others** (supra) and thus non-est.

67. Be all that as it may, addition of the Acts made in sub-part-III of part-I of the First Schedule of the Constitution has absolutely no effect when the word "specified" used in Article 8(3)(b)(ii) cannot be extended to include a law to be specified in future. The argument

of the learned Attorney General was that the word "specified" used in the Article would include the law to be specified in future as does the word "specified" used in para 3 of the Fifth Schedule of the Constitution. But this parallel, to say the least, is misconceived on the face of it because it is not the word "specified" used in the said para which enables the President to raise the minimum or maximum amount of the pension so specified. It is indeed the proviso to para 3 of the Fifth Schedule which enables the President to raise from time to time the minimum or maximum amount of the pension so specified. The amount of the pension remains much the same so long as it is not raised by the President. Therefore, it is not correct to say that the word "specified" would include the law to be specified in future unless the words "to be specified in future" or the words permitting addition in line with the proviso to para 3 of the Fifth Schedule, are added after the word "specified". We also cannot read in the trial of the person under the Acts in sub-clause (ii) of Article 8(3)(b) on the ground of its being rendered redundant, when it has been and is being read viz-a-viz the laws "specified" at Srl. No. 4, 5 and 6 of sub-part-II of part-I of the Schedule. The addition thus made in the Schedule of the Constitution being outside the scope of the word "specified" is of no effect whatsoever. It, therefore, by virtue of the provision contained in Article 8(2), shall be void ab-initio.

68. Assuming that the addition of Acts mentioned at Srl. No. 6 to 9 of sub-part-III of part-I of the First Schedule is covered by the word "specified" used in Article 8(3)(b)(ii) of the Constitution, it at its best may make it immune from being declared void in terms of Article 8(2) of the Constitution, but it by no means confers jurisdiction for the trial

of the person on the Courts constituted thereunder. We, therefore, hold that Courts constituted under the Acts being coram non judice cannot try the person mentioned above.

69. The other questions requiring examination are that when Anti-Terrorism Courts under the Anti-Terrorism Act, 1997 and Courts under Protection of Pakistan Act 2014 are already in place what necessitated trial of the person by the Courts constituted under the Acts; what this classification is based on, how far it is reasonable and what nexus it has with the purpose sought to be achieved; when the person could be tried by the Courts under the Protection of Pakistan Act, 2014 which covers every conceivable crime, why should he be classified for the purpose of trial and punishments with the persons having no nexus with his class and background; what nexus he has with the members of the Armed Forces or Police or such other Forces as are charged with the maintenance of public order for the purpose of exercising the proper discharge of their duties or the maintenance of discipline amongst them; and why should he be deprived of the due process of law and fair trial as is envisaged by Article 4, 8, 9, 10, and 10-A of the Constitution? While answering the questions, the learned Attorney General heavily relied on the case of **Brig. (Retd). F.B. Ali and another v. The State** (supra) but it does little to justify the classification in question. The reason advanced by Mr. Khalid Anwar, the learned Sr. ASC for justifying the classification was that criminal justice system in place at the moment has failed to deliver goods as many criminals despite having been hooked were let off at the end of the day with the result that every part of the country is, now, in the grip of terrorism. Alright if criminals hooked were let off due to fault of the

Court, there is every justification for the change of the Court. But this argument stands belied by the data collected in this behalf showing that let off of the criminals was due to lack of evidence, lack of proper investigation and lack of proper prosecution. Lack of evidence is due to lack of will on the part of the witnesses to give evidence. Lack of will on the part of the witnesses is due to lack of their proper security. Even if a witness makes up his mind to give evidence against an accused, lack of proper investigation turns out to be a cause for his let off. In case the witness has a will to give evidence and the investigating agency has the prowess to investigate the case and unearth the hand behind the crime, lack of prosecutorial skills leaves many lacunas and loopholes in the case which become instrumental in failure of the case. The most shocking part of the subject is that neither the people have been enlightened about the significance of deposing truthfully nor have they been empowered to protect themselves against the wrath of the criminals they deposed against. In the case of **Sheikh Liaquat Hussain and others. Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others** (supra), this Court by taking stock of these facts held as under :-

> *"I may point out that, unfortunately, in our country we have a weak agency for detection of crimes and an inefficient machinery for prosecution which are inter alia the cause of delay in disposal of criminal cases and higher percentage of acquittal orders. No doubt, that delay also occurs in disposal of criminal cases on account of lapses on the part of some of the Presiding Officers, but the main reason seems to be heavy pendency which warrants increase in the strength of the Courts. We will have to streamline and make more efficient the agency for detection of crimes, the*

machinery for prosecution and the Courts in I order to have better deterrent effect on criminals".

70. In the past and even at present, we have never thought over the problem holistically. We resorted to shortcuts and palliatives but they do not provide an enduring solution to the problem. We even thought about compounding the standards of proof but it tends to do more harm than good. We, thus have to move in the right direction, lock, stock and barrel by making up the deficiencies, empowering and protecting the witnesses, equipping the investigating agencies with the requisite expertise and enhancing prosecutorial skills to make escape of the criminals difficult if not impossible. In H.R.C. No. 1-K of 1992, we while examining the law and order situation prevailing in the country observed as under:-

"A look at the para 6 of CMA and the report reproduced above shows that the department has woken up from the slumber and is out to do something not only to face and brace the problems but to find remedial measures therefor. In any case the problems have not been looked at in their totality. One of the reasons therefor is that it is not the job of one department. All the departments of the government including police are to join their heads together to work out an effective strategy to find solution to the problems. One of the problems highlighted in CMA mentioned above is that complainant, kidnapee, the incident, nor do they depose against the accused, nor do they follow it up during the phase of investigation or trial, witnesses even if they are related do not come forward to report a case against the accused or to follow it up. The complainant, kidnapee and witnesses can be blamed and damned for it but this is not all because of this. As a matter of fact it is due to the failure of the police to provide them necessary protection. Had police operated effectively and assured the protection of the witnesses they would have been encouraged to do their civic as well as religious duties of reporting the crime and giving evidence. Another worrisome phenomenon is that witnesses or for that matter the police consider themselves to be isolated entities as both of them think that their domains are exclusive and have no bearing on

each other. Criminal Procedure Code was promulgated in 1898. It despite being old and obsolete law has the tools to cater for the situation which has changed a great deal due to urbanization and massive migrations of the population to the cities. Crime, due to lack of vigilance, has increased manifold. Not only that its commission has become much more sophisticated than ever before. But the police which were there to curb and control it are still in the 19th Century. They have not equipped themselves or updated and revamped their techniques to trace and track down the crime and nab the person behind that. Given that witnesses who muster up courage to give evidence before the police against the criminal cannot keep it up due to fear of the accused and many other attending factors of similar ilk. They do not turn up in the Courts to depose. In case they do, they are pressurized to make concession obliging the accused or turn hostile to the prosecution. This situation is not something new or unheard of. This has been in existence eversince the promulgation of the Code. But this has been effectively dealt with by making use of the tools provided by the old and obsolete law under the same Code. Police investigating the case used to produce the witnesses for recording magisterial statements under section 164 Cr.P.C. if and when they apprehended that the witnesses would resile therefrom or having been succumbed to pressure would not depose against the person behind the crime. We don't understand why those tools are not employed today which were employed a decade or so before. Video Cameras could be used for preserving the police statement of the witnesses or magisterial statements of the witnesses. Where has gone the inventive, creative, and ingenious mind of the investigating agencies which could unearth the crime notwithstanding the law in vogue was the one legislated and promulgated at the close of 19th Century. Compliance of provision of section 103 Cr.P.C. is considered one of the hurdles in proving recovery of incriminating material, weapon of crime or any other discovery made pursuant to the information furnished by the accused but we observe with pain that this hurdle is no more a hurdle as judgments of this Court which are galore have ruled that strict compliance with section 103 is not a must.

Why police are chary of using the latest devices in preserving the recovery of incriminating material or discovery in terms of Article 40 of Qanoon-e-Shahadat Order. We have been told that Forensic Laboratories have been updated and the persons manning them are men of competence and integrity. This news may be gladdening and even encouraging but our experience at the bar as well as bench shows that in every criminal case results in the Laboratories are maneuvered and

manipulated by those having riches and resources. In many cases we have noticed that the person giving report is not even equipped to do that in spite of the fact that questions of life and death are decided on the basis of such reports. Use of finger prints technology has never been seriously thought about when even children watching movies on T.V. comment if and when a criminal is tracked down on such basis. Installation of video cameras in all the places where crimes are committed with sickening frequency could decrease their number if not bring to end to that but it is thought to be a forbidden tree whose eating will result in the ouster of a few from the fool's paradise which, with every passing day, is turning to a terrible hell. We are encouraged by the statement of SSP Investigation. We wish it were so. Even we have assured by the learned Additional A. G. that police have been depoliticized but it appears to be a hoarse cry if not a cry in the wilderness, because even today police personnel are posted, transferred and appointed on the bidding of those who wield influence in the lounges and corridors of power. Well this may serve the purpose of a chosen few but this is taking the entire society with a rapidity hither to unknown to a catastrophe if not complete annihilation. In good old days an SHO of the area could effectively work to reach the hand committing the crime but today we with all our means and resources and redoubtibility of the civil superior service are either in the lurch or in a blind alley where neither the victims nor the police investigating the case can move back and forth except the criminals who not only move with unprecedented agility but escape the long arm of law. History sheets maintained in the Police Station were also one of the effective tools to keep surveillance of the habitual, hardened, dangerous and desperate criminals but they too are not seen today even with microscopic eye. The giant tree of the society is diseased. A few measures suggested in the CMA or the report of the SSP Investigation may tend to treat its leaves or a few of its branches but not its trunk and roots. With this treatment we cannot cure the disease. This problem has to be thought closely, critically and comprehensively by taking stock of the entire spectrum of the crime starting from cause to effect. We would, therefore, also like the Law Department of the Province, Law Department of the Federation and Law & Justice Commission of Pakistan to be on board and apprise us as to what have they done so far to deal with these aspects of the case and what they have up their sleeves.

We are at the threshold of a golden era but unfortunately our way to progress is blocked by the dragons of crime and terrorism. A sincere and whole hearted effort to slay these dragons has to be made. We

do not want to dispose of HRCs on the basis of what has been stated in the CMA and the report of SSP Investigation. We import watches, all the articles of luxuries including our ties and dresses. Why don't we import technical know how to meet the crime despite the fact that our civil superior service has been trained along side the line of the service structure of the U.K,. We would direct Mr. Qasim Meer Jat, Addl. A. G., Naeem Sheikh, SSP., Malik Altaf, S. P. Dr. Mazak Ali Shah, AIG. and Jan Muhammad, SHO Dumba Ghoat, the officers present in the Court to give their input as to what have they thought with all their experience, expertise and ingenuity to deal with these problems. Issue notices to Law Department of the Province, Home Departments of the Province, Law Department of the Federation and Law & Justice Commission of Pakistan to apprise the Court as to how maladministration in the police and Law Department can be eliminated and what steps could be taken to weed out not only the criminals but criminal psyche and criminal state of mind. Let us think to come out of adhocism, let us do away with myopic and cockeyed approach which has not yielded any fruit thus far."

71. Let's see how does the system we shirk and shrink from deal with a situation where enforcement of rights or liabilities in any form cannot be thought about without evidence. The Holy Quran, which is the fountain of the system, enjoins in clear and categorical terms when it says:-

يَا أَيُّهَا الَّذِينَ آمَنُواْ كُونُواْ قَوَّامِينَ بِالْقِسْطِ شُهَدَاء لِلّهِ وَلَوْ عَلَى أَنفُسِكُمْ أَوِ الْوَالِدَيْنِ وَالأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللّهُ أَوْلَى بِهِمَا فَلاَ تَتَّبِعُواْ الْهَوَى أَن تَعْدِلُواْ وَإِن تَلْوُواْ أَوْ تُعْرِضُواْ فَإِنَّ اللّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا

"O those who believe, be upholders of justice – witnesses for Allah, even though against (the interest of) yourselves or the parents, and the kinsmen. One may be rich or poor, Allah is better caretaker of both. So do not follow desires, lest you should serve. And if you twist or avoid (the evidence), then, Allah is all-aware of what you do."
(4:135)

يَا أَيُّهَا الَّذِينَ آمَنُواْ كُونُواْ قَوَّامِينَ لِلّهِ شُهَدَاء بِالْقِسْطِ وَلاَ يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَى أَلاَّ تَعْدِلُواْ اعْدِلُواْ هُوَ أَقْرَبُ لِلتَّقْوَى وَاتَّقُواْ اللّهَ إِنَّ اللّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

"O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do."

(5:8)

ذَلِكَ أَدْنَى أَن يَأْتُواْ بِالشَّهَادَةِ عَلَى وَجْهِهَا أَوْ يَخَافُواْ أَن تُرَدَّ أَيْمَانٌ بَعْدَ أَيْمَانِهِمْ وَاتَّقُوا اللّهَ وَاسْمَعُواْ وَاللّهُ لاَ يَهْدِي الْقَوْمَ الْفَاسِقِينَ

"That is most suitable: that they may give the evidence in its true nature and shape, or else they would fear that other oaths would be taken after their oaths. But fear Allah, and listen: for Allah guides not a rebellious people."

(5:108)

وَلاَ تَلْبِسُواْ الْحَقَّ بِالْبَاطِلِ وَتَكْتُمُواْ الْحَقَّ وَأَنتُمْ تَعْلَمُونَ

And do not confound truth by overlaying it with falsehood, nor knowingly conceal the truth.

(2:42)

إِنَّ اللّهَ يَأْمُرُكُمْ أَن تُؤدُّواْ الأَمَانَاتِ إِلَى أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ النَّاسِ أَن تَحْكُمُواْ بِالْعَدْلِ إِنَّ اللّهَ نِعِمَّا يَعِظُكُم بِهِ إِنَّ اللّهَ كَانَ سَمِيعًا بَصِيرًا

Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.

(4:58)

72. The system which is so strong and stringent in the matters of giving evidence and dispensing justice between the parties at dispute has to stay superior in the affairs of the State. Its worth should not be diluted on the bidding of those who oppose it on the basis of their prejudices or preconceived notions. It is also a lesson from this system which declares that:

مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا

"Any one slew a person--unless it be for murder or for spreading mischief in the land- -it would be as if he slew the whole people: And if any one saved a life, it would be as if he saved the life of the whole people."

(5:32)

Force of any magnitude has no place in this system as it invites the people to its fold not by force but wisdom and beautiful preaching as is enjoined by the Holy Quran:

ادْعُ إِلِى سَبِيلِ رَبِّكَ بِالْحِكْمَةِ وَالْمَوْعِظَةِ الْحَسَنَةِ وَجَادِلْهُم بِالَّتِي هِيَ أَحْسَنُ إِنَّ رَبَّكَ هُوَ أَعْلَمُ بِمَن ضَلَّ عَن سَبِيلِهِ وَهُوَ أَعْلَمُ بِالْمُهْتَدِينَ

"Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them. In ways that are best and most gracious: For thy Lord knoweth best, who have strayed from his Path"

(16:125)

How does the Holy Book keep an eye on creating equilibrium in every sphere of life can well be seen from the verse reading as under:

إِنَّ اللّهَ يَأْمُرُ بِالْعَدْلِ وَالإِحْسَانِ وَإِيتَاء ذِي الْقُرْبَى وَيَنْهَى عَنِ الْفَحْشَاء وَالْمُنكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ

"Allah commands justice, the doing of good, and liberality to kith and kin, and he forbids all shameful deeds, and injustice and rebellion. He instructs you that ye may receive admonition".

(16:90)

How the weak is to be dealt with against the strong and vice versa have been beautifully portrayed by the First Caliph of Islam in his

first speech. The relevant part of the speech deserves verbatim reproduction which reads as under:-

أَيُّهَا النَّاسُ فَإِنِّي قَدْ وُلِّيتُ عَلَيْكُمْ وَلَسْتُ بِخَيْرِكُمْ فَإِنْ أَحْسَنْتُ فَأَعِينُونِي وَإِنْ أَسَأْتُ فَقَوِّمُونِي. الصِّدْقُ أَمَانَةٌ وَالْكَذِبُ خِيَانَةٌ، وَالضَّعِيفُ فِيكُمْ قَوِيٌّ عِنْدِي حَتَّى أُرْجِعَ عَلَيْهِ حَقَّهُ إِنْ شَاءَ اللهُ، وَالْقَوِيُّ فِيكُمْ ضَعِيفٌ حَتَّى آخُذَ الْحَقَّ مِنْهُ إِنْ شَاءَ اللهُ. لَا يَدَعُ قَوْمٌ الْجِهَادَ فِي سَبِيلِ اللهِ إِلا خَذَلَهُمُ اللهُ بِالذُّلِّ، وَلَا تَشِيعُ الْفَاحِشَةُ فِي قَوْمٍ إِلَّا عَمَّهُمُ اللهُ بِالْبَلَاءِ، أَطِيعُونِي مَا أَطَعْتُ اللهَ وَرَسُولَهُ، فَإِذَا عَصَيْتُ اللهَ وَرَسُولَهُ فَلَا طَاعَةَ لِي عَلَيْكُمْ، قُومُوا إِلَى صَلَاتِكُمْ يَرْحَمْكُمُ اللهُ.(أبو الفداء إسماعيل بن عمر بن كثير القرشي البصري ثم الدمشقي (المتوفى: 774هـ)، البداية والنهاية، دار الفكر-بيروت، 1407 هـ - 1986 م، ج6، ص301)

> *"O people, I have been put in charge of your affairs though I am not the best among you. So if I do good assist me. If I go wrong resist and rectify me. Standing by truth is a trust and sliding toward falsehood is a breach of trust.*
> *The weak among you is strong in my estimation until I restore to him his due and the strong among you is weak in my sight until I retrieve by the will of Allah what he usurped.*
> *No community abandons* jihad *in the cause of Allah without being visited upon by humiliation as a Divine Retribution; and if obscenity prevails among some people, then they are enveloped by Allah in an all-pervasive adversity.*
> *Follow me so long as I obey Allah and His Prophet. If I disobey Allah and His Prophet, then you are absolved of your obligation to follow me."*

73. Bring us books from Anglo-Saxon, English, American or any other jurisprudence of the world, showing so clear a comprehension of the affairs of the State in general and administration of justice in particular, as has been portrayed above. Those who opposed Objectives Resolution neither read the principles incorporated therein nor the system they have been culled from. Their opposition to the system is nothing but an opposition for the sake of opposition. At times,

the name of Islam has been misused by a few bigoted, semi-learned and pseudo-scholars but for that they and not the system be blamed. Therefore, the critique of Ms. Asma Jehangir being more pedantic than scholarly, has left us unmoved.

74. What type of polity was sought to be established by the visionaries and founding fathers of this country; were the feudal lords to hold their sway over the lands and industrialists over their industries; was the rich to grow richer in the Republic established in the name of Islam; is religion, as said by Karl Marx, an opium which makes the people insensible and persuades them to resign to their unhappy lot or is it, as said by Professor Whitehead, a system of general truths having the effect of transforming character if vividly apprehended and sincerely acted upon; is Islam upholder of capitalistic economy or egalitarian order where each works according to his capacity and gets according to his needs; what is the scheme of the Divine Book and what pattern has been projected by the life of the Prophet (PBUH), are the issues which had all along been in the minds of the visionaries and founding fathers of the country. Dr. Muhammad Iqbal in one of his letters addressed to Sir Francis Young husband wrote:

> "*Since Bolshevism plus God is almost identical with Islam, I should not be surprised if, in the course of time, either Islam would devour Russia or Russia Islam. The result will depend, I think, to a considerable extent on the position which is given to the Indian Muslims under the new constitution*".

He on many occasions highlighted that Muslim leadership should not be oblivious of the egalitarian aspect of Islam which at no stage in the history recognized unrestricted ownership of means of production. He having been inspired by the Holy Quran and the life of Prophet (PBUH)

ardently professed establishment of an egalitarian society as is evident from his letter dated 28th May, 1937 addressed to Jinnah which has already been reproduced above. He also highlighted this aspect in his verses reading as follows:-

قوموں کی روش سے مجھے ہوتا ہے یہ معلوم
بے سُود نہیں رُوس کی یہ گرمیِ رفتار

اندیشہ ہُوا شوخیِ افکار پہ مجبور
فرسُودہ طریقوں سے زمانہ ہُوا بیزار

انساں کی ہوَس نے جنھیں رکھا تھا چُھپا کر
کُھلتے نظر آتے ہیں بتدریج وہ اسرار

قُرآن میں ہو غوطہ زن اے مردِ مسلماں
اللہ کرے تجھ کو عطا جدّتِ کردار

جو حرفِ قُلِ العفو میں پوشیدہ ہے اب تک
اس دَور میں شاید وہ حقیقت ہو نمودار

(From wont and ways of nations all these facts so clear with ease I learn,
The Russians seem to be in haste to gain the goal for which they yearn.)

(The world is red tip with the modes that aren't in vogue and are outworn;
My intellect, that was tame and mild much pert and insolent has grown.)

(These mysteries which the greed of man had kept in veils of stuff so coarse
Are step by step emerging now and coming forth by dint of force.)

(O Muslim, dive deep in the Book,Which was revealed to Prophets' Seal;
May God, by grace on you bestow politeness, for good deeds much zeal!)

(The fact concealed in words so far, spend what is surplus and is spare,"
May come to light in modern age and make the meanings clear and bare.)

(Zarb-e-Kaleem-151) Siasiyat-e-Mashriq-o-Maghrib - Ishtarakiat

کارخانے کا ہے یہ لِلّک سے رَوکِ ناکردہ کا
عیش کا پُتلا ہے محنت ہے اسے ناسازگار

حکمِ حق ہے لَیسَ لِلاِنسانِ اِلّا ما سَعیٰ

کھائے کیوں مزدور کی محنت کا پھل سرمایہ دار

The owner of the factory is a useless man.
He is very pleasure loving, hard work does not suit him
God's command is ***"Laisa lil Insani Illa Ma Sa'a".***
Fruit of laborer's work should not be usurped by the capitalist

(Bang-e-Dra-197)

It, as a matter of fact, is the duty of the Islamic State to provide means of sustenance to its citizens. The Holy Quran gives guarantee in this behalf in the words as follows:-

نَّحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ

"We will provide for you and your children."

(6:151)

Even the believers are not only supposed to part with what is surplus but are duty bound to reach out to the needy to give his due whether he asks for it or not as is enjoined by the verses reading as under:-

وَيَسْأَلُونَكَ مَاذَا يُنفِقُونَ قُلِ الْعَفْوَ كَذَٰلِكَ يُبَيِّنُ اللَّهُ لَكُمُ الْآيَاتِ لَعَلَّكُمْ تَتَفَكَّرُونَ

"They ask thee how much they are to spend; Say: What is beyond your needs." Thus doth Allah Make clear to you His Signs: In order that ye may consider"

(2:219)

الَّذِينَ هُمْ عَلَىٰ صَلَاتِهِمْ دَائِمُونَ
وَالَّذِينَ فِي أَمْوَالِهِمْ حَقٌّ مَّعْلُومٌ
لِّلسَّائِلِ وَالْمَحْرُومِ

"Not so those devoted to Prayer; Those who remain steadfast to their prayer; And those in whose wealth is a recognized right. For the (needy) who asks and him who is prevented (for some reason from asking);"

(70:22,23,24,25)

لَن تَنَالُواْ الْبِرَّ حَتَّى تُنفِقُواْ مِمَّا تُحِبُّونَ وَمَا تُنفِقُواْ مِن شَيْءٍ فَإِنَّ اللّهَ بِهِ عَلِيمٌ

"By no means shall ye attain righteousness unless Ye give (freely) or that Which ye love; and whatever Ye give, of a truth Allah knoweth it well."
(3:92)

وَالَّذِينَ يَكْنِزُونَ الذَّهَبَ وَالْفِضَّةَ وَلاَ يُنفِقُونَهَا فِي سَبِيلِ اللّهِ فَبَشِّرْهُم بِعَذَابٍ أَلِيمٍ

And there are those who bury gold and silver and spend it not in the way of Allah: announce unto them a most grievous penalty.
(9:34)

وَيُؤْثِرُونَ عَلَى أَنفُسِهِمْ وَلَوْ كَانَ بِهِمْ خَصَاصَةٌ وَمَن يُوقَ شُحَّ نَفْسِهِ فَأُوْلَئِكَ هُمُ الْمُفْلِحُونَ

"They prefer others before themselves though they themselves are in a State of poverty. And whosoever are preserved from their own greed such are the ones that will prosper."
(59:9)

See how the Divine Book aims at maintaining balance by stirring effort at State as well as individual level. The system thus operating would essentially be close to and even ahead of communistic economy.

75. The Founder of the nation in his speech delivered on 26th March, 1948 also pointed to the social order he intended to establish in the newly founded homeland when he said:-

"You are only voicing my sentiments and the sentiments of millions of Mussalmans when you say that Pakistan should be based on sure foundations of social justice and Islamic socialism, which, emphasis's equality and brotherhood of man. Similarly you are voicing my thoughts in asking and in aspiring for equal opportunities for all."

76. Quaid-e-Millat Liaqat Ali Khan also reiterated the same theme in August 1949 by saying:

> *"There are a number of issues being talked about now a days. But we are convinced that for us there is only one issue, namely, Islamic socialism which, in a nutshell, means that every person in this land has equal rights to be provided with food, shelter, clothing, education and medical facilities."*

Professor Arnold Toynbee in his celebrated treatise on Civilization on Trial (Chapter 2, Page 21) while highlighting this aspect of Islam observed as under :-

> *"Centuries before communism was heard of, our ancestors found their bugbear in Islam. As late as the 16th century, Islam inspired the same hysteria in the western hearts as communism in the 20th century. Like communism, it wielded a sword of the spirit, against which there was no defence in material armaments"*.

We, therefore, do not agree with Mr. Khalid Anwar that Article 3 projects socialistic rather than Islamic polity, for the sole reason that its latter part is a replica of Article 12 of the Constitution of USSR, 1936.

77. Having thus considered what has been addressed at the bar and laid down in the cases cited before us, we hold that :

> i) We have jurisdiction to examine the vires of any amendment and annul it if it impairs, undermines or alters any of the parts forming the basic structure of the Constitution;
>
> ii) There is nothing in the Constitution (Eighteenth Amendment) Act, 2010 as could impair, undermine, or alter any of the parts forming the basic structure of the Constitution, therefore, the petitions questioning its vires being devoid of merit are dismissed.
>
> iii) Mere insertion of the proviso to Article 175, excluding its application to the trial of the person by the Courts constituted under the Acts listed at Srl. No. 6 to 9 in sub-part-III of part-I of the First Schedule of the

Constitution, cannot confer jurisdiction on them nor can the word "specified" used in Article 8(3)(a)(b)(ii) be extended to include the said Acts in the Schedule;

iv) The Constitution (Twenty First Amendment) Act, 2015 impairing, undermining and altering the parts forming the basic structure of the Constitution is ultra vires and thus non-est; and

v) That once the amendment in the Constitution enabling amendment in the Acts is declared ultra vires and non-est, the latter automatically becomes ultra vires and non-est.

We, therefore, allow the Constitution Petitions in the terms mentioned above.

Sd/-
(Ejaz Afzal Khan)
Judge

Sd/-

(Ijaz Ahmed Chaudhry)
Judge

Dost Muhammad Khan, J.— Through these petitions, the petitioners, including the premier bar councils and bar associations of Pakistan have challenged the Constitution (18th Amendment) Act, 2010 and the Constitution (21st Amendment) Act, 2015 along with the amendments made in the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961.

The Creation of Pakistan:

2. One has essentially to look back at the historical struggle, which was launched by our forefathers, in gaining independence from the British Rule of colonization and to get an independent sovereign State from the overwhelming, dominating religious majority of Sub-Continent.

3. Enslaved and subjected to tyrannical rule, by our alien masters, the Muslims of Sub-Continent launched a crusade to achieve the noble cause. The dream of noble poet Dr. Allama Muhammad Iqbal could not have been achieved, if the dynamic leadership of Quaid-e-Azam, who fought the battle for independence, not with the guns or fireballs of cannons, rather with massive support of the Muslims of the Sub-Continent, the powerful tool, he utilized successfully, had not been there.

4. Before partition, the various speeches of Quaid-e-Azam would show that, he in unequivocal words and

declarations, championed the basic human rights. The gist of his speeches is reproduced below:-

> "We need an independent and sovereign State, to be based on Islamic ideology and religious tolerance, particularly of faith, dignity of man, ensuring social justice, principle of democracy, freedom of worship and beliefs of majority and minorities both, rule of law, sanctity of homes, equality of mankind, equal treatment of each before law, protection of life, liberty and property rights and where strict democratic principles shall be observed."

The crusade launched by the Muslims, under the leadership of Quaid-e-Azam, resulted in creation of the sovereign State of Pakistan on 14th August, 1947. The untold story of sacrifices, rendered by the Muslims, shall always be kept in mind, while making struggle for establishing egalitarian society

CONSTITUTION MAKING

5. After having been elected the President of the first Constituent Assembly, on August 11, 1947, in the next day's session a Committee for making the Constitution was constituted, followed by two Sub-Committees. The first was assigned the task of submitting report on fundamental rights of the citizens, to be made the bases of the Constitution, while the second Committee was given mandate to submit recommendations, protecting rights of the minorities. Unfortunately, when this important process was underway, Quaid-e-Azam left us and his soul departed for heavenly

abode. However, before that, he precisely and concisely provided guidance to the Committees about the basic features/structure of our First Constitution, to be enacted.

OBJECTIVES RESOLUTION:

6. In the fifth session of the Constituent Assembly, Mr. Liaquat Ali Khan (late), moved the 'Objectives Resolution'. The Head Note thereof is reproduced below:-

> *"Mr. President, Sir, I beg to move the following Objectives Resolution, embodying the main principle, on which the Constitution is to be based."*

It was based on ten commands, reflecting aspirations and will of the people, who rendered great sacrifices for the sovereign State of Pakistan. After few days' debate, the same was adopted by overwhelming majority. One of the commands contained therein is cited below:-

> *"Wherein, the independence of the judiciary shall be fully secured."*

Mr. Liaquat Ali Khan (late) in his speech, on the Floor of Constituent Assembly, emphatically stated that:-

> "He *considered this to be the most important occasion in life of this country, next in importance to the achievement of independence because by achieving that we only won an opportunity of building up a country and its polity in accordance with our ideals. He added, by saying, 'I would like to remind the House that founding father of the nation "Quaid-e-Azam" expressed these feelings and desired it at*

so many occasions and his views were endorsed by the nation in unmistakable terms."

Ultimately the sovereign State of Pakistan got the First Constitution in 1956, the basic features of which were, that the Preamble thereto was based entirely on the 'Objectives Resolution', earlier adopted.

CONSTITUTIONAL CRISES:

7. To the great misfortune of the Nation, Mr. Sikandar Mirza (late) the Governor General of the day, without just cause abrogated the First Constitution of 1956 and proclaimed Martial Law within the next few days throughout the country. However, within no time, he was removed from the power corridors by the then Dictator, who ruled the country without Constitution for five years and in the year 1962, he got enacted his self-styled Constitution. The fundamental rights of the people were placed under clog. Albeit the same were subsequently conceded to on the report of select committee but were not justiciable to be enforced through independent Judiciary. His dictatorial rule came to an end when agitation, or to say a revolt of the people was at the peak, however, against the provisions of his own Constitution, instead of handing over powers to the Speaker of National Assembly, the same were unconstitutionally given to the next Dictator.

ELECTION OF 1970 AND REVOLT IN EAST PAKISTAN:

8. After living a suffocated life under long dictatorial rule, the people of East Pakistan in particular and also in West Pakistan in general, in the General Elections held in 1970 gave a split

mandate. The manifesto based on 'Six Points' of Awami League headed by Sh. Mujeeb-ur-Rehman (late) was the sole reason, winning the overwhelming majority in East Pakistan (now Bangladesh), while in the then West Pakistan, the Pakistan Peoples' Party (PPP), freshly founded, headed by Mr. Zulfiqar Ali Bhutto (late) got the majority. When all efforts of reconciliation failed as Sh. Mujeeb-ur-Rehman (late) was not ready to concede on the 'Six Points' agenda, the Dictator of the day unlawfully refused to summon the Session of the Assembly.

DACCA FALL:

9. Due to the status-quo, a separatist movement was launched in East Pakistan (Bangladesh). To suppress it, Military operation was launched, however, due to involvement of the neighbouring country, the same turned into full fledged war. On December 16, 1971 the shocking and infamous incident of Fall of Dacca took place and the people of East Pakistan declared an independent State (Bangladesh).

INTERIM CONSTITUTION OF 1972:

10. Confronted with unmanageable grave emergency, the then Dictator handed over power to Mr. Zulfiqar Ali Bhutto (late), who became the President of the remaining Pakistan (West Wing). He after due consultation, gave the interim Constitution of 1972 but with the same Preamble, the integral part of 1956 Constitution. At the same time, a Constitution Making Committee, consisting of eminent legal brains/ luminaries and politicians of high stature and maturity, was constituted. The Committee worked on the contours of the new Constitution for many months.

CONSTITUTION OF 1973:

11. The Parliament of that time was consisting of Socialists (PPP), Seculars (ANP) and Fundamentalists/Religious parties, however, the nation's destiny was in safe hands therefore, all the three forces in the Parliament conceded considerably on their stand-points, as a result, the 1973 Constitution was unanimously adopted on 10th April, 1973 and it came into force on 14th August, 1973. The Preamble, with one amendment, almost the reproduction of the 'Objectives Resolution', was made the master key for the new Constitution.

12. The new Constitution successfully withstood the ruthless onslaughts of the two successive Dictators, however, some of its provisions were distorted by them and some new were inserted therein. Both the Dictators, while handing powers to the elected Governments, first got validation for all of their unconstitutional acts to avoid prosecution for the crime of high treason, provided in Article 6 of the Constitution.

ATTACKS ON DEMOCRACY/
LEGAL ORDER UNDER ARTICLE 58(2)(B):

13. When second to the last Dictator met unnatural and mysterious death in an air crash, General Elections were held, however, successive elected Governments were short lived as the Presidents pressed into service lethal device of

Article 58(2)(b), dismissing those Governments and dissolving the Assemblies, while one was dismissed earlier by the Dictator in 1988. For these reasons democratic polity could not achieve maturity with the required virtues and values. If the democratic process was allowed to flourish, like in the neighbouring country which got independence simultaneously with Pakistan, the new generation could breathe in a welfare state and not a security state.

ADVERSE EFFECTS ON RULE OF LAW, CONSTITUTIONAL CRISES:

14. The rule of law, the constitutionality and proper legal order at the very inception received a major set back, when rule of guns and cannons was preferred over the rule of law by the then learned Chief Justice of the Federal Court on the fallacious premise of effectiveness of the so called new legal order (Martial Law) of 1958 and his self assumed subordination of the people to the new legal order. This, I am saying with all humility and reverence to the learned Chief Justice, as his view has not been acknowledged or accepted by the legal fraternity and the society at large rather it has been the subject of criticism.

15. The most sublime view was rendered in the same case, Federation of Pakistan Vs. Maulvi Tameez-ud-Din (PLD 1955 FC 435) by Hon'ble Mr. Justice Cornelius (J.). His lordship made struggle and sacrifices rendered for

independence, by the Muslims of Sub-Continent, the baseline for reaching at a different conclusion.

16. In the case of the State vs. Doso (PLD 1958 SC 533) the ill-famed Kelsen theory, "*doctrine of necessity"* was introduced, which was not approved rather criticized by the overwhelming majority of jurists and superior Courts of all civilized nations. This was the era where the rule of law began to erode and was rendered subsidiary and subordinate to the law of rule of dictatorial regime.

17. In the case of *Miss Asma Jilani v. the Government of the Punjab* (PLD 1972 SC 139) this infamous and unjust doctrine of necessity was buried however, it was reborn in *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan* (PLD 1977 SC 657) and lastly in the case of *Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan*(PLD 2000 SC 869), however, it has now been permanently buried, by this Court in the famous dicta given in the case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879). In view of this judgment, drastic amendments were made in the code of conduct of Judges of the Superior Courts, almost the reproduction of Article 6 of the Constitution. Thus, it is my firm belief that on no future occasion, this detestable doctrine would be re-invented or re-applied under any circumstance, by the Superior Judiciary.

18. Having said much about the role of the Judiciary during the period of constitutional crises, the negative role of the politicians, who made their way to the Parliament with the blessings of each successive Dictator, cannot be overlooked. Probably it was that support of so called politicians, which constrained the Judiciary at different occasions, to act on the doctrine of necessity. In my humble view, this should not provide a license of exoneration to anyone.

EMERGENCY RULE Of 1999:

19. The last Dictator, acting in contempt of his sworn oath, causing irreparable harm to the aspirations and resolve of the people to live a life of dignity in a democratic polity, fully enjoying the fundamental rights guaranteed by the Constitution, toppled the elected government in 1999; prolonged his dictatorial rule through unconstitutional means and when general elections were held in the year, 2002, he also used the same old contrived strategy and got validated all his illegal and unconstitutional acts from the new Parliament to avoid prosecution under Article 6 of the Constitution. He retained dual position of power as a President of Pakistan, while wearing the Army uniform, retaining the slot of Chief of Army Staff. His wish for power did not end or diminish as he decided to contest elections for the Presidential slot while, wearing military uniform. When

his eligibility, as a candidate for the slot was challenged before this Court and the case was pending adjudication, perceiving unfavorable decision, he again in utter disregard of the Constitution, imposed Emergency Plus (Martial Law) however, this time, it was focused on the Superior Judiciary for whom new oath of office was prescribed, however, most of the Judges of the Superior Courts refused to take this new oath which was violative of the Constitution. Thus, they were unlawfully removed and were put in solitary confinement till the Emergency was lifted and the new democratic government lifted the ban.

20. Confronting the ruthless dictatorial rule, for more than three decades, this unconstitutional event gave a new dimension to the peoples' will. The legal fraternity spearheaded the movement against the Dictator, strongly supported by the civil society, the media and the political parties, ultimately, he was shown the door and after a short interval the sacked independent Judiciary was restored.

21. As referred to, in the preceding para in *Sindh High Court Bar case (supra),* a Full Court Bench of Supreme Court declared the act of the then Dictator of November 3, 2007, as unconstitutional along with some other orders. Due to wrong policies, both on internal and external fronts, adopted during the constitutional crises, not only the sovereignty of the State was compromised at many

occasions but the State itself was plunged into deepest crises of law and order and of economy, the nation is now confronted with today.

Albeit, to some extent, the above history of national legal order of the past and undemocratic policies, appear to be political questions, however, in substance these are legal and constitutional questions, as all these dictatorial rules and unconstitutional adventures, have inflicted a blow on the national legal order, based on instrumentality/constitutionalism and why it is thought necessary to look at the same.

CONSTITUTIONAL 18TH, 19TH AND 21ST AMENDMENTS/ EFFECTS ON FUNDAMENTAL RIGHTS AND INDEPENDENCE OF JUDICIARY:

22. In the General Elections, 2008, one political party got a slim majority in the Parliament and formed the government. It constituted a Constitution Reforms Committee, headed by the present Chairman of the Senate of Pakistan. The committee tabled the package of constitutional amendments before the Parliament however, I will restrict my discussion and ultimate conclusions to the insertion of Article 175A under 18th and 19th Constitutional Amendments and also the 21st Constitutional Amendment, which has considerably disturbed the legal foundations of the Constitution in particular and the people of Pakistan in general.

JUDICIAL COMMISSION:

23. Under the new Article [175A] a Judicial Commission, to be chaired by the Chief Justice of Pakistan was constituted however, the Executive i.e. the Law Ministers, the Attorney General for Pakistan were made its members with a right of vote. On the other hand, a Parliamentary Committee, consisting of eight members, four from the Treasury Benches, nominated by the Chief Executive and four from the Opposition, was constituted. In the un-amended Article 175A, it was given veto powers to super impose its own decision over that of the Commission, by rejecting its nomination. In this way, the independence of Judiciary was curtailed and the entire process of appointment and elevation of the Judges to the Superior Judiciary was given substantially in the hands of the Parliamentary Committee.

24. In the above backdrop, these petitions were filed including those, filed by the premier Bar Associations/ Bar Councils of the country, challenging the vires of Article 175A considering it a clear encroachment on the independence of Judiciary by the Executive.

25. Undeniably, the Cabinet Ministers/Executive has dominant role over the Legislature under the present scheme of the Constitution because all important bills, including Money Bills are moved by the Government. The majority

party head is the Prime Minister, who enjoys authority in the Parliament over members of his party by virtue of the defection provisions of Article 63A as amended by the 18th Amendment.

The Parliament's sovereignty has thus been diminished and compromised to great extent, in view of the provisions of Article 63-A of the Constitution, as for any dissent or voting by any member against the whims and wishes of the party head on the matters set out therein, he can loose his seat as Member of the Parliament. Thus, all vital decisions are taken outside the Parliament and in the process of any Bill introduced in the Parliament or in the other matters enumerated above, the members of the Parliament cannot exercise their independent right of vote or to raise voice against specified Legislation even if it may be ultra-vires of the Constitution. In view of these constitutional constraints, the Parliamentary Committee is also influenced by the Chief Executive/P.M. or the leader of the Opposition. Considering this constitutional aspect, the Executive has made serious inroads and has encroached upon the independence of Judiciary under a well contrived strategy. This practice, if is permitted, the Judiciary would be once again politicized like it was done in the past till the time when a firm dicta was delivered by this Court in the cases of *Al-Jihad Trust v. Federation of Pakistan* [(PLD 1996 SC 324),

(PLD 1997 SC 84)] and *Sharaf Faridi's case* (PLD 1994 SC 105). In the latter case, in view of the firm command contained in Sub-Article (3) of Article 175 of the Constitution, during the pendency of the case, the Federal Government and the four Provincial Governments, ultimately realized their constitutional obligation and conceded frankly and fairly to separate the Judiciary from the Executive and to fully secure its independence, thus, within months all necessary actions were taken where independence of Judiciary right from the District level upto the Supreme Court was fully secured. Each successive government not only accepted this constitutional position but also faithfully complied with the same till the time when the offending Article 175A was inserted in the Constitution.

26. The Federation's case has been based mainly on Sub-Articles (5) and (6) of Article 239 of the Constitution, investing power in the Legislature/Parliament to make any amendment in the Constitution and that such amendment cannot be called in question in any Court. In addition thereto, the learned Attorney General for Pakistan and Mr. Khalid Anwar, Sr. ASC with great vehemence placed reliance on the dicta given in *Dewan Textile Mills Case* (PLD 1976 SC 1363) and some other precedents.

EXTENT OF AUTHORITY OF PARLIAMENT TO AMEND THE CONSTITUTION:

27. True that, under the provision of Sub-Article (6) of Article 239 of the Constitution it is provided, that there is no limitation whatsoever on the power of the Parliament to amend any provision of the Constitution however, attempts were made on the part of the Federation, to read this provision exclusively and in isolation, disregarding the entire scheme of the Constitution.

It is decades old universal principle, consistently followed that, Constitution being a supreme and organic law of State, therefore, none of its provision shall be construed and interpreted without having regard to the other relevant provisions or the entire scheme of the Constitution.

28. Notwithstanding the fact that the Parliament, itself has accepted and acknowledged the power of Judicial Review of this Court while, complying with the short order on the same issue, given in the case of *Nadeem Ahmed Advocate v. Federation of Pakistan* (PLD 2010 SC 1165), in the past too, when the National Assembly was dissolved by the President under the un-amended provision of Article 58(2)(b), appropriate petitions were brought before this Court to declare the proclamation ultra vires of the Constitution. Thus, the power of Judicial Review surely and undoubtedly is vested in this Court to see and check that any act of the Executive or that of the Legislature is within the sphere of their jurisdiction allotted to them by the Constitution or is to the contrary.

29. The President, under Article 50 of the Constitution, is integral part of the two Houses of the Parliament, thus, his actions were subjected to Judicial Review by this Court on many occasions and that too, at the instance of the Parliamentarians, Speakers of Assemblies etc. and binding verdicts were given, in many cases.

30. Reading the scheme of our written Constitution, a system of trichotomy is provided where, the powers of Executive, the Legislature and the Judiciary has been clearly and squarely defined and demarcated. All the three organs are coordinate bodies and collectively act to run the affairs of the State, strictly according to the provisions of the Constitution, without encroaching upon the power and authority of one another. If such plea is allowed and this practice is faithfully adopted, there would be no disorder amongst the three organs, rather, harmony would establish true rule of law and supremacy of the Constitution.

31. As discussed, in the earlier part of this judgment that, 'Objectives Resolution' was made the basis of the Constitution of 1956, was reproduced in the Constitution of 1962 in the shape of Preamble. It was repeated in the interim Constitution of 1972 and ultimately in the present Constitution. It clearly provides that, the independence of Judiciary shall be fully secured, the 'Objectives Resolution' was made a substantive part of the Constitution (Article 2-A)

and finally it was incorporated into next substantive provision of Article 175(3). The Framers of the Constitution of 1973, rightly perceived this vital Constitutional requirement, therefore, with strong commitment, a period of five years was fixed within which, the Judiciary was to be separated from the Executive and to make it fully independent. However, the Dictator through Presidential Order No.14 of 1985 extended the period to 15 years.

32. Theoretically, it may be held that on expiration of 15 years, the Judiciary stood separated and became independent however, no meaningful attempt was made to comply with the command, contained in Sub-Article (3) of Article 175 of the Constitution and it was through judicial verdict and the clear consent given by the Federal Government and the Federating Units, that the binding dicta of this Court and the command contained in the Constitution was fully complied with, in the year 1996/1997.

33. A bare reading of the offending Article 175A would show that it was not preceded by non-obstante clause, providing notwithstanding, anything contained in Sub-Article (3) of Article 175, therefore, in the present form, in view of original Article inserted in the Constitution by its framers, Article 175A being in conflict therewith and the former being based on the will of the people, rightly perceived by the framers of the Constitution, thus shall reign supreme and

Article 175A cannot stand in its way and being ultra vires of the entire scheme of the Constitution, it is, liable to be struck down.

34. On a comparison, Article 368 of the Indian Constitution and Article 239 of ours, an ordinary man of prudence would find a lot of difference between the two as under Article 368, the Parliament of India is invested with dual authority and capacity as a Legislature and Constituent body, which is not the case in Pakistan.

35. The Indian Parliament, despite having overwhelming power, whenever made any attempt to change the basic structure of the Indian Constitution, the Indian Supreme Court in quick succession declared such amendment, distorting or destroying its basic structure, to be ultra-vires, beyond the scope of amending powers of the Indian Parliament. Amongst the several Indian precedents, some may be quoted as follows:-

(**1)** **Raghunathrao Ganpatrao Vs. U.O.I.**
(AIR 1991 SC 1267),

(2) ***L.Chandra Kumar v. U.O.I.***
[(1997)3 SCC 261: AIR 1997 SC 1125] and

(3). ***Keshavananda Bharati v. State of Kerala***
[(1973)4 SCC 225]

36. To move the Superior Courts through appropriate process, for enforcement of fundamental rights by itself is a fundamental right, which cannot be defeated through any means, by the Legislature or the Executive. The people of

the country are politically and legally sovereign in view of the constitutional scheme.

37. The fundamental rights guaranteed by the Constitution, occupy much higher pedestal and being super-supreme fundamental law, the same cannot be infringed, violated, harmed or destroyed by the Legislature or any other organ of the State. It has got a permanent berth in Chapter 1, Part-II of the Constitution; these have been declared inalienable and inviolable, therefore, are absolutely protected and are beyond the scope of amending power of the Legislature to infringe, take away, diminish or destroy it in any manner whatsoever.

38. The Constitution, itself provides through inbuilt mechanism (Articles 232-233), that in the state of emergency proclaimed by the President, only specified fundamental rights, in the larger interest of the State shall remain suspended however, the inviolable and inalienable rights like the right to life, to liberty, to property and sanctity of homes etc. cannot be suspended even in the state of emergency, proclaimed by the President due to external aggression or internal war or disturbances.

39. To protect, preserve, ensure and enforce these fundamental rights, the Superior Judiciary alone has been vested with authority under the Constitution, particularly the

Supreme Court, in view of Article 184(3) read with Article 199 of the Constitution.

40. If the independence of Judiciary is curtailed in the present manner by the Executive in concert with Legislature, the fundamental rights guaranteed by the Constitution would be rendered mere textual promises of ordinary text books. The supreme law of the land (Constitution) would be brought down to the level of ordinary law, the people would be deprived of the right to enforce the guaranteed fundamental rights. It was in this background that right from the time, the 'Objectives Resolution' was adopted, which was incorporated into the Preambles of the successive Constitutions, the framers of Constitution of 1973 inserted the provision of Article 175(3), a self-executory provision and being enacted by the Constituent Assembly, much higher in rank and authority than the Ordinary Parliament/Legislature, Sub-Article (3) undeniably, has super-imposing effect on Article 175A in question. Thus, in view of the irreconcilable clash between the two Articles, which cannot be harmonized on any lawful premise, Article 175A cannot stand in the way of Article 175 and on this score too, it is liable to be struck down and shall be deleted from the Constitution as a whole.

Otherwise too, keeping in view the provision of Article 68, the Parliament has been prohibited to discuss the

conduct of any Judge of the Supreme Court or of a High Court in discharge of his duties. The parliamentary Committee, under the Rules of Business of the two Houses, represents both and proceedings before such Committee shall be deemed to be the proceedings before the Parliament. In case, the Parliamentary Committee discuss the conduct of any sitting Judge, who is to be further elevated or of Additional Judge to be confirmed, they would clearly violate the prohibition contained in Article 68 of the Constitution. Therefore, the Parliamentary Committee is equally declared ultra vires of the Constitution and shall have no role whatsoever in the process of appointment and confirmation of the Judges to the Superior Judiciary.

41. In view of the above discussion, it is held, that notwithstanding the words used in Article 239(5) and (6), the Parliament has no authority to reverse the process of independence of Judiciary, which has attained finality and that too through such strategy as is provided under Article 175A, which would also politicize the Judiciary in the end. The same is against the will of the people and the entire scheme of the Constitution based on trichotomy of powers, the equal division thereof, provided therein.

If the Parliament so desire and deem appropriate, to make the Judicial Commission an extensively consultative body, by making the appointment and confirmation of

Judges more transparent, it is suggested that it may make suitable amendment in the relevant provisions of the Constitution to establish Judicial Commission. Besides the Chief Justice, the senior Puisne Judge, four senior Judges from all the four Federating Units and Islamabad Capital Territory, shall be included therein. In view of the devolution plan, provided under 18th Constitutional Amendment, four Provincial Judicial Commissions and one in the Islamabad High Court shall be constituted, to be chaired by the Chief Justices of the respective High Courts, while Senior Puisne Judge and all those Judges shall be included therein in rotation, from whose region/area, Judges to the High Court are proposed to be appointed, or already elevated Judges are to be confirmed. The Provincial Judicial Commission shall make recommendation to the National Judicial Commission. This will serve, to a great extent, the object of transparency in the appointment/elevation of Judges.

Conclusion:

42. Accordingly, Article 175A, inserted through Constitution (18th Amendment) Act, 2010 and the Constitution (19th Amendment) Act, 2010, is declared ultra vires and being in conflict with the provision of Article 175, carrying a firm command with regard to independence of Judiciary, is hereby struck down and shall remain no more the part of the Constitution, subject to the exception that

whatsoever has been done in the past by the Judicial Commission infested by the Executive and the Parliamentary Committee, shall be deemed to be past and closed transactions and are declared valid to avoid constitutional crises.

21st Constitutional Amendment:

43. As discussed earlier, due to the unwise, irrational and wrong policies both on the external and internal fronts, made and followed during the long dictatorial rule, which were unfortunately not largely disapproved by the successive democratic governments, have plunged the country/nation into unmanageable crises, the war waged against the State by the non-State actors on their ill perceived notions, the calling of Armed Forces to act in aid of the Civil Administration in state of grave emergency within the contemplation of Article 245 of the Constitution, was an inevitable act on the part of the Federal Government to counter the menace of brutal militancy. After calling the Armed Forces, in aid of the Civil Administration, the grave threats and abnormal situation has gradually diminished and the mischief of the brutality has been suppressed to a great extent therefore, the Federal Government was justified to that extent being a permissible course, in view of Article 245

of the Constitution, hence, the same cannot be declared ultra-vires.

44. The fundamental question which requires proper determination is whether the Parliament, in exercising the amending powers under Article 239 of the Constitution has acted within the scope of its authority in establishing a parallel Judiciary to the established one, recognized and permitted by Chapter 1, Part-7 of the Constitution. The sure answer to it is, 'NO'.

45. Before dealing with the constitutionality of the Act of the Parliament, investing the Military Courts to try civilians for specified offences, it would not be out of context to point out that the nation, particularly, the civilian population has been made victim of brutal terrorism of militancy for the last 13/14 years. The indiscriminate violence against civilian population by the militants had been the order of the day. On the basis of informative estimates, more than forty five thousands civilians have been killed so far in the brutal activities, carried out by the militants throughout the country and in particular in the Province of KPK, its adjoining F.R and Tribal Areas, Province of Balochistan and in Karachi, the port city of Pakistan. The sectarian killing apart, however, no timely action was taken to protect life and properties of citizens.

46. Keeping in view the enormous loss of lives and properties of the citizens at a large scale, no strategic policy or plan was made by each successive government, how to counter and suppress the menace of terrorism, which has also played havoc, even with the economy of the country, thus, the State failed in its obligation to protect the lives and properties of the citizens, commanded by the Constitution.

47. The existing Special Courts, established under the provision of Anti-Terrorism Act, 1997, particularly in the Province of KPK, flash point and soft target for the militants, besides the rest of the country, no comprehensive and strategic policy was adopted or enforced to enhance the capacity and skill of the investigative, prosecution and forensic agencies, nor any arrangement was put in place to protect the Presiding Judges of these Courts, their families, the investigating officers, the prosecutors and the witnesses. Except for the one in Punjab (Lahore) no forensic laboratory, equipped with modern forensic equipments/tools, to be run by highly qualified staff in the relevant field, was established in KPK or the rest of the country, to collect concrete evidence and provide it to the Special Courts, ensuring the conviction of terrorists, so far arrested, to meet a proper sentence after conviction. Majority of the Special Courts in KPK are either housed in rented buildings or they have been mixed up with ordinary Criminal Courts with least security

measures. The above apathy apart, no concrete effort was made to trace out, identify and to destroy the infrastructure of the militants.

48. Despite, all these shortcomings and lack of facilities, in many cases, Judges of the Special Courts, undeterred, awarded major penalties to the terrorists, however, for unknown reasons, moratorium was pressed into service and execution of terrorists, condemned to death, was held in abeyance for many years, which encouraged the terrorists to carry out their activities without any fear of being executed after conviction.

49. During a short debate on 21st Constitutional Amendment, in both Houses of the Parliament, no single word was uttered by any Hon'ble member that the Judiciary has failed to meet the challenges of terrorists. The negligent omission on the part of the government to enhance the capacity and skills of all the stakeholders of this particular justice system, do not provide any justification to divest the established Judiciary, the only one recognized and acknowledged by the Constitution and to create/establish a parallel judiciary with absolute and exclusive jurisdiction to try civilians for such offences. This act of the Parliament clearly violates the explicit scheme of the Constitution on one hand and on the other the Military Courts, thus established, could be subjected to serious criticism, both on

national and international level where minimum standards of justice and due process are not observed and the trial of accused is held behind closed doors, in violation of Articles 10A and 10(1) of the Constitution.

Our apprehension, came true when the learned Attorney General for Pakistan was directed by the Court to produce 'minutes of the proceedings/trial' of six condemned accused, to whom sentences were awarded by Military Courts and were suspended by this Court on the first day of hearing in these cases, but he failed for no reason, much less plausible to produce the same The strong presumption would be, that trial held in these cases, in a summary manner, violated the mandatory provisions of law and that of Constitution, otherwise they would not have been withheld.

50. The casualties of lives and loss of properties suffered by the nation/people during last about 14 years, did not shake the conscience of each successive government. It is a matter of record that numerous shocking incidents of terrorist activities were carried out and amongst these, the bombing of Mina Bazar, Peshawar, the Assembly of elders in Dara Adam Khel, the devastating bombing of village Hassan Khel of Lakki Marwat, the killing of personnel of Armed Forces and particularly, of the police in Peshawar right from the rank of DIGs down to the constable level in hundreds, did not give a wake up call to the Government rather these

tragic incidents were conveniently ignored while the gruesome activities of killing the civilians, members of armed forces, civil armed forces and, in particular, police officers/officials in KPK, Balochistan and Karachi and also in the Punjab Province went unabated.

51. It was the heart breaking and shocking incident of APS, Peshawar where 142 innocent children were butchered by the terrorists, which served as a wake up call for all the stakeholders including the government of the day. Although the shocking impact of the brutal incident of APS, Peshawar jolted all segments of the society however, we have to deal with the case in hand on the basis of the Constitution only.

52. As discussed earlier, that the scheme of the Constitution, particularly Article 175 thereof clearly provides for the establishment of one Judiciary, the Supreme Court is placed at the helm of the hierarchy.

All matters, in connection with the terms and conditions of service, or offences committed by the personnel of the Armed Forces, semi Armed Forces and the Police in connection therewith, while in active service, through a specific provision i.e. Sub-Article (3) of Article 199 of the Constitution, have been kept out of the jurisdiction of the Supreme Court, the High Courts and the District Judiciary. This exception is based on sound rationale and reasonable differentia. The demarcation line, so drawn by the

Constitution to the above effect, investing power in different Courts Martial for the trial of the accused, who belong to Armed Forces, may be declared as valid but at the same time, the jurisdiction of these different Courts Martial could not be extended to try the civilians for the offences, specified in the proviso to Article 175 of the Constitution. The amendments brought in the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 for all intents and purposes, keeping in view the specific division of powers of the two hierarchies of Courts i.e. the Constitutionally recognized Judiciary on the one hand and the Courts Martial, thus, investing power in the Military Courts to try civilians, amounts to introducing altogether a different hierarchy of Courts into the established system, ordained by the Constitution. Whether, based on doctrine of necessity or otherwise, the Parliament in exercise of its amending powers under Article 239 of the Constitution, has definitely exceeded its authority and acted in violation of strict command of the Constitution.

53. The Proviso, inserted in Article 175 is in the nature of a carrier Statute, after serving its purpose, by inserting the proposed amendments, in Part-1, Sub-Part 3 of the 1st Schedule, investing power in Courts Martial to try

civilians, it has become a dead and excised Statute and no longer is a part of Article 175 of the Constitution.

54. It is well settled principle of construction of Statute/Constitution that Schedule thereto is always subservient to the substantive provision of the law and the Constitution. It cannot independently operate nor can be effective. On this ground too, the impugned amendments, investing Military Courts to try the civilians for specified offences, now part of the above Schedule, are ultra-vires and liable to be struck down. While discussing the constitutionality of 18th Amendment, in the earlier part of this judgment, sound reason has been given that the entire scheme of the Constitution is based on trichotomy of powers therefore, the Legislature has acted beyond the scope of its allotted authority by making the questioned amendments through the above proviso and in Schedule I by establishing a separate hierarchy of Tribunals (Courts Martial) to try the civilians because that is the exclusive domain of the established Judiciary including the Special Courts, constituted for that purpose.

It is, undeniable fact that, this decision was taken in a Conference attended by the Heads of the Parliamentary Parrties, whereafter, the already drafted Bill was tabled before the Parliament. The Constitutionality of the proposed amendments were not subjected to the required debate,

keeping in view its importance and effects on the existing legal order, rather it was hurriedly passed because the Members of the Parliament were left with no option except to give consent thereto, apprehending the penalty of disqualification provided in Article 63A of the Constitution.

55. With respect, it may be mentioned here that, it was a kind of imposed/coerced legislation, super-imposed on the Parliament. The claim that, it had powers within its domain, was thus, denied to it. The impugned law for this reason too, is not a valid constitutional amendment. Senior Parliamentarians, acquainted with the scheme of the Constitution, on the Floor of each House expressed serious reservations and repentance, while voting in favour of the questioned amendments. This, in my humble view, is a strong evidence to re-inforce the view that the Act in question was not based on the will of the Parliamentarians but of the Heads of the Parliamentary Parties, thus, its constitutional validity stands vitiated.

56. To wriggle out of this constitutional dilemma, the Federation's lawyers vehemently argued that, many provisions introduced in the Anti-Terrorisms Act, where certain accused were liable to be tried by Military Courts, were stuck down in Mehram Ali's case (supra), however, the baseline of the Dicta was that the Military Courts, invested with such powers through statutory law, were having no

constitutional protection. Thus, on that account, the same were declared null and void.

57. After going through the facts of the case of *Mehram Ali* (ibid), the ratio laid down and the dicta delivered, leaves no room for doubt that civilians could not be tried by the Military Courts for certain offences under the Anti-Terrorism Act. Therefore, the stance of the Federation is based on misconception, hence untenable.

58. Apart from the above, the amendments made in the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014, amounts to enacting a new law; the same was done in clear violation of the absolute prohibition, contained in Article 8 of the Constitution, an integral part of the basic structure of the Constitution. Therefore, the new law introduced through the questioned amendments and through a proviso, inserted in Article 175, amounts to distorting the fundamental/ basic structure of the Constitution and a clear violation of Article 8, hence, are *ab-inito* void and of no legal effect, the same was certainly beyond the amending powers of the Legislature.

59. Under the provisions of Article 190, the executive authorities throughout the country are required to act in aid of Supreme Court. The Armed Forces are the part of the Executive therefore, these Tribunals, being quasi judicial,

established for specific purpose, could not be placed on a higher pedestal than the Superior Judiciary of the country, as has been done in the present case.

60. The principles of law laid down in *Mehram Ali case* (supra) have been violated by the Legislature under the cover of so called constitutional protection thus, given to these Tribunals, on this ground too, the questioned amendments are void and liable to be struck down.

61. The fundamental rights, as held earlier are an inalienable part of the supreme law, which cannot be encroached upon or destroyed by the Executive, the Legislature or even by the Judiciary in any manner, even on basis of the doctrine of necessity, which the Parliament has pressed into service.

62. The provision of Article 247(3) provides that '*no Act of Parliament shall apply to any Federally Administered Tribal Areas (FATA) or to any part thereof, unless the President so directs, and no Act of Parliament or a Provincial Assembly shall apply a Provincially Administered Tribal Area (PATA) or to any part thereof unless the Governor of the Province, in which the Tribal Area is situate, with the approval of the President, so directs."* . During the course of proceedings, the learned Attorney General for Pakistan was asked this question as to whether any regulation/notification has been issued by the President, extending the Act of the

Parliament in question to these areas, as required under Article 247(3), he could not produce or show us the same. On this account too, the questioned Act/amendment called the 21st Constitutional Amendment Act shall have no operation in these areas nor the law so amended, shall be effective to that extent.

63. As the Armed Forces are directly engaged in a fight with the Terrorists, any person captured in the course of combat, the investigator into the crime and the Judge presiding the Military Court would certainly belong to the Armed Forces and being party to the conflict therefore, they may be held to be Judges in their own cause. Thus, trial of such civilians by the Military Courts would certainly violate this inviolable universal principle of independent justice. On this account too, such trial would be ab-initio void.

64. There is another serious legal anomaly, fraught with the mischief of serious discrimination because a notified team of functionaries of the Federal Government alone would determine the fate of the civilians accused, referring their cases for trial by the Military Courts. This is a clear encroachment on the power of the Judiciary as, such determination being judicial one, is beyond the scope/authority of the Executive, therefore, fair play and justice would certainly be the casualty. Similar view was taken by this Court in *Mehram Ali case* (supra), thus,

investing the powers in the hands of few individuals with little knowledge of law and principles of justice to decide the fate of a particular civilian, to be tried by the Military Court, would be a clear violation of Article 190 and Article 203 of the Constitution.

The Constitution itself provides that all before the law shall be treated equally. While Article 5 of the Constitution provides as follows:-

> *"Art. 5: (1)Loyalty to the state is the basic duty of every citizen.*
>
> *(2) Obedience to the Constitution and law is the [inviolable] obligation of every citizen wherever he may be and of every other person for the time being within Pakistan."*

65. Thus the guarantee of equal treatment before law is a qualified one and any person, who himself forfeit such rights by his own conduct and consistent behaviour like terrorist/militants they, of course may be differently treated from the rest of the civilians and why the Superior Courts have watchfully monitored the progress, proceedings of terrorism cases and conduct of the Judges, presiding over Anti Terrorism Courts throughout Pakistan. Suggestions and recommendations were forwarded to the Federal Government by Law & Justice Commission for bringing suitable amendment in the law to make it an effective tool of deterrence for militants/ terrorists involved in brutalities. It is still open to the government to confer upon such Courts more powers

making reasonable amendments in the Anti Terrorism Act, the evidence Act and other laws relevant to the subject. At the same time quick measures shall be taken, establishing modern Forensic Laboratories with highly qualified staff in the relevant field and equipped with modern facilities to lend support to the investigating agency and the latter too, must be imparted sufficient skill, training and knowledge in the field of investigation to effectively counter and confront terrorism and terrorists, enabling them to bring on record sufficient evidence, ensuring the conviction of those guilty of the crimes of terrorism and affiliated matters. Also, full protection shall be given to the Presiding Judges of the Special Courts, already established under the Act, 1997, its paralegal staff, the witnesses, the investigating officers, the prosecutors, the lawyers, etc. as required under the law.

66. The legislature also violated the prohibition contained in Article 12, making subsequent amendment in the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961, investing the Military Courts, also to try those accused persons, who were arrested many years back and detained for indefinite period since long.

Order/Conclusion:

67. In view of the above discussion, the findings recorded, the conclusion drawn based on the interpretation of the various provisions of the Constitution and the law, the

18th Constitutional amendment and 19th Constitutional amendment inserting Article 175A, the 21st Constitutional amendment inserting a proviso in Article 175 and amendment in the Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 and all subsequent amendments, made through ordinary legislation are declared null and void being unconstitutional and shall be deleted from the Constitution as a whole.

68. All the proceedings, inquiries, trials, investigations, and convictions as well sentences recorded by the military courts so established under the 21st amendment are declared illegal and unconstitutional. The same are therefore, set aside and all the cases pending there shall stand transferred to the ordinary criminal courts in particular Anti Terrorist Courts established under the Act, 1997, for trial or for the purpose of investigation by the special team constituted therefor. The charge sheets be submitted to the said Special Courts.

69. However, all appointments, confirmation and elevation of Judges to the Superior judiciary, made in the past under the offending Article 175A are declared valid for all intents and purposes to avoid Constitutional crises.

70. Accordingly, the first set of petitions with regard to 18th Amendments i.e. Article 175A of the Constitution are accepted and the said Article is struck down as a whole.

Similarly, while accepting the second set of the petitions throwing challenge to the 21st Constitutional Amendment along with the all amendments made in the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 are also declared ultra-vires and are hereby struck down.

Sd/-

(Dost Muhammad Khan, J-13)

Umar Ata Bandial, J. – I have had the privilege of reading the erudite and considered opinion rendered by my learned brother Sh. Azmat Saeed, J. which comprehensively deals with the different facets of the controversy raised before the Court in relation to the validity or otherwise of the Constitution (18th Amendment) Act, 2010; Constitution (21st Amendment) Act, 2015 **("21st Amendment")** and Pakistan Army (Amendment) Act, 2015 **("Army Amendment Act")**. The analysis of law undertaken by the said judgment with respect to the aforementioned constitutional amendments and the statutory amendment answer the objections raised on behalf of the petitioners on cogent and convincing grounds. With respect, I agree with the appreciation of relevant facts and the grounds and reasons sustaining the findings given on all the points addressed in the aforementioned opinion.

2. One of the threshold findings given in the opinion rendered by my learned brother is that notwithstanding the bar contained in sub-Article (5) and (6) of Article 239 of the Constitution

of Islamic Republic of Pakistan **("the Constitution")** this Court has jurisdiction to examine the validity of Constitutional amendments on the touchstone of limitations imposed on the amending power of the Parliament by the salient features of the Constitution. In the background of the said finding, I have anxiously deliberated the objection that the 21st Amendment and the corresponding amendments made by the Army Amendment Act, in the Pakistan Army Act, 1952 **("PAA")** substantially alters one of the salient and sacrosanct features of our Constitution, namely, independence of the Judiciary and its separation from the Executive. This feature is boldly enshrined in Article 175 of the Constitution and echoed in its Articles 202, 203 212 and its Preamble. It is this feature of the Constitution that protects and nurtures the fundamental right of access to justice of the citizens of Pakistan. The quality of justice assured includes a right to fair trial and due process under Article 10A of the Constitution and safeguard to enjoy equality before law and equal protection of law is guaranteed in Article 25 of the Constitution. Has the afore-noted 21st Amendment changed one of the cherished features of the Constitution, namely, provision of justice through an independent judiciary, to the point that the Constitution has substantially lost that essential characteristic?

3. It is common ground that in relation to the offences added to the PAA by the Army Amendment Act, civilian citizens of Pakistan may become accused persons before the Courts Martial constituted under the PAA. The primary offence included by Army Amendment Act in the PAA envisages its commission by a person claiming or known to belong to any terrorist group or organization who uses the name of religion or a sect to, "raise arms or wage war

against Pakistan, or attack the Armed Forces of Pakistan or law enforcement agencies, or attack any civil or military installations in Pakistan"[*Section 2(1)(d)(iii)(a)*]. In addition to the foregoing offence, a number of other cognate and related offences are also added to the PAA by the said amending law. To my understanding, these offences are applicable only in the context contemplated by the 21st Amendment and the Army Amendment Act. This view finds support from the fact that the offences added by the Army Amendment Act to the PAA are not new but exist, *inter alia*, in the Pakistan Penal Code, 1877. Pursuant to the impugned Amendments accused persons who allegedly belong to a terrorist group that uses the name of religion or a sect and are alleged to have committed a Section 2(1)(d)(iii) offence are liable to be tried by Court Martial under the PAA. Previously such accused persons were triable by the Anti Terrorism Courts **("ATCs")** established under the Anti Terrorism Act, 1997 and more recently the Special Courts set up under the Protection of Pakistan Act, 2014. It is necessary to establish the object and scope of the amendments made in the Constitution and the PAA in order to determine whether the 21st Amendment, that is enacted unanimously by the Parliament to protect the amendments in the PAA, has at all violated a salient feature of the Constitution.

4. To understand the object, scope and legal effect of the impugned amendments in the Constitution and in the law, it is useful to first read the provisions of 21st Amendment:

SENATE SECRETARIAT
Islamabad, the 7th January, 2015

No.F.9(2)/2015-Legis. – The following Act of Majlis-e-Shoora (Parliament) received the assent of the President on 7th January, 2015 is hereby published for information :---

ACT No.I of 2015

An Act further to amend the Constitution of the Islamic Republic of Pakistan;

WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist or terrorist group, armed group, wing and militia or their members using the name of religion or a sect;

AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constitution, from the terrorist groups by raising of arms and insurgency using the name of religion or a sect or from the foreign and locally funded anti-State elements;

AND WHEREAS it is expedient that the said terrorists group including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2;

AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in all parties conferences held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipeout and eradicate terrorists from Pakistan, it is expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan;

It is hereby enacted as follows :—-

1. **Short title and commencement**.—(1) This Act may be called the Constitution (Twenty-first Amendment) Act, 2015.

(2) It shall come into force at once.

(3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.

2. **Amendment of Article 175 of the Constitution**.—In the Constitution of the Islamic Republic of Pakistan, hereinafter called the Constitution, in Article 175, in clause (3), for the full stop at the end a colon shall be substituted and thereafter, the following proviso shall be inserted, namely :–

"Provided that the provisions of this Article shall have no application to the trial of persons under any of 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 using the name of religion or sect.
>
> *Explanation*: In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."
>
> 3. **Amendment in the First Schedule of the Constitution.**—In the Constitution, in the First Schedule, in sub-part III of Part I, after serial No. 5, the following new entries shall be added, namely :–
>
> "6. The Pakistan Army Act, 1952 (XXXIX of 1952).
>
> 7. The Pakistan Air Force Act, 1953 (VI of 1953).
>
> 8. The Pakistan Navy Ordinance, 1961 (XXXV of 1961).
>
> 9. The Protection of Pakistan Act, 2014 (X of 2014)."

5. For the sake of completeness it would be appropriate at this stage to also read through the Army Amendment Act since it is enacted as part and parcel of the new legal dispensation enforced under the umbrella of the 21st Amendment:

> "SENATE SECRETARIAT
> Islamabad, the 7th January, 2015
>
> **No.F.9(3)/2015-Legis.–** The following Act of Majlis-e-Shoora (Parliament) received the assent of the President on 7th January, 2015, is hereby published for information :---
>
> ACT No.II of 2015
> *An Act further to amend the Pakistan Army Act, 1952;*
>
> WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist group, armed group, wing and militia or their members using the name of religion or a sect;
>
> AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan by raising of arms and insurrection using the name of religion or a sect by groups of foreign and locally funded elements;
>
> AND WHEREAS it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect captured or to be captured in combat with the Armed Forces and other law enforcement agencies or otherwise are tried under this Act;
>
> AND WHEREAS Article 245 of the Constitution of Islamic Republic of Pakistan, 1973 enjoins upon the Armed Forces to act in consonance with the provisions of the said Article;
>
> It is hereby enacted as follows:-
>
> 1. **Short title and commencement**.- (1) This Act may be called the Pakistan Army (Amendment) Act, 2015.

(2) It shall come into force at once.

(3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement.

2. **Amendment of section 2, Act XXXIX of 1952.-** In the Pakistan Army Act, 1952 (XXXIX of 1952), hereinafter referred to as the said Act, in section 2,-

(l) in sub-section (1), in clause (d), after sub-clause (ii), the following new sub-clauses, shall be inserted, namely:-

"(iii) claiming or are known to belong to any terrorist group or organization using the name of religion or a sect; and

(a) raise arms or wage war against Pakistan, or attack the Armed Forces of Pakistan or law enforcement agencies, or attack any civil or military installations in Pakistan; or

(b) abduct any person for ransom, or cause death of any person or injury; or

(c) possess, store, fabricate or transport the explosives, fire arms, instruments, articles, suicide jackets; or

(d) use or design vehicles for terrorist acts; or

(e) provide or receive funding from any foreign or local source for the illegal activities under this clause; or

(f) act to over-awe the State or any section of the public or sect or religious minority; or

(g) create terror or insecurity in Pakistan or attempt to commit any of the said acts within or outside Pakistan,

shall be punished under this Act; and

(iv) claiming or are known to belong to any terrorist group or organization using the name of religion or a sect and raise arms or wage war against Pakistan, commit an offence mentioned at serial Nos. (i), (ii), (iii), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xv), (xvi), (xvii) and (xx) in the Schedule to the Protection of Pakistan Act, 2014 (X of 2014):

Provided that any person who is alleged to have abetted, aided or conspired in the commission of any offence falling under sub-clause (iii) or sub-clause (iv) shall be tried under this Act wherever he may have committed that offence:

Provided further that no person accused of an offence falling under sub-clause (iii) or sub-clause (iv) shall be prosecuted without the prior sanction of the Federal Government.

Explanation: In this clause, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

(2) after sub-section (3), the following new sub-sections shall be added, namely:-

"(4) The Federal Government shall have the power to transfer any proceedings in respect of any person who is accused of any offence falling under sub-clause (iii) or sub-clause (iv) of clause (d) of sub-section (1), pending in any court for a trial under this Act.

(5) Any proceedings transferred under sub-section (4) shall be deemed to have been instituted under this Act.

(6) Where a case is transferred under sub-section (4) it shall not be necessary to recall any witness or again record any evidence that may have been recorded.".

3. **Amendment of section 60, Act XXXIX of 1952.-** In the said

> Act, in section 60, in clause (k), after the word "law" occurring at the end, the words "and any other law for the time being in force", shall be added.
>
> 4. **Overriding effect.**--(1) The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.
>
> (2) In case there is any conflict between the provisions of this Act and any other law for the time being in force, the provisions of this Act shall prevail to the extent of inconsistency."

6. The 21st Amendment sets out in its Preamble the factual imperatives that have occasioned its enactment. It is stated that "a grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution" confronts the State presently. This threat is posed by "terrorist groups" who have "by raising of arms and insurgency using the name of religion or a sect or from the foreign and locally funded anti-State elements"... have committed "offences relating to terrorism, waging of war or insurrection against Pakistan ... threatening the security of Pakistan." Special measures necessary to prevent the commission of the said offences include the trial of those of the aforementioned terrorists who are "captured or to be captured in combat with the Armed Forces or otherwise." In order to implement the said special measure adopted "to permanently wipe out and eradicate terrorists from Pakistan" constitutional protection has been given "to the necessary measures taken... in the interest of security and integrity of Pakistan."

7. The specific measure that has been given constitutional protection by the 21st Amendment is the trial by Courts Martial of terrorist militants who use the name of religion or a sect to *inter alia* wage war against Pakistan and who threaten the security of Pakistan. Courts Martial constituted for trial of the said terrorists under the PAA, Pakistan Air Force Act, 1953 **("PAFA")**, Pakistan Navy Ordinance, 1961 **("PNO")**and by the Special Courts under the

Protection of Pakistan Act, 2014 have by the 21st Amendment been given constitutional immunity from challenge for violation of fundamental rights or of the independence of the Judiciary.

8. Court Martial of terrorist militants is a measure by which Parliament has sought to address a grave and serious existential threat to the integrity and security of Pakistan. From the provisions of the 21st Amendment, it is obvious that the Parliament is conscious that the amendment made by the Army Amendment Act, enabling trial of civilian terrorist militants by Courts Martial is an extra-ordinary step that may deviate from the pristine principle of judicial power being exercised by the independent Judiciary of the country and under its oversight. To safeguard that principle, the 21st Amendment restricts the constitutional immunity given to Court Martial trials of certain terrorist militants specified in the Army Amendment Act to be a temporary measure that "shall remain in force for a period of two years from the date of its commencement and shall stand repealed on the expiration of the said period." Nevertheless, for a period of 2 years Parliament has unambiguously endorsed the impugned Court Martial trials by exempting these from the requirements of a sacrosanct salient feature of the Constitution. My learned brother Sh. Azmat Saeed, J. has rightly held that constitutional immunity given to the legal validity and status of the impugned Courts Martial survives the salient features threshold of the Constitution. Indeed the existentialist threat posed by terrorist militants by waging war against Pakistan, the restriction on Court Martial trials of terrorist militants to a narrow class of persons, who are captured or to be captured in combat with the law enforcement agencies of Pakistan, and the time limitation on constitutional

immunity given to the legal status of such Court Martial trials survive the salient features threshold upheld by my learned brother Sh. Azmat Saeed J.

9. A survey of our law regarding the right of fair trial, due process and access to justice for all, leads us to a seminal and profound discourse on the present issue rendered by Chief Justice Ajmal Mian (as he then was) in the case of **Sh. Liaquat Hussain v. Federation of Pakistan** (PLD 1999 SC 504). It was held unanimously therein by the Court that the Pakistan Armed Forces (Acting in Aid of Civil Powers) Ordinance, 1998, that established Military Courts for trial of civilians charged, *inter alia*, with offences of terrorism mentioned in the Ordinance, was unconstitutional and therefore, of no legal effect. The grounds for such declaration were firstly, that the Military Courts presided by Army Officers who belong to the Executive failed the constitutional test of independence of judiciary; secondly, that lack of oversight by the superior constitutional judiciary deprived such Courts of their foundation in the provisions of the Constitution; thirdly, in pith and substance the impugned Ordinance lacked nexus with the Defence of Pakistan or with the Armed Forces, rendering it *ultra vires* the legislative competence of the Parliament under the Federal Legislative List. For the sake of convenience, the relevant extracts from **Sh. Liaquat Hussain**'s case *(supra)* are reproduced below. At page 609, it is observed that:

> "... The question at issue before us is, as to whether by virtue of the impugned Ordinance the four types of Courts envisaged under the Army Act referred to hereinabove can be substituted for ordinary criminal Courts created under the Constitution for the trial of civilians for civil offences having no nexus with the Armed Forces or defence of the country. There is no doubt that in terms of the Army Act even certain

> civilians can be tried for the offences covered under the Army Act. In this regard reference may be made to the relevant portion from the opinion of Hamoodur Rahman, C.J. in the case of Brig. (Rtd.) F.B. Ali (supra) quoted hereinabove, wherein Hamoodur Rahman, C.J. observed that "the nexus with the defence of Pakistan was not only close but also direct. It is difficult to conceive of an object more intimately linked therewith. The prevention of the subversion of the loyalty of a member of the Defence Services of Pakistan is as essential as the provision of arms and ammunition to the Defence Service or their training." *(emphasis provided)*

On the point that legislative incompetence of Parliament in that case was fatal for the Ordinance of 1998, it was held at page 613 that:

> "... It may be pointed out that, this Court in the cases of Government of Balochistan v. Azizullah Memon (supra), Al-Jehad Trust (supra) and Mehram Ali (supra) has held that the right to have access to justice through independent Courts is a Fundamental Right and, therefore, any law which makes a civilian triable for a civil offence, which has no nexus with the Armed Forces or defence of the country, by a forum which does not qualify as a Court in terms of the law enunciated particularly in Mehram Ali's case (supra) will be violative of Articles 9, 25, 175 and 203 of the Constitution." *(emphasis provided)*

Again at page 620, it is ruled that:

> "... In the absence of nexus between the alleged offence and the discipline of the Armed Forces or defence, a citizen of Pakistan is entitled to the trial by ordinary criminal Courts in view of the change brought about in the present Constitution of 1973, which aspect has already been discussed hereinabove." *(emphasis provided)*

Finally on the limitation of acting "in aid of civil power" meant assisting rather than effacing civil power under Article 245 of the Constitution, it was held at page 626 that:

> "The above contention is not tenable as convening of Military Courts for trial of civilians for civil offences having no

> nexus with the Armed Forces or defence of Pakistan cannot be treated as an act incidental and ancillary under clause (1) of Article 245 of the Constitution. ..." *(emphasis provided)*

10. In the present case of the impugned 21st Amendment and the Army Amendment Act, the objections upheld in **Sh. Liaquat Hussain**'s case (supra) and noted above have been raised forcefully by the learned counsel for the petitioners. However, the facts in the present case differ considerably from those in the **Sh. Liaquat Hussain**'s case *(supra)*. Presently, the parliamentary acknowledgment made in the impugned amendments about combat of Armed Forces and law enforcement agencies of Pakistan with terrorist militants waging war against Pakistan in the name of religion or a sect amounts to a declaration of a state of armed conflict in Pakistan. Several measures including forceful Military action taken to reverse that onslaught have been approved by all parliamentary parties and are under implementation by the Federal Government. All these measures are claimed to have nexus with the "Defence of Pakistan"under Article 245 of the Constitution; in particular the Court Martial trials of the above mentioned narrow class of terrorist militants. On the other hand, the **Sh. Liaquat Hussain**'s case (supra) concerned the role of the Armed Forces in acting "in aid of civil power." The above noted judicial pronouncements made in that case are relied by the learned Attorney General to advance the plea that the impugned Amendments in the Constitution and the law are competent and valid under the Constitution.

11. It may be recapitulated that the impugned Amendment in the PAA has the protective backing of a constitutional amendment. Such constitutional amendment confers only a temporary immunity upon Courts Martial constituted for trial of offences added by the said amendment to the PAA. These offences are intimately related to

insurrection and terrorism; actions aimed against the integrity and security of Pakistan. Acts involving "terrorism, waging of war or insurrection against Pakistan" that are committed by a terrorist "using the name of religion or sect" and who has been "captured or to be captured in combat with Armed Forces or otherwise" constitute the defining factual facets of a case that can be put up for trial before the Courts Martial. These factual ingredients are reflected in the offences freshly added by sub clause (iii) in Section 2(1)(d) of the PAA. The purposes for bringing the impugned amendments are expressed in common terms by the Preambles to both the 21st Amendment and the Army Amendment Act. In order to derive guidance about the purpose, meaning and effect of impugned statutory amendments which may seem disparate and unrelated to Articles 175 and 245 of the Constitution, the law permits reference to be made to the provisions of the Preamble of an amending statute for seeking guidance about the purpose, scope and meaning of the amendments under review.

12. Reading the 21st Amendment and the Army Amendment Act in the light of their Preambles, it is crystal clear that both the impugned amendments have been made solely for the purpose of ensuring the defence of the integrity and security of Pakistan against armed groups of terrorists and militants that have by gruesome acts of physical violence duly propagated by digital communications openly attacked and threatened the existence of Pakistan. The scale and severity of the terrorist onslaught is clear from the attacks conducted against the State institutions, agencies, service personnel and ordinary citizen of Pakistan. The learned Attorney General for Pakistan has presented data of human and economic losses suffered by the nation in 12 years since the year 2002. These figures paint a

grim picture of State inability to combat the ever growing menace of extremist violence against State and society. It is reported that during the said period approximately 50,000 civilian citizens of Pakistan have lost their lives in terrorist attacks conducted in different parts of Pakistan. Of these, 4879 are soldiers who laid down their lives in battles with or attacks by terrorist militants. Nearly 400 officers of the Pakistan Army laid down their lives whilst leading operations against such terrorist militants. The civilians who have been killed in terrorist attacks during the same period include 400 journalists, 230 lawyers and 321 doctors. More than 1000 schools have been attacked and destroyed in FATA, Swat and other areas of the Province of Khyber Pakhtonkhwa. Equally, more than 100 mosques and other places of worship have been attacked and destroyed by terrorists in different parts of the country. The estimated economic toll on account of the ongoing armed conflict with terrorists and militants exceeds US$ 100 billion. The nation has paid a huge price in terms of human life, economic losses, erosion of State writ and authority and continuous flight of capital and skilled human resource owing to the growing insecurity and lawlessness that has beleaguered the State.

13. According to the learned Attorney General, hardly any of the militants that are engaged in combat with the law enforcement agencies, has been prosecuted. Some elements operating in the settled areas of Pakistan, who have been facilitating, aiding, abetting, financing or otherwise connected with such terrorist militants have been prosecuted for various terrorist offences in the ATCs of the country. 17,596 criminal cases were put up for trial by the ATCs in Pakistan during the period 2008 to June, 2014. During this period, 7,565 cases have been decided by the ATCs, resulting in the acquittal

of accused in 5,841 cases, that is in 77% of the decided cases. It is acknowledged that the Police investigators and State prosecutors are handicapped in the collection of incriminating evidence because the principal players in the execution of terrorism acts escape to the havens of their sponsors or commanders, who are in turn the terrorist militants engaged in combat with the law enforcement agencies in waging their war against Pakistan. Logistical shortcomings and legal lacunae expose witnesses, police investigators, Prosecutors and Judges to violence that impairs the working of the criminal justice system. More safeguard are therefore required.

14. The shocking attack on children-students in the Army Public School, Peshawar in December, 2014, in which 143 minor children were brutally executed, has jolted the Executive and Parliament into further action to curb terrorist activities. All parliamentary leadership including the Executive unanimously adopted a National Action Plan on 24.12.2014 comprehending a variety of actions aimed at curbing and eliminating terrorist militancy in Pakistan, including trial of terrorist militants by Courts Martial. The impugned Amendments which deal with the specific measure of Court Martial trial of terrorist militants proposed in the National Action Plan were adopted unanimously by both houses of Parliament through the 21st Amendment and the Army Amendment Act. The language of these Amendments have already been considered above; the data noted above shows an unabated spate of terrorist and militant activity throughout Pakistan causing tens of thousands of civilians deaths and the loss of nearly 5000 servicemen in action; executive incapacity to bring successful prosecutions of deadly

terrorist militants makes out a case for comprehensive, concerted and consistent action by the State to curb and eliminate the menace of terrorism currently facing Pakistan. The nature and types of action to be taken for achieving the said purpose is a matter of executive decision. Notwithstanding the 21st Amendment, the statutory amendment to hold Court Martial trials of terrorist militants falling within the narrow class mentioned in the Army Amendment Act would be liable to quashment if it substantially alters the salient feature of independence of Judiciary and its separation from the Executive.

15. The opinion rendered by my learned brother Sh. Azmat Saeed, J. has carefully examined and rejected the objection to the validity of the 21st Amendment on the touchstone of independence of the Judiciary as a salient feature of the Constitution. I would only add that a limited class of terrorist militants bearing attributes that have already been described above are made the subject of Court Martial trials under the Army Amendment Act. In a case where executive action is occasioned by the duty of the Federal Government to defend Pakistan, the Courts exercise restraint because "national success in the war is to be ensured in order to escape from national plunder or enslavement..." The above mentioned judicial observation made in the case of **Farooq Ahmed Khan Leghari v. Federation of Pakistan** (PLD 1999 SC 57), justifies judicial restraint in such circumstances. However, even here the Court nevertheless looks to the proportionality of the executive action taken in retaliation to the severity of the war being waged; in the present case, by terrorist militants against Pakistan. The said judgment at page 191 of the law report makes the following statement of law:

> "... In my view, a distinction is to be made between an emergency which is imposed when a country is engaged in an actual war or is subjected to actual external aggression and when the same is imposed on account of imminent danger thereof for the purpose of suspension of fundamental rights and continuation of the emergency. In the former case, the above Latin maxim *inter arma silent leges* (i.e. when there is an armed conflict, the law remains silent) or that the national success in the war is to be ensured in order to escape from national plunder or enslavement even if the personal liberty and other rights of the citizens are sacrificed as observed by Lord Atkinson in the case of King v. Halliday (supra) would be applicable. But in the latter case the rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the International Conventions of Civil and Political Rights. ..."

16. The narrow class of persons affected by the Army Amendment Act, the reviewability to the Executive decision to select persons on the basis of statutory criteria and limited duration of the constitutional immunity given to such Courts Martial impose limitations that indicate proportionality in the legislative measures adopted by the Parliament.

17. Needless to say, the principles laid down in **Sh. Liaquat Hussain**'s case (supra) pertain to the Armed Forces being called to act in aid of civil power. The Military Forces can assist but not replace civil power. The present case of the Armed Forces defending Pakistan from belligerent militancy expands the ambit of military action but subject to the direction of the Federal Government and in the present case also subject to the law enacted by Parliament.

18. Whilst construing the present situation in the country as a state of war declared by terrorist militants against Pakistan, there are several indicators apart from the losses inflicted on the State and the nation which exemplify war time conditions. The level of coordination, organization and networking of terrorist organizations

within and outside Pakistan, their declared objectives for undertaking terrorist activities as gathered from their profile on the social media and from their printed literature, the vast area and scale of their operations in the country wherein terrorist operations have been executed, the degree and scale of violence that has been perpetrated to shatter State resistance. Data on the forgoing factors shown to the Court by the learned Attorney General for Pakistan reveals increasing boldness of the terrorist militants to debilitate and thereby crumble the State. This situation is made more serious by the theatre of war extending across all major cities of the country.

19. The terrorist militants operating in the country belong to different groups and organizations. Sometimes their actions may be coordinated, however, these groups do not have a unified command, nor do they wear an identifiable uniform or distinctive sign in order to be recognized; they operate by resort to subterfuge, perfidy and disguise without regard to the rules governing war. The said elements and characteristics make the case of terrorist militancy more sinister than enemy State combatants who abide the aforementioned international norms. The treatment of belligerent citizen and unlawful combatants in custody who have waged war against the State is not just a matter of municipal law. The subject also attracts the principles of public international law on armed conflict and war.

20. There was a time when civilians and combatants belonging to an enemy State were treated mercilessly and inhumanely by a detaining State to exact vengeance or extract work or advantage. The human rights laws in relation to prisoners of war and civilians in captivity of a detaining State came to be expressed through four Geneva Conventions concluded in the year 1949 under

the aegis of the United Nations. Pakistan has ratified these international conventions, which are mentioned below:

i) 1st Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces and Field;

ii) 2nd Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea;

iii) 3rd Geneva Convention Relative to the Treatment of Prisoners of War;

iv) 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War;

The two Conventions relevant for our present discussion are the 3rd Geneva Convention relative to the Treatment of Prisoners of War and the 4th Geneva Convention relative to the Protection of Civil Persons in Time of War. According to Article 4 of the 3rd Geneva Convention:

> "Prisoners of war are persons, who have fallen into the power of the enemy State and who are members of the armed forces of a party to the conflict or members of militias or volunteer corps forming part of such armed forces; members of other militias and members of other volunteer corps, that do not form part of the regular armed forces may also qualify for the status of prisoners of war, provided the militia or volunteer corps is:
>
> **a)** commanded by a person responsible for his subordinates;
>
> **b)** such militia or volunteer corps has fixed distinctive sign recognizable at a distance;
>
> **c)** such militia or volunteer corps carry arms openly;
>
> **d)** such militia or volunteer corps conducts its operation in accordance with laws and customs of war."

21. In the facts of the present case, the persons engaged in waging war against Pakistan through armed conflict, insurrection, terrorism and militancy do not belong to the Armed Forces of any State. Although the combatants are member of terrorist groups or militia yet these groups lack the abovenoted four elements that qualify such groups for protection as prisoners of war. Consequently, the terrorist militants fighting against Pakistan and captured by the

Armed Forces of Pakistan may be considered for protection under the 4th Geneva Convention dealing with civilians in the captivity of a party to the conflict of which they are not nationals. Article 3 of the said Convention enumerates the essential human rights restraints imposed in this respect on a detaining power. These include non-discriminatory treatment of civilians without distinction founded on race, colour, religion or faith, gender or other similar criteria. In this respect a prohibition is imposed against violence to the life and person of the captive civilians in particular murder of all kinds, mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity in particular humiliating and degrading treatment." Finally and more importantly, "passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

22. Before dealing with the mode and manner of trial of civilians who are in the custody of a detaining State, it is important to highlight those civilian persons that are excluded from the human rights dispensation accorded by the 4th Geneva Convention. Such persons are listed in Article 5 of the said Convention which provides that:

> "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication

> under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be." *(emphasis provided)*

It is clearly noticeable from the above exclusionary Article 5 of the 4th Geneva Convention that a belligerent civilian who has committed hostile acts against the detaining State may forfeit certain human rights privileges under the said Convention; however, he remains entitled to a fair and regular trial prescribed by the said Convention.

23. Articles 66 of 4th Geneva Convention provides that an accused civilian shall be tried by a properly constituted non-political Military Court, "which shall apply only those provisions of law which were applicable prior to the offence, and which are in particular, in accordance with the principle that the penalty shall be proportionate to the offence"*(Article 67)*. Article 71 of the Convention provides that an accused civilian person shall be promptly informed in writing of the particulars of the charges preferred against him, in a language that he can understand. Article 72 of the said Convention provides that an accused civilian person shall have a right to present evidence necessary for his defence and may call witnesses; he shall have a right to be assisted by a qualified advocate who shall be able to visit him freely. Article 73 of the Convention provides that the convicted person shall have a right of appeal about which he shall be fully informed including the time limit for availing such remedy.

24. The provisions of the 3rd Geneva Convention relative to the treatment of prisoners of war also assures similar rights to a prisoner under trial and that its Article 99 specifies that a prisoner

may not be tried or sentenced for a new offence enforced retrospectively. Article 102 of the said Convention however makes a substantive law provision that a "prisoner of war can be validly sentenced only if sentence has been pronounced by the same Court according to the same procedure as in the case of members of Armed Force of the detaining State." It is noticed that unlike trial of a belligerent civilian by a Military Court, the international law ensures that a prisoner of war is tried by a Court Martial. In the instant case before the Court, the Army Amendment Act assures a terrorist militant falling within the qualifying class, to trial by Court Martial. The due process extended to a warring terrorist militant who does even not meet the criteria of prisoner of war, is the same as that granted to a loyal serviceman of the Armed Forces. The principles of international law broadly capitulated above represent the essence of the guarantee of due process extended to a detained belligerent civilian or to a prisoner of war. Two Protocols on the subject of treatment of prisoners of war and on the treatment of civilian persons in time of war were concluded pursuant to the aforementioned Geneva Conventions in the year 1977. Without making significant changes, these Protocols are not materially different from the Conventions and further elaborate the principles enshrined in the latter. However, Pakistan has not ratified the said Protocols and therefore, reference thereto is unnecessary.

25. Before undertaking a comparison of the threshold conditions of trial assured by the aforenoted Geneva Conventions, with the terms of trial before the Courts Martial under the PAA, it is useful to examine the legal precedents about the trial of a civilian citizen committing hostile activities against his own State. In the case

of **Sh. Liaquat Hussain** (*supra*), this Court has referred to a number of international precedents, drawn from the Commonwealth jurisdiction and the United States of America (**"US"**). In the case of **Ex Parte Milligan** [71 US 281] (1866), the US Supreme Court allowed the plea on a habeas corpus petition to release a US citizen, who was alleged during the American civil war to have conspired to do acts against the US Government and its arsenal. He was put to trial before a Military Commission and was sentenced to death for committing the alleged offences. The US Supreme Court observed that:

> "It is the birthright of every American citizen when charged with crime to be tried and punished according to law … every trial involves the exercise of judicial power and from that source did not military commission that tried him derive their authority? Certainly no part of judicial power of the country was conferred on them; because the Constitution expressly vests it in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish, and its is not pretended that the commission was a Court ordained and established by Congress."

It was held that the President could not in the exercise of his executive authority order the trial of an American citizen by Military Commission. The said American precedent is widely hailed for protecting civilians' right to criminal trial before the civil Courts of the State. This judgment, however, gave the above finding based upon the conclusion that the circumstances and conditions of the case did not attract the law of war.

26. In the matter of **Ex Parte Quirin** [317 US 1] (1942), the petitioners filed applications for leave to file petitions of habeas corpus before the US Supreme Court. One of the petitioners, namely, Haupt claimed to be a US citizen whilst the remaining petitioners

were German nationals who had been captured within the territory of the US and were put to trial before a Military Commission on charges of possessing explosives for the destruction of war industrial supply. The US Supreme Court dealt with the consequences of hostile acts committed by a citizen of the US in the following terms:

> "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and, with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. ... It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused."

With respect to the findings of belligerency committed by the petitioner Haupt, the US Supreme Court adopted a distinction between lawful and unlawful combatants applied in the public international law in situations of armed conflict with a State. It was observed that:

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are

> generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

Whilst dismissing the petitions for habeas corpus relief, the US Supreme Court addressed the law laid in **Ex Parte Milligan** [71 US 281] (1866) and explained its inapplicability to the cases of unlawful combatants acting on behalf of a belligerent enemy in the following terms:

> "Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the Milligan case, supra, p. 71 U.S. 121, that the law of war can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open, and their process unobstructed." Elsewhere in its opinion, at pp. 71 U. S. 118, 71 U. S. 121-122 and 71 U. S. 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them, the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war save as -- in circumstances found not there to be present, and not involved here -- martial law might be constitutionally established."

27. The foregoing decision on the law regarding a belligerent citizen in armed conflict with his own State firstly yields the conclusion that such persons are liable to be treated under the law of war and for the offences committed by them as belligerents, the competent *fora* for their trial are Military Tribunals. Their cases are distinguishable from delinquent civilians who do not violate the law

of war. They would remain entitled to prosecution and trial before the criminal Courts of the country in accordance with the ordinary criminal law. A reading of the 3rd & 4th Geneva Conventions and the aforementioned two decisions of the US Supreme Court bring to light an important distinction which was never canvassed before or considered by this Court in the case of **Sh. Liaquat Hussain** (supra). That judgment reiterates the principles laid down in the case of **Mehram Ali v. Federation of Pakistan** (PLD 1998 SC 1445) about the conditions to be met by a Court of law for grant of a fair trial to an accused. The said requisites in a Court of law were explored in the case of **Mehram Ali** (ibid) which lays down far reaching law on the subject. Pursuant to Articles 175, 202 and 203 of the Constitution, the two judgments emphasize in particular, the separation of Judiciary from the Executive and hence assert independence of the Judiciary, including, its power of Judicial Review over all subordinate *fora* exercising judicial power, to be a hallmark of our Constitution. Equally, the **Mehram Ali** (supra) judgment emphasizes the right of "access to justice to all" as a fundamental right, which is meaningless in the absence of independence of Judiciary that provides impartial, just and fair adjudication by a hierarchy of judicial *fora* comprising judges, enjoying security of tenure, appointed and supervised by the High Court of each Province.

28. With utmost respect to the illuminating jurisprudence laid down both in **Mehram Ali** and **Sh. Liaquat Hussain** cases (supra), it may be observed that the said principles apply to criminal administration of justice by the civil Courts of the land. These constitutional principles cannot be adopted across the board for the trial of terrorist militants, who are engaged in waging war against

Pakistan, *inter alia,* through belligerent and hostile armed conflict with the Armed Forces and law enforcement agencies of Pakistan. Trial of such offences is subject to the minimum guarantees afforded by the 1949 Geneva Conventions, by application of the law of war. This classification appeals to common sense and is also justified by the failure of the Executive to put up cases of such persons for trial by the ordinary civil Courts of the country. Deficiencies in the police investigation or the criminal prosecution in accordance with applicable municipal laws have failed to yield results that can have a penal or deterrent effect. The acquittal rate of nearly 80% of all cases tried and decided by the Anti-Terrorism Courts is predominantly, if not wholly, attributable to the incapacity of the civilian executive authorities to deal with terrorist offences involving heinous crimes.

29. The judgment in **Ex Parte Quirin** [317 US 1] (1942) came under review of the US Supreme Court in number of cases. In recent years, in the matter of **Hamdi v. Rumsfeld** [542 US 507] (2004), a US citizen named Yaser Esam Hamdi was detained as an enemy combatant having been captured in an armed conflict zone. On a habeas corpus petition filed by the detainee's father, the US Supreme Court considered:

> "The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants."

After approving the judgment in **Ex Parte Quirin** [317 US 1] (1942), the US Supreme Court observed that:

> "On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. … striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our

> calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. … We therefore hold that a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker. … At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant."

Having laid down the criteria to make detention justiciable, the US Supreme Court proceeded nevertheless to entrust the determination of an enemy combatant's status to a duly authorized and competently constituted Military Tribunal in the following terms:

> "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention."

30. The case of **Hamdi v. Rumsfeld** [542 US 507] (2004) upholds that an enemy combatant who is a belligerent citizen described as an unlawful combatant in **Ex Parte Quirin** [317 US 1] (1942) is liable to trial by a Military Tribunal under the law of war. The case is also significant because it makes the military authorities accountable for setting out the criteria on the basis of which a civilian is detained on the allegation of being an enemy combatant. In the case before us, the provisions of the second proviso to amended Section 2(1)(d)(iii) of the PAA places the selection of the terrorist militants to be prosecuted and tried by Courts Martial in the hand of the Federal Government. The competent executive authority is obligated by law to take its decision justly, fairly and reasonably in the matter of selecting the case of a terrorist militant for trial by Court Martial.

31. Consequently, the Federal Government is under a duty to decide each case selected for trial by Court Martial after conscious application of mind to the relevant statutory criteria and for reasons that are reflected on the record. The selection of persons for trial by Courts Martial is guided by the criteria laid down in the Army Amendment Act containing ingredients of specified offences. The principal offence amongst these being the raising of arm or waging war against Pakistan or attacking the Armed Forces of Pakistan or law enforcement agencies or attacking any civil or military installation in Pakistan. Another attribute is the commission of the specified offence by terrorist militants captured in combat or otherwise, or the commission of these offences by the aiders, abettors, conspirators of such captured persons. The judicial scrutiny of Executive reasons and record selecting a case for Court Martial trial is outside the prohibition contained in Article 199(3) of the

Constitution and, therefore, may be judicially reviewed in a challenge filed by an alleged belligerent combatant who is accused of being a terrorist militant within the meaning of Section 2(1)(a)(iii) of the PAA. As such a person falling within the mischief of the said provision has a judicial remedy available to him before the competent constitutional Courts of Pakistan for challenging the executive decision to select him as a belligerent combatant or as an aider, abettor or conspirator of such combatant, for trial by Court Martial.

32. In the case of an unsuccessful challenge to an entrustment of trial of a belligerent combatant to a Court Martial, whether under the second proviso to Section 2(1)(d)(iii) of the PAA or in exercise of the power of transfer conferred on the Federal Government under Section 2(4) of the said Act, the affected person is liable to be tried by a Court Martial. Article 199(3) of the Constitution bars the jurisdiction of the Court in respect of any action taken in relation to a person subject to the PAA. In the light of the aforementioned international human rights law and judicial opinion based thereon the nature of armed conflict in which terrorist militant combatants are engaged in waging war against Pakistan with the Armed Forces and the law enforcement agencies of Pakistan, it is crystal clear that such combatants have nexus with the defence of Pakistan and are fit subjects for inclusion within the ambit of the PAA for the purpose of their detention, trial or punishment in accordance with the laws of Pakistan by Courts Martial constituted under the PAA. Consequently, the proceedings of such Courts Martial cannot be interrupted or challenged. However, if such proceedings have concluded in a conviction and sentence, a challenge to the same is available, consistent with the law laid down in **F.B. Ali v. State** (PLD 1975 SC 506), **Shahida Zahir Abbasi v. President of Pakistan** (PLD 1996 SC 632) and **Mushtaq Ahmed v. Secy.**

Ministry of Defence (PLD 2007 SC 405) on the grounds of proceedings under the PAA being *corum-non-judice*, without jurisdiction or *mala fide*.

33. The mandate given, *inter alia*, to trial under the PAA necessarily raises the question whether a Court Martial trial conforms the judicially recognized principles of fair adjudication by providing requisite due process. The international law aspect of this matter has been discussed above and there can be no dispute that Court Martial procedure under the PAA complies the minimum safeguards expected by the Geneva Conventions, 1949. Be that as it may, the standard and adequacy of due process provided by Courts Martial under the PAA has been considered and approved by this Court as being sufficient and satisfactory in the case of **Shahida Zahir Abbasi** (ibid). The Court dealt with this issue in the light of existing law and quoted at length from the case of **F.B. Ali** (ibid). Reference is made to the following passage:

> "...Whether the trial of a person accused of a criminal offence by a Court Martial could be considered a fair criminal trial, was considered at length by this Court in the case of F.B. Ali v. State (PLD 1975 SC 506). Anwarul Haq, J. (as his lordship then was) while considering the validity of a trial by a Military Tribunal in the context of a fair trial, observed as follows:-
>
> > "It seems to me, therefore, that, as held in Ch. Manzoor Ellahi's case the injunction as embodied in Fundamental Right No.1 of the 1962-Constitution required the Court to ensure that:-
> >
> > (a) the deprivation of life and liberty of a person is under and in accordance with law; and
> > (b) that the law in question is a valid law in term of the Constitution as well as the accepted forms of legal process obtaining in the country.
> >
> > If the law violates accepted legal and judicial norms it would be repugnant to Article 9 of the Constitution even though it may have been enacted by a competent Legislature.
> >
> > Coming now to the substance of the contention raised on behalf of the appellants with reference to Fundamental Right No.1 our attention was drawn by Mr. M. Anwar to the criteria of a fair trial as enumerated on page 197 of the Constitution of the Islamic Republic of Pakistan (1962) by Mr. M. Monir, a former Chief Justice of Pakistan. According to the learned author, in a criminal trial, an accused person has under the general law some important rights.

> They are:--
> (1) the right to know before the trial the charge and the evidence against him;
> (2) the right to cross-examine the prosecution witnesses;
> (3) the right to produce evidence in defence;
> (4) the right to appeal or to apply for revision;
> (5) the right to be represented by counsel;
> (6) the right to have the case decided by the Judge who heard the evidence;
> (7) the right to trial by jury or with the aid of assessors;
> (8) the right to certain presumptions and defences; and
> (9) the right to apply for transfer of the case to another Court.
>
> The right mentioned at No.7 is no longer operative in Pakistan as the requirement of a trial by jury or with the aid of assessors was dispensed with long ago. The other rights enumerated by Mr. Munir are clearly available in a trial by a Court Martial. Although there is no appeal to a higher Court, yet the convicted accused has a right of revision to the Commander-in-Chief of the Pakistan Army or to the Federal Government under section 131 and 167 of the Pakistan Army Act. It is true that a Court Martial is not required to write a detailed judgment, as is commonly done by the ordinary Criminal Courts of the country, yet this is obviously not one of the essentials of a fair trial, it being intended more for the benefit of the Appellate Court rather than for that of the accused.
>
> I may add that, as observed by Halsbury on page 825, the Courts Martial are parts of the ordinary law of the land, and must not be confused with Martial Law Courts which are brought into existence on suspension of the ordinary law. Any criticism or misgivings attaching to the functioning of military Courts under Martial Law cannot be imported into a consideration of the fairness of trial held by Courts Martial established under the relevant Acts for the Army, Navy and Air force. These Courts Martial are intended to regulate the discipline and conduct of the personnel of the respective forces, and of all other persons who may be made subject to these laws in certain circumstances. They are thus established institutions with well-known procedures, which cannot be described as arbitrary, perverse or lacking in fairness in any manner.
>
> I am, therefore, of the view that there is no merit in the contention that a trial by court Martial violates the accepted judicial principle governing a fair trial as obtaining in Pakistan."

From the above-quoted passage, it is quite clear that the rules of procedure applicable for trial of a person in a criminal case before a Military Court do not violate any accepted judicial principle governing trial of an accused person. With the assistance of learned Attorney-General and the learned counsel for the petitioners we have gone through various provisions of the Act governing the procedure of trial before a Military Court and after going through the same, I am of the view that the procedure prescribed for trial before Military Courts is in no way contrary to the concept of a fair trial in a criminal case. I may also add here, that unlike the previous position when no appeal was provided against the conviction and sentence awarded by a Military Court, the Act now provides an appeal against the conviction and sentence awarded by a Military Court before an appellate forum."

Thereafter the Court referred to the Pakistan Army Act Rules to note that alongwith an abstract of evidence made by the Commanding Officer, copy of signed statements given on oath by witnesses necessary to prove the charge, statement made by the accused after reading the abstract of evidence, are to be provided to the accused, who is entitled to be represented by a counsel, to state his defence. Section 133B of the PAA incorporated by amendment made in 1992 provides a substantive right of appeal to a convict against an adverse finding and sentence given by a Court Martial. The said law which has been held to provide sufficient legal safeguards for a fair trial of those citizen who are members of the Armed Forces even in relation to offences falling under the ordinary criminal law of the country, cannot surely be said to be deficient for the trial of offences alleged to have been committed by terrorist militants, who fall in the category of unlawful combatant engaged in armed conflict with the Armed Forces and the law enforcement agencies of Pakistan in their bid to wage war against Pakistan.

34. It has remained a crucial concern of the Court in this case that no civilian citizen of Pakistan should be put to trial before a Court Martial in the purported implementation of the impugned constitutional and statutory amendments, when in fact he does not fall within the category of offenders assigned for such trial in the Army Amendment Act. On that score, both the Executive and Judicial *fora* of the country must remain vigilant to prevent injustice to a person who falls outside the boundaries defined for the offences liable to trial by Court Martial under the Army Amendment Act. That safeguard must be faithfully implemented in Pakistan to ensure that guarantee of rule of law, independent Judiciary and access to justice

to an affected citizen before an independent Judiciary is fully performed.

35. Reverting to the question whether the impugned amendments substantially alter the salient feature of an independent Judiciary, separation of Judiciary and exercise of judicial power from the hands of the Executive, the answer is an unambiguous 'no'. That salient feature is still intact for all citizen of Pakistan except a miniscule class of persons comprising terrorist militants who have forsaken their duty of loyalty to Pakistan and obedience to its Constitution under Article 5 of the Constitution. There is no prohibition in our Constitution against treating such terrorist militants as unlawful combatants or enemy combatants and providing them due process under the law of war. Even otherwise, such terrorist militants have an adequate opportunity to challenge the decision of the executive entrusting their trial to Courts Martial. They may approach the High Courts of the country presided by an independent judiciary to determine such challenge. In accordance with earlier law laid down by this Court, even the finding and sentence given by the appellate Court under the PAA may again be assailed by a convict before the High Courts of the country on the ground that the orders and proceedings under the PAA are *corum-non-judice*, without jurisdiction or *mala fide*. The Constitution permits valid classification of persons forming subject matter of a law. In the light of law declared in **F.B.Ali**'s case (supra), the separate classification of terrorist militants raising arms against or waging war against Pakistan is based on intelligible differentia having nexus to the object of trial of such unlawful and belligerent combatants. Consequently, the separation of the said class of terrorist militants

for trial by Courts Martial assures them the requisite safeguards applicable to their class. As such for the specified persons connected, *inter alia,* with national defence, trial under the PAA enjoys constitutional protection in Article 8(3) of the Constitution. The 21st Amendment has accordingly lawfully extended trial under the PAA to terrorist militants who are unlawful combatants.

36. Also for the additional grounds given above, I respectfully agree with findings and result of the opinion rendered by my learned brother Sh. Azmat Saeed, J.

Sd/-

(Umar Ata Bandial)
Judge

Qazi Faez Isa, J. The petitioners have assailed certain provisions of the Constitution (Eighteenth Amendment) Act, 2010, Act X of 2010 (published in the Gazette of Pakistan, Extraordinary, Part-I, on 20th April 2010) and the Constitution (Nineteenth Amendment) Act, 2010, Act I of 2011 (published in the Gazette of Pakistan, Extraordinary, Part-I, on 4th January 2011), and Constitution (Twenty-first Amendment) Act, 2015, Act I of 2015 (published in the Gazette of Pakistan, Extraordinary, Part-I, on 8th January 2015), (hereinafter referred to as the "**18th Amendment**", "**19th Amendment**" and "**21st Amendment**") which amended the Constitution of the Islamic Republic of Pakistan (hereinafter referred to as "**the Constitution**" or "**the 1973 Constitution**").

Ouster of Jurisdiction - Article 239 (5)

2. The preliminary objection taken by Mr. Salman Aslam Butt, the learned Attorney-General for Pakistan, and Mr. Khalid Anwer, the learned counsel for the Government of Pakistan, is that such a challenge cannot be made let alone heard; and in this regard they relied on clause (5) of Article 239 of the Constitution, reproduced hereunder:

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

It is further contended that clause (6) of Article 239 reinforces the plain language of the said clause (5) as Parliament has absolute power to amend the Constitution as has been made clear by Article 239 (6), reproduced hereunder:

> "(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."

Therefore, the first and foremost question requiring examination is whether the stated restriction contained in the aforesaid clause (5) of Article 239 is applicable and absolute; needless to state, if it is, then the matter would peacefully come to rest under the crushing weight of this juggernaut provision.

Other Types of Ouster of Jurisdiction Articles - 203F and 247 (7)

3. The learned Attorney-General and the learned counsel for the Government contended that clause (5) of Article 239 stipulates that – "*no amendment to the Constitution shall be called in question in any court on any ground whatsoever*." Therefore, it requires examination whether '*any court'* includes the Supreme Court. And, whether the Supreme Court has jurisdiction to examine a constitutional amendment? Let us proceed by examining other Articles of the Constitution which also purport to oust the jurisdiction of the courts. In Article 203G, reproduced hereunder, the bar of jurisdiction specifically includes "*Supreme Court and High Courts*":

> "203G. Save as provided in Article 203F, no court or tribunal, **including the Supreme Court and a High Court**, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court." [emphasis added]

Additionally, in clause (7) of Article 247, reproduced hereunder, both the "*Supreme Court*" and the "*High Court*" are specifically mentioned with regard to exercise of jurisdiction:

> "**Neither the Supreme Court nor a High Court** shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides." [emphasis added]

Ouster of Jurisdiction in Article 236 (2), which is Similar to Article 239 (5), and its Interpretation

4. Let us proceed to examine a provision of the Constitution that uses language similar to the one used in Article 239 (5) and how the Supreme Court has interpreted it. Article 239 (5), which is similarly worded to Article 236 (2), reproduced hereunder:

> "The validity of any Proclamation issued or Order made under this part shall not be called in question in any court."

The abovementioned Proclamation refers to the Proclamation of Emergency issued under Part X of the Constitution, entitled "Emergency Provisions". In the

reported case of Farooq Ahmad Khan Leghari v. Federation of Pakistan (PLD 1999 Supreme Court 57), a seven Member Bench of this Court considered the constitutionality of the Proclamation of Emergency dated 28th May 1998 issued by the then President Muhammad Rafiq Tarar in exercise of powers conferred by Article 232 of the Constitution. Emergency was imposed on the same day, i.e. 28th May 1998, that Pakistan, in response to the Indian testing of its nuclear devices, also carried out nuclear tests. The Proclamation initially suspended all Fundamental Rights, however, the order imposing Emergency was varied on 28th July 1998 and thenceforth only Fundamental Rights prescribed in Articles 10, 15, 16, 17, 18, 19, 23, 24 and 25 were suspended. Ch. Muhammad Farooq, the then Attorney-General, took the objection that the Supreme Court did not have jurisdiction to hear a challenge to the Proclamation. The objection of the Attorney-General recorded in the judgment (at page 68) was:

> "That the above petitions are not only barred by virtue of clause (2) of Article 236 of the Constitution but also on account of the fact that the enforcement of the relevant Fundamental Rights stood suspended and hence this Court has no jurisdiction to press into service clause (3) of Article 184 of the Constitution which relates to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution."

5. The Supreme Court held that, petitions assailing the Proclamation of Emergency were maintainable and that the Supreme Court also had the jurisdiction to examine the continuation of Emergency at any stage. The Supreme Court determined that, "*prima facie there was some material on the basis of which the President could issue the impugned Proclamation of Emergency on account of imminent danger of external aggression. However, the same did not warrant passing of an order under clause (2) of Article 233 of the Constitution suspending the enforcement of the Fundamental Rights*." The reasons for not allowing the suspension of Fundamental Rights were the following (paragraph 48, page 193):

> "(i) That the above view fits in with the above modern jurisprudential theory of proportionality.
>
> (ii) That as a rule of interpretation, the Courts should make efforts to preserve the Fundamental Rights of the citizens while construing the Constitutional provisions. This aspect, I intend to deal with hereinafter while touching upon the aforesaid second question in issue.
>
> (iii) That those who have taken oath to protect the Constitution, particularly, the Judges of the Supreme Court and the High Courts are bound by their oath and duties to act so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects, save from all defects or harm and to stand firm in defence of its provisions against attack of any kind

as held by this Court in the case of Fazlul Quader Chaudhry (supra), in which the view taken is in line with the above Constitutional mandate.

(iv) That even in spite of suspension of the enforcement of certain Fundamental Rights under clause (2) of Article 233 of the Constitution, Article 4 thereof remains fully operative which lays down that "*to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen wherever he may be, and of every other person for the time being within Pakistan.*
In particular—
(a) *no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*
(b) *no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*
(c) *no person shall be compelled to do that which the law does not required him to do*." "

Established Principles of Interpretation

6. It is well settled that whenever there is a particular enactment and a general enactment, which, taken in its most comprehensive sense would overrule the former, the particular enactment would prevail. The Constitution specifically mentions the Supreme Court and ousts its jurisdiction in some Articles, but in other places, it simply mentions 'any court'. Under such circumstances when a clear distinction between terms is being drawn, the general ouster clause ('any court') cannot be construed to include the Supreme Court.

There is another established principle that every part and every word of the Constitution is significant and an interpretation that renders any word or provision meaningless must be avoided; therefore, if we discard the words 'Supreme Court' (mentioned in Article 203G and clause (7) of Article 247) and/or import the same into Article 239 (5), which uses the words 'any court' the stated principle of interpretation stands violated. The Constitution has at places ousted the jurisdiction of 'any court' and in other places excluded the jurisdiction of all courts 'including the Supreme Court' (Article 203G) or specifically restrained 'the Supreme Court' from exercising jurisdiction (clause (7) of Article 247), therefore, we must give effect to this clear intent of the Constitution.

When we examine the Constitution as a whole, to ascertain the correct meaning of Article 239 (5), no doubt is left that it does not oust the jurisdiction of the Supreme Court.

(Reference by the President, PLD 1957 Supreme Court 219, Fazlul Quader Chowdhry v. Muhammad Abdul Haque, PLD 1963 Supreme Court 486, Federation of Pakistan v. Ghulam Mustafa Khar, PLD 1989 Supreme Court 26, and Hakim Khan v. Government of Pakistan, PLD 1992 Supreme Court 595 are only a few

precedents amongst numerous others that recognize the aforestated rules of interpretation)

Conclusion on Jurisdiction

7. The Constitution mentions the Supreme Court by name when the jurisdiction of the Supreme Court is to be ousted, but when it does not mention the Supreme Court, jurisdiction is not ousted. The learned Attorney-General, however, wants to undermine the perspicuous skills of those who drafted the Constitution, but we must not in any manner attribute to the framers of the Constitution lack of clarity or a propensity to obfuscate meaning. Thus, the answer to the first question, whether the term 'any court' used in Article 239 (5) includes the Supreme Court, stands answered in the negative.

Historical Context of the 1973 Constitution

8. The above conclusion is also supported if clauses (5) and (6) of Article 239 are examined in their historical contexts. The freedom and independence movement spearheaded by the All India Muslim League culminated in the establishment of the sovereign state of Pakistan on the 14th day of August 1947. The first constitutional document that emerged was the Objectives Resolution adopted by Parliament on 12th March 1949. This document, with minor variations, has adorned each and every Constitution that was framed: the 1956 Constitution, the 1962 Constitution, the interim 1972 Constitution and finally the 1973 Constitution. The 1956 Constitution lasted all of 2 years and 7 months as it was abrogated by President Iskander Mirza on 7th October 1958. The 1962 Constitution was a one-man document, which departed with its promulgator General Ayub Khan. However, the 1973 Constitution was robust enough to sustain itself. The *raison d'etre* of its endurance may well lie in the fact that it was adopted unanimously by the directly elected representatives of the people in a free and fair election. The 1973 Constitution has grown in stature and has found acceptance in the hearts and minds of the people of Pakistan so much so that even the onslaughts on democracy and the Judiciary by General Zia-ul-Haq (1977-1985) and General Pervez Musharraf (1999-2002) could not dislodge it. The 1973 Constitution has celebrated its 42nd year having successfully seen the back of self-proclaimed saviours. The dictators however left their imprint on the 1973 Constitution.

Insertion of Article 239 (5) & (6) into the Constitution and their Purpose

9. Clauses (5) and (6) of Article 239 were inserted by General Zia-ul-Haq vide President's Order No. 20 of 1985 - Constitution (Second Amendment) Order, 1985 (published in the Gazette of Pakistan, Extraordinary, Part-I, on 17th March 1985) which received protection by Article 270A, introduced by the Constitution (Eighth Amendment) Act, 1985, Act No.XVIII of 1985 (published in the Gazette of Pakistan, Extraordinary, Part-I on 11th November 1985). Parliamentarians were presented with the proverbial Hobson's choice, either accept the General in the presidential chair and bring the derailed democratic carriage back onto the rails or leave it to rust. The lesser of the two evils was chosen; "*and when a man is compelled to choose one of two evils, no one will choose the greater when he might have the less"* (Plato, 'The Republic').

10. Clauses (5) and (6) of Article 239 had no place in the original 1973 Constitution. The device through which these clauses were inserted also proclaimed that the President of Pakistan shall be General Muhammad Zia-ul-Haq for a period of five years; a new clause (7) was added to Article 41 of the Constitution through President's Order 14 of 1985 – Revival of the Constitution of 1973 Order, 1985 (published in the Gazette of Pakistan, Extraordinary, Part-I, on 2nd March 1985), which is reproduced hereunder:

> "(7) Notwithstanding anything contained in this Article or Article 43 or any other Article of the Constitution or any other law, General Muhammad Zia-ul-Haq, in consequence of the result of the referendum held on the nineteenth day of December, 1984, shall become the President of Pakistan on the day of the first meeting of Majlis-e-Shoora (Parliament) in joint sitting summoned after the elections to the Houses of Majlis-e-Shoora (Parliament) and shall hold office for a term of five years from that day, and Article 44 and other provisions of the Constitution shall apply accordingly."

The insertion of clauses (4) and (5) to Article 239 ergo was to sustain General Zia-ul-Haq in the usurped office of the Republic's President. Ironically the provision of the Constitution stipulating that General Muhammad Zia-ul-Haq, *"shall hold the office for a term of five years"*, was derided by his death before the end of his term.

Similar Provisions in the Indian Constitution were Struck Down

11. The wording of clauses (5) and (6) of Article 239 was borrowed from the Indian Constitution (42nd (Amendment) Act of 1976), which amended Article 368 of the Constitution of India. This was done to save the Prime Minister of India, Mrs. Indira Gandhi, from disqualification. The *pari materia* provisions in the Indian Constitution are reproduced herein below:

> "Art. 368. Power of Parliament to amend the Constitution and procedure therefor:
>
> (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, 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.**" [Emphasis added]

Pakistan's military dictator found common ground with the peremptory autocratic tendency from across the border. The Supreme Court of India, in the case of Minerva Mills Ltd. v. Union of India (AIR 1980 Supreme Court 1789) declared the said amendments to the Constitution of India as unconstitutional and void. The Chief Justice of India, Y. V. Chandrachurd held, that:

> "Clause (5) purports to remove all limitations on the amending power while Clause (4) deprives the courts of, their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Art. 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power." (page 1799, paragraph 26)

12. Since considerable time was spent by a number of counsel on the basic structure doctrine, it is appropriate to briefly examine the concept. To clarify, this is not being done to vest the Supreme Court with jurisdiction through this doctrine. It has already been determined that Article 239 (5) does not oust the jurisdiction of the Supreme Court in examining the validity of a constitutional amendment. In dismantling the aforementioned amendments the Supreme Court of India discerned an immutable basic structure in the Indian Constitution. In a series of judgments, starting from Kesavananda v. State of Kerala (AIR 1973 Supreme Court 1461), it has consistently upheld the basic structure doctrine; some of the recent judgments recognizing this basic structure doctrine are I.R. Coelho v. State of Tamil Nadu (AIR 2007 Supreme Court 861), Ashok Kumar Thakur v. Union of India (AIR 2008 SC (Supp) 1) and State of W.B. v. Committee for Protection of Democratic Rights (AIR 2010 Supreme Court 1476).

13. The Supreme Court of Bangladesh in the case of Anwar Hossain v. Bangladesh (1989 BW (Spl) 1) has adhered to the theory of the *"basic structure of the Constitution"*, also calling it *"the basic features"*, *"structural pillars"*, and *"fundamental principles"*. In Anwar Hossain the Supreme Court of Bangladesh held, that:

> "Supremacy of the Constitution as the solemn expression of the will of the people, Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental Rights are basic structures of the Constitution. There is no dispute about their identity. By amending the Constitution the Republic cannot be replaced by Monarchy, Democracy by Oligarchy or the Judiciary cannot be abolished, although there is no express bar to the amending power given in the Constitution. Principle of separation of powers means that the sovereign authority is equally distributed among the three Organs and as such one Organ cannot destroy the others: These are structural pillars of the Constitution and they stand beyond any change by amendatory process. Sometimes it is argued that this doctrine of bar to change of basic structures is based on the fear that unlimited power of amendment may be used in a tyrannical manner so as to damage the basic structures. In view of the fact that "power corrupts and absolute power corrupts absolutely", I think the doctrine of bar to change of basic structure is an effective guarantee against frequent amendments of the Constitution in sectarian or party interest in countries where democracy is not given any chance to develop." (page 156, paragraph 377)

Pakistan: References to Basic/Salient Features in the Constitution

14. The first hint of the Supreme Court of Pakistan identifying some basic features in the Constitution of Pakistan was in the case of Fazlul Quader Chowdhry v. Muhammad Abdul Haque (PLD 1963 Supreme Court 486) wherein the Supreme Court considered the 1962 Constitution and declared that it had some "*basic provisions*" and held that, "*The major duty upon all concerned including the President was to bring these fundamental provisions into operation*" (Cornelius, CJ, page 511 B). Justice Hamoodur Rahman concurred with the judgment of Chief Justice Cornelius and both he and Justice B. Z. Kaikaus also wrote separate supporting opinions.

15. We then come to the case of Miss Asma Jillani v. Government of Punjab (PLD 1972 Supreme Court 139). Justice Hamoodur Rahman, who had by then attained the position of Chief Justice, held that, *"Pakistan's own grund norm is enshrined in its own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March, 1949."* However, the

following year Hamoodur Rahman, CJ, in the case of State v. Zia ur Rehman (PLD 1973 Supreme Court 49) surprisingly interpreted his own judgment in Asma Jillani and stated that he had not said, "*that the Objectives Resolution is the grund norm of Pakistan but that the grund norm is the doctrine of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it"*.

16. In Al-Jehad Trust v. Federation of Pakistan (PLD 1996 Supreme Court 324) the Supreme Court held that, when there was a conflict between two articles of the Constitution effort should be made to reconcile them by reading the Constitution as an organic whole. *"A close scrutiny of the various provisions of the Constitution highlights that it envisages that the independence of judiciary should be secured as provided by the founder fathers of the country by passing Objectives Resolution… The Constitution also envisages separation of judiciary from the executive"* (per Ajmal Mian, J, pages 515-6 LLLL). This judgment also reiterated the principle that if two provisions of the Constitution cannot be reconciled then provisions of the original 1973 Constitution would prevail over those incorporated by a dictator (pages 365-366G).

17. The following year the Supreme Court once again, in Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 Supreme Court 426), recognized the singular position of the Objectives Resolution in the Constitution. Chief Justice Sajjad Ali Shah stated that the Objectives Resolution had, *"remained preamble in all the four Constitutions including the Interim Constitution of 1972 and therefore, it has to be read for the purpose of proper interpretation in order to find out as to what scheme of governance has been contemplated"* (page 458 G). He concluded, "*as long as these 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*" (page 459 H). Justice Saleem Akhtar in a separate judgment categorised the Objectives Resolution and the principles of democracy, equality, freedom, justice and fair play as, "*the guiding principles which were to be moulded in the form of Constitution*" (page 495 O), and that if reconciliation between two provisions of the Constitution was difficult, "*then such interpretation should be adopted which is more in consonance or nearer to the provisions of Constitution guaranteeing fundamental rights, independence of judiciary and democratic principles blended with Islamic provisions*" (page 511 Y). He further held that, if any provision sought to negate the independence of the Judiciary, the higher right which preserved the independence of the Judiciary would prevail over Article 203C which negated the same (paragraph 43, page 511).

18. We next come to the case of Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 Supreme Court 869). The judges of the Supreme Court who heard this case were the remnants of a truncated Court as nearly half of the total number of judges had refused to take the oath to, *"abide by the provisions of the Proclamation of Emergency"* (Oath of Office (Judges) Order 1 of 2000) (published in the Gazette of Pakistan, Extraordinary, Part-I, on 25th January 2000) whereby General Pervez Musharraf installed himself to govern Pakistan. It may be mentioned that every judge before he assumes office is required to take the oath prescribed in the Third Schedule to the Constitution, and therefore, if he were to take a different oath he violates the oath already taken. Nonetheless, those judges who declined to take the oath manufactured by General Musharraf, were unconstitutionally removed from office, including Chief Justice Saeeduzzaman Siddiqui, Justice Nasir Aslam Zahid, Justice Khalil-ur-Rehman Khan, Justice Mamoon Kazi, Justice Wajihuddin Ahmed and Justice Kamal Mansoor Alam. These men sacrificed their careers to speak truth to power. On an earlier occasion, the moral bankruptcy of another General was revealed when Justice Dorab Patel declined to take an illegal oath. A diminished Supreme Court presided over by Justice Irshad Hasan Khan heard Zafar Ali Shah's case and presented General Musharraf with the power to also amend the Constitution whilst placing a limitation, "*that no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of Government blended with Islamic provisions*". Mr. Khalid Anwer categorised this judgment as the "*single most shameful judgment in the history of Pakistan*". He correctly pointed out that the Constitution does not envisage an individual amending the Constitution nor could the Supreme Court bestow upon him such power. The aberration of granting dictators power to amend the Constitution was put to rest by the Supreme Court in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 Supreme Court 879). After specifically referring to the Zafar Ali Shah case a fourteen Member Bench of the Supreme Court unanimously held that the Constitution can only be amended by Parliament in the prescribed manner and, "*by no other means, in no other manner, and by no one else*" (page 1064 FF). It was further clarified that amendments made by General Pervez Musharraf had abrogated and subverted the Constitution and no sanctity can be attached thereto even if the Supreme Court had permitted a usurper to make amendments; "*No sanctity attaches to them* [constitutional amendments] *if they are made after a declaration to that effect is made by the Court while adjudging the validity of such assumption of power. Equally bereft of sanctity remain the amendments of any such authority, which are ratified, affirmed or adopted by the*

Parliament subsequently and deemed to have been made by the competent authority."

19. The judgment in the case of Pakistan Lawyers Forum v. Federation of Pakistan (PLD 2005 Supreme Court 719) was a decision by a five-member Bench of this Court; it was authored by the then Chief Justice Nazim Hussain Siddiqui. The challenge *inter-alia* was against the Legal Frame Work Order, 2002 enacted through the Constitution (Seventeenth Amendment) Act, 2003, by General Pervez Musharraf as Chief of Army Staff / President of Pakistan. Nazim Hussain Siddiqui, CJ, observed (paragraph 56) that, "*the superior Courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution*", but "*such limitations* [to amend the Constitution] *are to be exercised and enforced not by the judiciary, but by the body politic, i.e., the people of Pakistan*." It is not clear what he meant by enforcement through the 'people of Pakistan'. Was a referendum contemplated? Or was enforcement to be through a constituent assembly? However, if by the 'people of Pakistan' he had Parliament in mind then a self-imposed limitation would be entirely meaningless. To confound matters further Nazim Hussain Siddiqui, CJ, stated that the basic structure theory was "*already considered and rejected*" (paragraph 58), but he did not reveal as to who had considered and then rejected it.

Basic / Salient Features Derived from the Preamble

20. From the aforesaid review of the precedents of the Supreme Court it is noticeable that the Constitution is stated to have certain basic or salient features, all of which are derived from the text of the Preamble of the Constitution; reference has also been made therein to the Objectives Resolution which contains similar words. The Preamble has been derived from the Objectives Resolution, but with a very important difference. The opening words of the Objectives Resolution state that, "*Sovereignty over the entire universe belongs to Allah Almighty alone and the* ***authority which He has delegated to the State of Pakistan****, through its people*" whereas the Preamble states that, "*Sovereignty over the entire Universe belongs to Almighty Allah alone, and the* ***authority to be exercised by the people of Pakistan***" [emphasis added]. The substitution of the inanimate 'State' with 'the people' is immensely significant and reveals the nucleus of the Constitution. And 'the people' take precedence over their representatives because what follows (in the Preamble) "*is the will of the people of Pakistan to establish an order – wherein the State shall exercise its powers and authority through the chosen representatives of the people*." The people, each and every member of the nation, effectually enacted the Preamble

and then granted to their chosen representatives, some, and not all of the State's *powers and authority*. The people made it absolutely clear that they did not want their representatives to dilute their fundamental rights. It was categorically stated that the fundamental rights "*shall be guaranteed*." My distinguished colleague Justice Jawwad Khawaja has comprehensively articulated the significance of the Preamble to the Constitution and I am in complete agreement with his opinion.

Which Institution Interprets the Constitution and Whether its Jurisdiction can be Ousted

21. Hamoodur Rahman, J. in Fazlul Qauder Chowdhry (above) stated, "*that it is a cardinal principle that in every system of Government operating under a written Constitution the function of finally determining its meaning must be located in some body or authority and the organ of Government which is normally considered most competent to exercise this function is the Judiciary*". He further stated, "*the consistent rule of construction adopted by all Courts is that provision seeking to oust the jurisdiction of superior Courts are to be construed strictly with a pronounced leaning against ouster*" (page 539 QQ). In Mehmood Khan Achakzai (above) Chief Justice Sajjad Ali Shah held that, "*Article 239 cannot be interpreted so liberally to say that it is open-ended provision without any limits under which any amendment under the sun of whatever nature can be made to provide for any other system of governance, for example, monarchy or secular, which is not contemplated by the Objectives Resolution. Clause (6) of Article 239 provides for removal of doubt that there is no limitation whatsoever on the power of Parliament to amend any provision/provisions of the Constitution. It therefore, follows that Parliament has full freedom to make any amendment in the Constitution as long as salient features and basic characteristics of the Constitution providing for Federalism, Parliamentary Democracy and Islamic provisions are untouched and are allowed to remain intact as they are*" (page 480K).

The Supreme Court also made serious inroads into Article 270A of the Constitution, which had sought to provide complete insulation to the proclamation of the 5th day of July 1977 and all acts of Chief Martial Law Administrator / President (General Muhammad Zia-ul-Haq). Clauses (1) and (2) of Article 270A respectively concluded in the following terms:

> (1) "…notwithstanding any judgment of any court, to have been validly made by competent authority and, notwithstanding anything contained in the Constitution, shall not be called in question in any court on any ground whatsoever."

> (2) "…notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever."

Despite the fact that the aforementioned provisions appear to be all encompassing and the word 'notwithstanding' (non-obstante clause) was used, but still Justice Saleem Akhtar held that the acts and actions sought to be protected by Article 270A could be, "*challenged on grounds of coram non judice, mala fide and lack of jurisdiction*" (page 515 BB). Justice Saleem Akhtar's pronouncement was undeterred by the above quoted provisions and clause (5) of Article 270A of the Constitution, which stated that, "*all orders made, proceedings taken, acts done or purporting to be made, taken or done by any authority or person shall be deemed to have been made, taken or done in good faith and for the purpose intended to be served thereby*". He held that the superior Courts were the defenders, protectors and preservers of the Constitution:

> "The power and jurisdiction of judicial review cannot be controlled and fettered on this basis. The Judges of the superior Courts have taken oath to defend, preserve and protect the Constitution. If any illegal amendment is made or has been made in the Constitution, the Court is competent to examine it and make interpretation to reconcile its provisions in which inferior rights must yield to higher rights. The salary paid to the Judges is not a bounty or favour. It is a Constitutional duty to provide salary and benefits to the Judges by which independence of judiciary is guaranteed. While striking down any illegal and unconstitutional provision or interpreting the Constitution in the manner stated above, the Court defends, protects and preserves the Constitution." (page 517 EE)

22. The view taken by the Supreme Court in Al-Jehad Trust (above) regarding the separation, independence and jurisdiction of the Supreme Court was followed in the case of Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (PLD 1998 Supreme Court 1263). Justice Saeeduzzaman Siddiqui agreed with Chief Justice Ajmal Mian and also wrote his separate reasons. He stated that Parliament under Article 239 of the Constitution does not enjoy *"unlimited and unbridled"* power to amend the Constitution (page 1359 W). Justice Raja Afrasiab Khan was also of the opinion that the superior Courts were competent to look into the validity of an amendment made in the Constitution and that, "*this authority of the Judiciary cannot be abridged/ousted because it is its inherent right/power to do so*" (page 1405 HH and II).

The Power of Parliament and that of the Supreme Court - Conclusion

23. Therefore, it can be stated unequivocally that Parliament does not have unbridled or unfettered power to amend the Constitution, and if an amendment is made the Supreme Court has the jurisdiction to examine it and, if necessary, strike down the offending whole or part thereof. The Supreme Court exercises this power not because it seeks to undermine Parliament or travel beyond its domain, but because the Constitution itself has granted it such power. The Supreme Court's power of judicial review cannot be negated in any manner whatsoever because it is provided in the original 1973 Constitution and in its Preamble.

Trichotomy of Powers

24. The Constitution is both premised and structured on a trichotomy, i.e. the Legislature, the Executive and the Judiciary. The Judicature is attended to in Part VII of the Constitution. In the case of Sindh High Court Bar Association (above) the Supreme Court concluded that the jurisprudence of Pakistan has recognized, "*the principle of trichotomy of powers and the power of judicial review vested in the superior Courts*" (paragraph 167, page 1174). The Indian Supreme Court's judgment in the Minerva case (above) held, "*that the judiciary was the interpreter of the Constitution and was assigned the delicate task of determining the extent of the power conferred on each branch of the government, its limits and whether any action of that branch transgressed such limits*" (paragraph 167 NNN, page 1174) and this judgment was cited with approval by the Supreme Court of Pakistan. Ch. Ijaz Ahmed, J. while concurring with the judgment authored by the Chief Justice gave additional reasons wherein he opined that the, "*Constitution may be amended by Parliament vide Article 238 whereas Article 239 prescribes procedure for amending the Constitution. Even the Parliament cannot change the salient features of the Constitution to destroy one organ of the judiciary*" on the basis of Articles 238 or 239 of the Constitution (paragraph 22, age 1231 PPPP).

The case of Mobashir Hassan v. Federation of Pakistan (PLD 2010 Supreme Court 265) was decided by a Full Court comprising of the Chief Justice and sixteen Judges, wherein it was reiterated that the Constitution envisaged a trichotomy of power amongst the three organs of the State, namely the Legislature, the Executive and the Judiciary and none of the organs of the State could encroach upon the field of the other (paragraph 34, page 347).

Jurisdiction of the Supreme Court and How it is to be Exercised

25. The 1973 Constitution has bestowed the Supreme Court with jurisdiction. The 'appellate jurisdiction' of the Supreme Court is specifically conferred by Article

185. The Supreme Court also has 'advisory jurisdiction' pursuant to Article 186. Additionally, the Supreme Court has 'original jurisdiction' under clause (1) of Article 184 of the Constitution in respect of disputes between two governments. In matters of public importance that involve the enforcement of any of the Fundamental Rights the Supreme Court has been granted 'original jurisdiction' by clause (3) of Article 184, and significantly, the jurisdiction of the Supreme Court to review an amendment made to the Constitution has not been excluded either in this clause or in any other clause or article of Part VII of the Constitution titled 'The Judicature'. We have already scrutinized and determined that the jurisdiction of the Supreme Court in respect of a constitutional amendment is not ousted under clause (5) of Article 239, and the jurisdiction of the Supreme Court cannot be curtailed by insinuating such a restriction, because the Constitution itself does not permit it. It may further be added, that even if an attempt to curtail the jurisdiction of the Supreme Court was to be made it would not be sustainable as the original 1973 Constitution does not envisage it.

Oath Taken by Judges

26. The abovementioned interpretation is reinforced when we examine the wording of the oath that the judges of the superior Courts upon entering office have to take. They solemnly swear to, "*preserve, protect and defend the Constitution*." The same words also appear in the other 'Oaths of Office' (Third Schedule of the Constitution). The inclusion of the word '*preserve'* is not without significance or importance; 'preserve' means to safeguard and to prevent from injury or destruction.

> "The word 'preserve' may mean anything from maintaining something in its status quo to preventing the total destruction of something. Doe v. Scott, D.C.III.321 F. Supp. 1385,1389."
>
> "To 'preserve' something is to keep it in existence or to keep or save it from injury or destruction, to protect it, to save it, or to maintain or keep it up. People v. Belous, 80 Cal.Rptr. 354,358,458 P.2d 133,135, 100 N.H. 513."
>
> ('Words and Phrases', St. Paul, Minn: West Publishing Co., Permanent Edition, 1971, Volume 33A page 47-48)

Supreme Court's Role as Guardian of the Constitution and the Peoples' Right

27. The Supreme Court has been assigned the momentous responsibility to act as the guardian of the Constitution, to safeguard the Constitution and the peoples' Fundamental Rights. The Constitution states that, "*to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen*"; the use of the word *inalienable* in Article 4 is of immense significance. Parliament

through a constitutional amendment cannot take away 'inalienable rights', because if this were permitted, then the word 'inalienable' would be left bereft of meaning.

> "**Inalienable Right**: A right that cannot be transferred or surrendered; esp., a natural right such as the right to own property. – Also termed *inherent right*."
>
> ('Black's Law Dictionary' St. Paul, Minn: Thomson Reuters, Tenth Edition, 2014, page 1518)
>
> "'**Inalienable**', means incapable of being surrendered or transferred, at least without one's consent. Morrison v. State, Mo.App., 252 S.W.2d 97,101."
>
> ('Words and Phrases' St. Paul, Minn: West Publishing Co., Permanent Edition, 1971, Volume 20A, page 45)'

The majestic crown of the Constitution, its Preamble, refers to Fundamental Rights which "*shall be guaranteed*", i.e. it presupposes their subsistence and lists some of them. The significance and importance of Fundamental Rights contained in Chapter 1 of Part II is provided by Article 8 of the Constitution, which states that no law shall be made, *"which takes away or abridges*" the same. And, as we have already seen, even a Proclamation of Emergency and the temporary suspension of certain Fundamental Rights is open to judicial review (Farooq Ahmad Khan Leghari, above). To clarify the point further, let us consider some hypotheses: if an amendment to the Constitution is made that introduces slavery (forbidden by Article 11 of the Constitution), or restricts professing, practicing or propagating one's faith (in violation of Article 20), or depriving girls from seeking education (in contravention of Article 25 and 25A), the Supreme Court, as the guardian of the Constitution and the peoples' rights, would prevent this because it has been mandated by the Constitution.

Conclusion

28. We can therefore conclude that the Constitution does not place any limitation on the Supreme Court to examine the validity of a constitutional amendment made under Article 239. But such an exercise must not be undertaken lightly. Great care and caution should be taken because any amendment under challenge would have been made by at least two-thirds of the peoples' chosen representatives. However, it needs to be remembered that parliamentarians are elected for a prescribed period, i.e. every Parliament by its very nature is transient, whereas the Constitution abides and is required to be preserved, protected and defended for all times. Certain features mentioned in the Preamble of the Constitution cannot be abrogated. Judges must fulfill their Oath to "*preserve, protect and defend the Constitution*" from injury or destruction and to ensure the survival of the guaranteed Fundamental Rights of the

people because the Constitution itself expects no less. This does not mean that the Constitution cannot be amended. The Constitution neither is a static document nor the words therein etched in stone, immutable.

18th Amendment

Non-Muslim (Minorities) Representation in Parliament and Provincial Assemblies

29. In respect of the manner in which non-Muslims (minorities) are elected I concur with the judgment authored by Justice Jawwad Khawaja who has precisely analysed the matter in terms of the Constitution.

Validity of Article 63A to the Extent it Disqualifies Members who Vote Contrary to the Dictate of their Party

30. Mr. Abid Zuberi, representing the Sindh High Court Bar Association canvassed an interesting proposition. He referred to the methodology of making amendments to the Constitution contained in clauses (1) to (3) of Article 239, which stipulate that a Bill to amend the Constitution must pass by the votes of "*not less than two-thirds of the total membership of the House*". The ability however to vote independently has been compromised as members are now required to vote (pursuant to the amendment made in Article 63A), if they belong to a political party, as per the dictates of their Party Head. He proceeded to state that a handful of Party Heads are now in actual control of both the legislative and constituent power of the Houses as opposed to the members, the chosen representatives of the people. To appreciate the learned counsel's submission, the relevant portion of Article 63A of the Constitution is reproduced hereunder:

> "**63A. Disqualification on grounds of defection, etc.**
>
> (l) If a member of a Parliamentary Party composed of a single political party in a House-
>
> (a) resigns from membership of his political party or joins another Parliamentary Party; or
>
> (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to-
>
> (i) election of the Prime Minister or the Chief Minister; or
>
> (ii) a vote of confidence or a vote of no-confidence; or
>
> (iii) a Money Bill or **a Constitution (Amendment) Bill**; [emphasis added]
>
> he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to

> the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:
>
> Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.
>
> Explanation.- "Party Head" means any person, by whatever name called, declared as such by the Party.
>
> (2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.
>
> (3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.
>
> (4) Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.
>
> (5) Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.
>
> (6) Nothing contained in this Article shall apply to the Chairman or Speaker of a House.
>
> (7) For the purpose of this Article,-
>
> (a) "House" means the National Assembly or the Senate, in relation to the Federation; and a Provincial Assembly in relation to the Province, as the case may be;
>
> (b) "Presiding Officer" means the Speaker of the National Assembly, the Chairman of the Senate or the Speaker of the Provincial Assembly, as the case may be."

31. Article 63 of the original 1973 Constitution provided for the "*Disqualification for membership of Parliament*", and there was no provision in respect of the defection of a member from his/her political party. The Constitution (Fourteenth Amendment) Act, 1997 (published in Gazette of Pakistan, Extraordinary, Part-I, 4th April, 1997) ("**the 14th Amendment**") introduced Article 63A - "*Disqualification on ground of defection*" from a political party. The preamble of the 14th Amendment stated that the Constitution was being amended to, "*prevent instability in relation to the formation of functioning of Government*". The anxiety was understandable because a member who had been elected as a candidate of a political party would defect to another, and not necessarily for altruistic reasons. Justice Saiduzzman Siddiqui recalled the history of the anti-defection laws in

Wukala Mahaz (above, pages 1320-1328). The Supreme Court in the same case also considered whether Article 63A was *ultra vires* the Constitution and, by a majority of 6 to 1, concluded that it was not.

Justiciability of Disqualification Under Article 63A

32. The Supreme Court in Wukala Mahaz held that, the 14th amendment was *intra vires* the Constitution, however, it rejected the non-obstante clause pertaining to the ouster of jurisdiction of the superior courts as provided in clause (6) of Article 63A (as it then stood), reproduced hereunder:

> "(6) Notwithstanding anything contained in the Constitution, no Court including the Supreme Court and a High Court shall entertain any legal proceedings exercise any jurisdiction or, make any order in relation to the action under this Article."

Chief Justice Ajmal Mian held that, "*...it has been consistently held by this Court that the question, as to whether a superior Court has jurisdiction in a particular matter or not, is to be decided by the Court itself. No provision of whatsoever amplitude can take away the jurisdiction of the superior Courts... Furthermore, the simpliciter factum that a particular provision of the Constitution contains a non-obstante clause will not itself be sufficient to deny the jurisdiction of the superior Courts if the impugned action/order is without jurisdiction, coram non judice or mala fide*" (page 1315 L).

33. Wukala Mahaz was concerned with the scope and interpretation of the phrase, "*votes contrary to any direction issued by the Parliamentary Party to which he belongs*" (Article 63A (1) (b)). The said phrase however, was not examined to consider whether it also included a direction in respect of a constitutional amendment even though the words *"any direction"* may seem to suggest such inclusion. Article 63A, as it presently stands, has limited the scope of the direction to specific matters mentioned in sub-paragraphs (i) to (iii) of paragraph (b) of clause (1) of Article 63A. The directions by parliamentary leaders with regard to the election of Prime Minister or Chief Minister, vote of confidence or no confidence or a Money Bill appear to be reasonable and may also be necessary for the maintenance of party discipline, stability and the smooth functioning of democracy and Parliament.

The only point of contention is with regard to the words - "*or a Constitution (Amendment) Bill*", added to the sub-paragraph (iii) of paragraph (b) of clause (1) of Article 63A. It is noteworthy that Article 63A directs only the voting behavior of members. It does not infringe upon their right to debate or raise a point of order in

the House. Moreover, voting against the party position does not automatically deseat a member. In case of a genuine apprehension or for legal reason or on moral grounds a member could still exercise his/her independent discretion on how to vote, even if his/her political party or its Party Head is not pleased.

34. Clause (6) of Article 63A (quoted above), has been deleted and the present Article 63A has a safeguard mechanism before disqualifying a member. Firstly, the Party Head has to provide an opportunity to show cause why a declaration that he/she has defected from the party may not be made. Secondly, the declaration is sent to the Presiding Officer of the concerned House and copied to the Election Commission. Thirdly, the Election Commission is required to decide it. Fourthly, any party aggrieved by the decision of the Election Commission can file an appeal in the Supreme Court. The decision of the Party Head therefore is justiciable before two forums. There are thus ample safeguards against an apprehension of a vindictive or unreasonable Party Head. Therefore, the said provision cannot be categorized as undermining any of the "*principles of democracy*" mentioned in the Preamble to the Constitution or any of the stated Fundamental Rights of the chosen representatives of the people.

35. Mr. Abid Zuberi also raised another issue. Before the 21st Amendment Bill was presented in Parliament an all parties conference was held on the same subject and it was this conference, and not Parliament, which decided the matter. To support his statement he referred to the fourth recital of the 21st Amendment Act which commences by stating: *"AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in the* ***all parties conference****..."* [emphasis added]. He was also correct in stating that the chosen representatives of the people, sit in the National Assembly, Senate or the Provincial Assemblies, of which a Party Head may not even be a member.

36. Parliamentary democracy flourishes when discussions take place in the forums of the chosen representatives of the people. There are a number of political parties that have no representation in any House, or a negligible one, yet they may be able to participate in and even dominate such conferences; the national discourse should be set by political parties who have the people's mandate and not diverted or determined by those who have been rejected by the people in elections. The people are best served when the National Assembly, the Senate and the Provincial Assemblies are fully functional, debating in the full view of the people, and only

after due deliberation laws and constitutional amendments are made. Parliamentary debates also mould and help to develop a national consensus on important matters. In such an environment the people become stakeholders and develop a keen sense of participation in the affairs of the State. They are galvanized and stand firm with their chosen representatives whenever there is a threat to derail democracy. In such an environment those who audaciously use the seal of the Prophet (Peace and Blessing be Upon Him) or his title or those of the Rightly Guided Caliphs, and demand allegiance on the strength of a barrel of gun, stand exposed for the petty and mean men they truly are. The antidote for non-elected terrorist organizations commanding allegiance by fear is not an all parties conference, hurriedly convened and equally hurriedly dispersed, but rather an undiluted and flourishing parliamentary democracy working through the peoples' chosen representatives in full public view.

Manner of Selecting and Appointing Judges – Article 175A

37. At the time when some of these petitions were filed this matter had attained considerable interest, however, the subsequent amendments made to Article 175A by the 19th Amendment, appears to have addressed the apprehensions that were earlier expressed; confirmed by the fact that none of the petitioners could seriously point out that Article 175A, as it presently stands, in any manner violates the independence of judiciary, the preamble to the Constitution or any other provision of the Constitution. Therefore, there is no need to examine the matter.

38. I may, however, make an observation with regard to the working of the Parliamentary Committee ("**the Committee**"), referred to in clauses (8) to (17) of Article 175A. When the Judicial Commission of Pakistan ("**the Commission**") nominates a person for appointment as a Judge in the Supreme Court, a High Court or the Federal Shariat Court it sends his/her nomination for consideration to the Committee. The Committee then proceeds pursuant to clauses (12) and (13) of Article 175A, reproduced hereunder:

> "(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:
>
> Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:
>
> Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

> Provided further that if a nomination is not confirmed, the Commission shall send another nomination.
>
> (13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment."

39. It is observed from the above provisions that the Committee can:

(a) confirm the nominee sent by the Commission within 14 days;

(b) not confirm the nominee sent by the Commission within 14 days whereupon the nominee shall be deemed to have been confirmed; or

(c) not confirm the nominee for reasons that are recorded and forwarded to the Commission through the Prime Minister.

As regards the nomination mentioned in (a) and (b) above the matter is clear. However, as regard (c) it is somewhat ambiguous. The ambiguity arises because it is not stated as to what then becomes of the nomination sent by the Commission. Does it stand rejected? The first proviso to clause (12) requires the Committee to record reasons if it is not confirming the nomination and such reasons are sent to the Commission. What I understand is that the Committee provides its input. It may have knowledge or information about the non-suitability of a particular nominee which it shares with the Commission, otherwise there would be no purpose for sending its 'reasons' to the Commission. The Constitution mandates that the Committee's "decision with reasons" be sent to the Commission, which leads me to understand that the same is for the reconsideration by the Commission. The third proviso to clause (12) of Article 175A requires the Commission to send another nomination in case the nomination earlier sent has not been confirmed. The matter thus comes to rest with the Commission and not the Committee.

40. The aforesaid interpretation does not in any manner undermine the Committee's importance. It has an important role in examining the suitability of nominees. The Committee's members who are the chosen representatives of the people may have knowledge or information about a nominee's character or conduct, which would make him/her unsuitable to hold judicial offices. And when the Commission is made aware of the same, it would surely withdraw its nomination. Neither does the Constitution give nor is there any reason to provide the Committee with veto powers. If there is a valid objection to the nominee of the Commission, the Committee will give its reasons and the Commission upon receipt thereof reconsiders the nominee's suitability to hold judicial office.

21st Amendment:

Addition of Proviso, its Explanation & Laws added to the First Schedule of the Constitution

41. The 21st Amendment added a proviso and an Explanation to clause (3) of Article 175 of the Constitution. It will be appropriate to reproduce Article 175 as it existed prior to the amendment and the additions made thereto pursuant to the 21st Amendment:

> **Article 175 of the Constitution Prior to the 21st Amendment:**
>
> "**175.** (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.
>
> *Explanation*.— Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court.
>
> (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.
>
> (3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day."
>
> **Changes inserted in Clause (3) of Article 175 pursuant to the 21st Amendment:**
>
> "Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.
>
> Explanation:- In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

42. Article 175 of the Constitution has three components. Firstly, it provides for a system of law courts; secondly, it attends to the jurisdiction of such courts; thirdly, it mandates that the exercise of judicial power by the Executive shall stop by the stipulated date, and that judicial power henceforth shall be exclusively exercised by the Judiciary.

The 21st Amendment substituted the full-stop with a colon after clause (3) of Article 175 and added a proviso (hereinafter "**the Proviso**") which requires interpretation. What also needs to be considered is whether, with the addition of the Proviso, a new or parallel system of courts can be established for the trial of civilians? The Proviso states that the provisions of "this Article" will have no application to 'trials' under certain laws that have been added to the First Schedule of the Constitution through the Proviso. Through such a mechanism, persons who are not members of the Armed Forces of Pakistan can be tried under the Army Act, the

Air Force Act or the Navy Ordinance ("**the Laws of the Armed Forces**"), which are comprehensive laws governing the Armed Forces, including trials by summary, district, field general and general courts-martial. There is also another aspect to consider, 'trials' take place in 'courts', however, has any court been created for the purpose of trying civilians by the military either in the Constitution or under any legislation?

43. The learned Attorney-General submitted that a regime of military-courts already exist under the Laws of the Armed Forces, therefore, there is no need to re-establish them under the Constitution. Moreover, the same result has been achieved by inserting the Laws of the Armed Forces in the Constitution's First Schedule, which through the device of clause (3) of Article 8, *"are exempted from the operation of Article 8 (1) and (2)"* that render all laws inconsistent or in derogation of Fundamental Rights to be void. With regards to the constitutional mandate, which states the Judiciary be separated from the Executive, the same has been overcome by adding the Proviso to clause (3) of Article 175 of the Constitution.

44. Previously when military-courts were established to try civilians it was categorically stated. Article 212A was inserted into the Constitution which stipulated:

> **"212A. Establishment of Military Courts or Tribunals.—**
>
> (1) Notwithstanding anything hereinbefore contained, the Chief Martial Law Administrator may, by a Martial Law Order, provide for the establishment of one or more Military Courts or Tribunals for the trial of offences punishable under the Martial Law Regulations or Martial Law Orders or any other law, including a special law, for the time being in force specified in the said Martial Law Order and for the transfer of cases to such Courts or Tribunals.
>
> (2) The jurisdiction and powers of a Military Court or Tribunal shall be such as may be specified in a Martial Law Order issued by the Chief Martial Law Administrator.
>
> (3) Notwithstanding anything hereinbefore contained, where any Military Court or Tribunal is established, no other Court, including a High Court, shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the Military Court or Tribunal extends and of which cognizance has been taken by, or which has been transferred to, the Military Court or Tribunal and all proceedings in respect of any such matter which may be pending before such other Court, other than an appeal pending before the Supreme Court, shall abate."

Article 212A came into *"force at once"* and was *"deemed to have taken effect on the fifth day of July 1977"* (sub-section (2) of section 1 of the Constitution (Second Amendment) Order, 1979 published in the Gazette of Pakistan, Extraordinary, Part-I, on 18th October 1979) ("**the 2nd Amendment Order**"). The military courts lasted for a period of seven years, five months and twenty-five days and were abolished by the 'Proclamation of Withdrawal of Martial Law' (published in the Gazette of Pakistan, Extraordinary, Part-I, on 30th December 1985).

Additionally, when 'special courts' were made impervious to the ordinary appellate procedure and the jurisdiction of the ordinary courts was excluded, it was done by amending the Constitution and the amendment explicitly stated this. The 'Constitution (Twelfth Amendment) Act, 1991 (published in the Gazette of Pakistan, Extraordinary, Part-I, 28th July 1991) ("**the 12th Amendment**") added Article 212B to the Constitution. Clauses (1) and (8) of Article 212B, which are relevant for our purposes, are reproduced hereunder:

> "**212B. Establishment of Special Courts for trial of heinous offences.—**
>
> (1) In order to ensure speedy trial of cases of persons accused of such of the heinous offences specified by law as are referred to them by the Federal Government, or an authority or person authorized by it, in view of their being gruesome, brutal and sensational in character or shocking to public morality, the Federal Government may by law constitute as many Special Courts as it may consider necessary."
>
> "(8) Notwithstanding anything contained in the Constitution, no Court shall exercise any jurisdiction whatsoever in relation to any proceedings pending before, or order or sentence passed by a Special Court or a Supreme Appellate Court constituted under a law referred to in clause (1), except as provided in such law."

However, the 21st Amendment does not establish military courts for the trial of civilians; instead, the definition clauses in the Laws of the Armed Forces has been changed to include particular type of civilians accused of certain kinds of terrorist acts. The 21st Amendment does not tread the time-tested methodology of the Constitution 2nd Amendment Order that had established military-courts and of the 12th Amendment that had established special courts. Instead it sets out to break new ground.

45. The 21st Amendment substitutes the full stop at the end of clause (3) of Article 175 with a colon and thereafter inserts the Proviso. Clause (3) of Article 175 had set out a clear goal of achieving a progressive separation of the Executive from

the Judiciary, which initially was to be done within three years, but, such period was extended to fourteen years' from the 'commencing date', i.e. 14th August 1973 (clause (2) of Article 265). The fourteen years milestone was reached on 14th August 1987, on which date the Executive and the Judiciary stood separated, irrevocably and absolutely. The Proviso seeks to undo what has already been attained, i.e. the separation of the Judiciary from the Executive, and as it is not conceivable to force a flower back into a bud it is not possible to yoke or agglutinate the Executive with the Judiciary.

46. The Proviso, without stating as much, presumes that the separation of the Executive from the Judiciary has as yet not been effected. It then seeks to carve out an exception. The premise on which the Proviso is built does not exist like the idiomatic castles in the sky; therefore, the purported exception is utterly meaningless. Upon a specific query regarding the Proviso, the learned counsel for the Government of Pakistan stated that it referred to 'this Article', i.e. the entire Article 175, and not just to its clause (3), to which it was appended. He further stated that the words contained therein should be given their full effect and it was immaterial whether it starts with the word 'Provided' or that it is referred to as 'this proviso' in the 'Explanation'. However, the learned counsel did not support such a novel method of interpretation by reference to any legal dictionary, book of legal interpretation or even a single judgment. Be that as it may, the Proviso and the manner in which the learned counsel desired to interpret it has been considered.

47. Provisos have been defined as, *"A clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent"* (Black's Law Dictionary, St. Paul, Minnesota: West Publishing Co., Revised 4th Edition, 1968). A proviso therefore excepts, qualifies or restrains and, *"as such has no existence apart from the provision which it is designed to limit or to qualify. It should also be constructed in harmony with the rest of the statute…a proviso subsequently following, should be construed strictly"* (Earl Crawford's 'The Construction of Statutes' St. Louis, Missouri: Thomas Law Book Company, 1940, page 605). *"The proviso cannot be interpreted in a manner which would defeat the main provision, i.e., to exclude, by implication, what the enactment expressively says would be covered by the main provisions…To treat the proviso as if it were an independent enacting clause instead of being dependent on the main enactment is to sin against the fundamental rule of construction…Provisos and sub-clauses should be governed by the operating portion of the section…A proviso should not by mere*

implication withdraw any part of what the main provision has given" (N. S Bindra's 'The Interpretation of Statutes' Allahabad: Law Book Company, 6th Edition, 1975, pages 69-70). *"...A proviso cannot be constructed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect." "In West Derby Union v. Metropolitan Life Assurance Co. Lord Watson said: 'I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and objects of provisos, and the manner in which they find their way into Acts of Parliament, I think your lordships will be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute… ." "In R. v. Dibdin Moulton L.J. said: 'the fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso"* ('Craies on Statute Law' London: Sweet and Maxwell, 7th edition, 1971, page 217).

48. Legal precedents also do not support the learned counsel's contentions regarding the Proviso. It was held in Dunn v. Bryan (77 Utah 604) that, *"Since the office of the proviso is not to repeal the main provisions of the act but to limit their application, no proviso should be so construed as to destroy those provisions."* Similarly, in Keshav Lal v. Commissioner of Income-tax (AIR 1957 Bom 20) it was determined that, *"... it is perfectly true that before a proviso can have any application the section itself must apply."* In Commissioner of Income Tax v. Nasir Ali (1999 SCMR 563) the Supreme Court held, that, *"The proviso only carves out an exception which, but for the proviso, would fall within the language and meaning of the enacting part. A proviso, therefore, has to be interpreted strictly, and where the language of main enacting part is clear and unambiguous, the proviso cannot by implication exclude from its purview what clearly falls within the express terms of the main enacting part."* In Enmay Zed Publications (Pvt.) Limited v. Sindh Labour Appellate Tribunal (2001 SC PLC (CS) 368), the Supreme Court stated that, *"According to the well-established principles of interpretation of statutes, and in particular proviso attached to the main section is that the same operates as an exception and cannot render redundant or ineffective the substantial provisions of the main section."*

Can There be a Parallel System of 'Courts' to Conduct Criminal Trials?

49. Even though it is clear that the purported object of subjecting civilians who have allegedly committed terrorist acts to trials under the Laws of the Armed Forces has not been achieved by the Proviso and/or by the insertion of the said laws in the First Schedule, let us still consider whether certain kinds of civilians accused of certain terrorist acts can be tried by a parallel system of courts. These 'courts' have not been established by amending the Constitution, but by subterfuge. A parallel court system is not envisaged by Article 175. In Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445), the Supreme Court held, *"That the words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the subordinate Courts referred to in Article 203 thereof."* It was further held, "*...that the constitutional framework relating to judiciary does not admit/permit the establishment of a parallel system of the Courts or Tribunals, which are not under the judicial review and administrative control and supervision of the High Court. It may be pointed out that where the Constitution makers wanted to provide judicial forums other than what is envisaged by Articles 175, 202 and 203, they have expressly provided for the same in the Constitution"* such as Administrative Courts and Tribunals established under Article 212 of the Constitution or the Federal Shariat Court established under Article 203C of the Constitution.

50. The learned Attorney-General sought to rescue the 21st Amendment by alternatively contending that under Article 245 of the Constitution the Armed Forces are required to combat a *"threat of war"* and to *"act in aid of civil power"* whenever called upon to do so by the Federal Government, and that clause (3) of Article 245 of the Constitution excluded the jurisdiction of the High Courts under Article 199 of the Constitution, *"in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power"*. The jurisdiction of the High Courts was also excluded under clause (3) of Article 199 of the Constitution with regard to any action taken in relation to a member of the Armed Forces "*or a person subject to such law*".

He next stated that Parliament could establish military-courts as entry No.1 of the Federal Legislative List (Part-I of the Fourth Schedule) included the, *"security of Pakistan or any part thereof"* and entry No.59 thereof widened the scope of the power of Parliament to legislate in respect of, *"Matters incidental or ancillary to any matter enumerated in this Part"*.

51. The contentions put forward by the learned Attorney-General are identical to those of a predecessor of his, which the Supreme Court unequivocally rejected, in the case of Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504). The Bench hearing the said case comprised of nine judges of this Court and the judgment of the Court was authored by Chief Justice Ajmal Mian. Five constitutional petitions had been filed under Article 184 (3) of the Constitution challenging the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 that permitted the trial of civilians by military-courts for criminal offences mentioned in section 6 and the Schedule to the said Ordinance. The Supreme Court concluded that the establishment of military-courts for trial of civilians charged with the offences mentioned in section 6 and the Schedule to the said Ordinance was unconstitutional, without lawful authority and of no legal effect; consequently, the decisions of the military-courts were set aside and the cases transferred to the Anti-Terrorist Courts already in existence under the Anti-Terrorism Act.

52. It was held in Liaquat Hussain that, *"It may again be pointed out that by virtue of clause (1) of Article 245 of the Constitution quoted hereinabove in para. 11, the Armed Forces are mandated, subject to law, to act in aid of civil power when called upon to do so by the Federal Government. The constructions placed on the above important expressions, namely, 'subject to law' and 'act in aid of civil power' have been very ably interpreted by the learned Judges of the Full Benches of the Sindh and Lahore High Courts in the case of Niaz Ahmed Khan (supra) and Darvesh. M. Arbey (supra), respectively"* (page 588). Chief Justice Ajmal Mian writing for the court held, that:

> "(i) That the scope and purpose of Article 245 is restricted, namely, it is called in aid of civil power subject to law and its scope may further be limited or controlled by law but cannot be increased by any subsidiary law beyond the purview of Article 245;
>
> (ii) That the words "act in aid" have their own connotation, namely, to come to help or assistance of the civil power for maintaining law and order and security;
>
> (iii) That the words "act in aid" employed in clause (1) of Article 245 dispel all doubts about the scope of the above Constitutional provision inasmuch as it presupposes that the civil power is still there while the Armed Forces act in aid of civil power;
>
> (iv) That in case of invocation of Article 245 of the Constitution the civil power is neither supplanted nor effaced out but it is preserved and invigorated through the instrumentality of the Armed Forces;
>
> (v) That since the scope and sphere of action of Army under Article 245 is strictly limited to aiding a civil power, it disqualifies the Army to

act in supersession of the Civil Courts and even an Act of Parliament cannot enable them to perform such judicial functions;

(vi) That the language employed in Article 190 that "all Executive and Judicial Authorities throughout Pakistan shall act in aid of the Supreme Court" reinforces the conclusion that the civil power is neither to be supplanted nor to be effaced out;

(vii) That the use of Armed Forces in aid of civil power in case of failure of the machinery of civil power may be needed by the Civil Courts themselves for the purpose of performing their own functions;

(viii) That the quantum of aid to be given and the manner in which this assistance is to be rendered by the Armed Forces as a matter of Constitutional duty depends upon the nature of the direction issued by the Federal Government in this behalf and such direction should also to be within the ambit of the law and the Constitution;

(ix) That to enable the Armed Forces to perform their aforesaid limited function/duty, they must of necessity be clothed with Police Powers and to constitute valid exercise of such power, it must neither be arbitrary nor excessive as it is subject to law;

(x) That the argument that the Military Tribunal will ensure prompt punishment as an example for others overlooks the disadvantages of military trial and underestimates the importance of a trial by an ordinary Civil Court;

(xi) That Article 245 of the Constitution cannot be invoked by a Political Government to rule through the Armed Forces so as to clothe them with such powers and jurisdiction which purports to replace the civil powers; and

(xii) That the language employed in Article 245 of the present Constitution as compared to the language, which was used in the corresponding Articles of the late Constitutions, namely, Article 199 of 1956 Constitution, Article 223-A of 1962 Constitution and Article 278 of the Interim Constitution, 1972, clearly indicates that the present Constitution does not envisage the imposition of Martial Law." (pages 581-582)

53. The learned Attorney-General's contention regarding the Fourth Schedule and the entries therein was also repudiated. The Supreme Court held that, "*neither Article 245 of the Constitution nor Entry No. 1 of the Federal Legislative List read with Entry No.59 empowers the Legislature to legislate a statute which may establish or convene Military Courts in substitution of the ordinary Criminal and Civil Courts*" (page 632 LL). The decisions in the cases of Government of Baluchistan v. Azizullah Memon (PLD 1993 SC 341) and Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) were also referred and it was, *"emphasized that separation and independence of judiciary are the hallmark of the present Constitution"* (page 612

V). There is no reason to take a view different from the one earlier taken by the Supreme Court in Liaquat Hussain's case.

In Accountant-General v. Ahmed Ali U. Qureshi (PLD 2008 Supreme Court 522) the Supreme Court reiterated, "the concept of independence of judiciary is complete separation from executive authorities of the State" (page 541). The Constitution contemplates, "*not a batch of unconnected courts but a judiciary composed of superior courts and subordinate courts*" Muhammad Mansha v. State (PLD 1996 Supreme Court 229, at 233).

54. Military personnel, who will preside over the trials, are part of the Executive, and it goes without saying that they are not part of the Judiciary. It has been repeatedly held by the superior Courts of Pakistan that the Executive cannot decide cases. In Azizullah Memon (above) the Supreme Court in clear and categorical terms, held:

> "In fact the administration of justice cannot be made subject to or controlled by the executive authorities. The Constitution provides for separation of judiciary from the executive. It aims at an independent judiciary which is an important organ of the State within the Constitutional sphere. The Constitution provides for progressive separation of the judiciary and had fixed a time limit for such separation. It expired in the year 1987 and from then onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation. Separation of judiciary is the corner-stone of independence of judiciary and unless judiciary is independent, the fundamental right of access to justice cannot be guaranteed. **One of the modes for blocking the road of free access to justice is to appoint or hand over the adjudication of rights and trial of offence in the hands of the executive officers. This is merely a semblance of establishing Courts which are authorized to decide cases and adjudicate the rights, but in fact such Courts which are manned and run by executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution.**" (page 369) [emphasis added]

55. A Law Reform Commission was set up on 27th May 1967 under the Chairmanship of Justice Hamoodur Rahman, and its report is entitled, 'The Report of the Law Reform Commission 1967-70'. The Commission traced the administration of justice from earliest Islamic times. It noted (in paragraphs 42 and 45, pages 115-6 of the Report) that justice during the caliphate of Hazrat Umar (may Allah be pleased with him) was administered by civil judges who were independent of the governors and he also made the office of judges independent from the executive officers. "*Thus the Islamite administration even in its infancy, proclaims in word and in deed the necessary separation between judicial and executive power.*" After mentioning a particular incident the Commission noted, "*that the judiciary was independent and that even the Caliph was subject to discipline of the Court*". The very first

recommendation of the Commission was that, "*There should be complete separation of the judiciary from the executive*" ('Summary of Recommendations' by the Commission (page 252 of the Report).

56. It would be appropriate to conclude this portion of the judgment by quoting from a speech that the founder of Pakistan, Muhammad Ali Jinnah delivered in the Imperial Legislative Council on 6th February 1919, when the Criminal Law (Emergency Powers) Bill was introduced. The Quaid systematically dissected the proposed piece of legislation; He stated that he could not envisage a trial save a judicial trial in accordance with the accepted rules of evidence and procedure:

> "My Lord, to any man who believes in law and justice, these measures must seem abhorrent and shocking… Now, before I deal with these bills and the speech of the Hon'ble Home Member, I shall place before the Council the grounds on which I am opposed to these Bills. My first ground is this, that it is against the fundamental principles of law and justice, namely, that no man should lose his liberty or be deprived of his liberty, without a judicial trial in accordance with the accepted rules of evidence and procedure. My second reason is, that this is a wrong remedy for the disease, namely, these revolutionary crimes, although I for one am prepared to accept as correct the findings of facts of the Rowlatt Committee that the crimes of the nature indicated have been committed. My third ground is that the powers which are going to be assumed by the executive, which means substitution of executive for judicial, such powers are likely to be abused and in the past we have instances where such powers have been abused. My fourth ground is that there is no precedent or parallel that I know of in any other civilized country where you have laws of this character enacted. My fifth ground is that this is a most inopportune moment. At this moment I can tell you that high hopes have been raised among the people of this country because we are on the eve of great and momentous reforms being introduced. My sixth ground is that the proposed measures intended only to deal with an emergency of a temporary character. And the last ground why I oppose this measure is that, my Lord, I do not wish to state it by sway of any threat or intimidation to Government, but I wish to state it because it is my duty to tell you that, if these measures are passed, you will create in this country from one end to the other a discontent and agitation, the like of which you have not witnessed, and it will have, believe me, a most disastrous effect upon the good relations that have existed between the Government and the people"

> "Therefore, my Lord, it is no use shirking the issue, it is no use hedging round the whole of this question. It is quite clear and it is obvious that this measure is of a most serious character. It is dangerous. It imperils the liberty of the subject and fundamental rights of a citizen and, my Lord, standing here as I do, I say that no man who believes in the freedom and liberty of the people can possibly give his consent to a measure of this character."

Does Article 8 (3) Take Away the Fundamental Rights of Civilians who have been Subjected to the Laws of the Armed Forces

57. We next consider whether the learned Attorney-General's submission that laws may be made in derogation of Fundamental Rights provided they are specified

in the First Schedule pursuant to clause (3) of Article 8. Ms. Asma Jehangir, the learned counsel for the Supreme Court Bar Association, contended that the insertion of the Army Act, the Air Force Act, the Navy Ordinance and the Protection of Pakistan Act in sub-part III of Part-I of the First Schedule to the Constitution was not sustainable in view of clauses (2) and (5) of Article 8 of the Constitution. She further said that the ambit of clause (3) of Article 8, whereupon the learned Attorney-General placed reliance, was not such to enable the said insertion. The learned counsel submitted that in any event Article 8 (3) does not assist the learned Attorney-General as its scope is limited to the 'Fundamental Rights' contained in Chapter 1 of Part II of the Constitution; therefore, no inroads can be made into the rights conferred by Article 4. To appreciate the learned counsel's submission, it would be appropriate to reproduce Articles 4 and 8 of the Constitution:

> "**Article 4. Right of individuals to be dealt with in accordance with law, etc.-**
>
> (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.
>
> (2) In particular-
>
> (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
>
> (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
>
> (c) no person shall be compelled to do that which the law does not require him to do."
>
> "**Article 8. Laws inconsistent with or in derogation of Fundamental Rights to be void.-**
>
> (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.
>
> (3) The provisions of this Article shall not apply to–
>
> (a) Any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or

(b) any of the-

(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) other laws specified in, Part I of the First Schedule;

and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

(4) Notwithstanding anything contained in paragraph (b) of clause (3) within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in Part II of the First Schedule into conformity with the rights conferred by this Chapter:

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

Explanation.- If in respect of any law Majlis-e-Shoora (Parliament) is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution."

58. The learned Attorney-General sought to meet the abovementioned submissions by referring to clause (3) of Article 8 and in particular paragraph (a) and sub-paragraph (ii) of paragraph (b). We need to examine Article 8 in its entirety before attending to the learned Attorney-General's response. Clause (1) of Article 8 refers to the past, i.e. the commencement of the Constitution and the laws then existing. Clause (2) of Article 8 looks to the future "*shall not make a law*", it is categorical and declares that "*any law which takes away or abridges*" any Fundamental Right shall be void to such extent. Clause (3) of Article 8 carves out certain exceptions from the aforementioned. Paragraph (a) of clause (3) is restricted to laws relating to members of the Armed Forces or of the police or of such other forces as are charged with the maintenance of public order, discharge of their duties and maintenance of discipline amongst them; conducting the trial of civilians who have been accused of terrorist acts does not come within its parameters.

59. Therefore, the remaining provision of Article 8, i.e. paragraph (b) of clause (3), is left to be examined and whether the Laws of the Armed Forces and the Pakistan Protection Act have been made impervious to Fundamental Rights. Article 8 (3) (b) has undergone a few changes since its inception in the 1973 Constitution, when it simply stated, *"(b) any of the laws specified in the First Schedule as in force*

immediately before the commencing day". Thereafter, by the Constitution (First Amendment) Act, 1974 (published in the Gazette of Pakistan, Extraordinary, Part-I, 8th May 1974), the following words were added, *"or as amended by any of the laws specified in that Schedule"*. By the Constitution (Fourth Amendment) Act, 1975 (published in the Gazette of Pakistan, Extraordinary, Part-I, 25th November 1975) paragraph (b) was further altered by sub-dividing it into sub-paragraphs (i) and (ii). The 1st, 4th and 5th Amendments to the Constitution added certain laws to the First Schedule and now the 21st Amendment has added the Army Act, the Air Force Act, the Navy Ordinance and the Protection of Pakistan Act to it. This is an unreasonable and retrogressive step taken in haste to compromise Fundamental Rights, without even a careful consideration of the measures that could be performed by the Executive under the prevailing circumstances (some of which are identified below). The learned Attorney-General contends that clause (3) of Article 8 excluded the applicability of Fundamental Rights to members of the Armed Forces and laws that have been added to the First Schedule. However, amending the said laws by permitting the trials of civilians by the military is altogether a different matter and if this is permitted it would render the entire Fundamental Rights' Chapter an illusion. In this context it would be appropriate to reproduce the following extract from the judgment of Ajmal Mian, CJ, in Liaquat Hussain (above):

> "It may be pertinent to refer to clause (2) and clause (5) of above Article 8 of the Constitution before dilating upon clause (3) relied upon by the learned Attorney-General. It may be observed that clause (2) of the above Article enjoins that the State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void. Whereas clause (5) thereof postulates that the rights conferred by this Chapter (i.e. Chapter relating to the Fundamental Rights) shall not be suspended except as expressly provided by the Constitution. If **clause (3) of above Article 8** is to be viewed with reference to the above two clauses, it becomes evident that paragraph (a) of clause (3) does not empower the Legislature to legislate the impugned Ordinance for providing a parallel judicial system. The above paragraph (a) of clause (3) provides that the provision of the above Article 8 shall not apply to any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them. The above paragraph refers to any law which may be in existence or which may be enacted in order to enable the Armed Forces or other forces to discharge their duties and to maintain proper discipline. It **has nothing to do with the question, as to whether the Military Courts can try civilians for civil offences which have no nexus with the Armed Forces."** (page 633 OO) [emphasis added]

60. There is also merit in the submission of Ms. Asma Jehangir, that the exception contained in clause (3) of Article 8 does not whittle away those rights that have been conferred by Article 4, which provides to every person the protection of

law and to be treated in accordance with law, etc. The generality of the protection referred to in clause (1) of Article 4 is particularized in clause (2) and specifically includes, prohibition "*against action detrimental to life, liberty, body, reputation and property of any person*". This aspect was also considered in Liaquat Hussain; the following extract from the judgment of Chief Justice Ajmal Mian is reproduced:

> "It will not be out of context to mention that clause (1) of Article 4 provides that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan. Whereas clause (2) thereof lays down that in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The above Article is to be read with Article 9 of the Constitution which postulates that no person shall be deprived of life or liberty save in accordance with law. If a person is to be deprived of his life on account of execution of death sentence awarded by a Tribunal which does not fit in within the framework of the Constitution, it will be violative of above Fundamental Right contained in Article 9. However, the learned Attorney-General contended that in fact terrorists who kill innocent persons violate the above Article 9 by depriving them of their lives and not the Federal Government which caused the promulgation of the impugned Ordinance with the object to punish terrorists. **No patriotic Pakistani can have any sympathy with terrorists who deserve severe punishment, but the only question at issue is, which forum is to award punishment, i.e. whether a forum as envisaged by the Constitution or by a Military Court which does not fit in within the framework of the Constitution. No doubt, that when a terrorist takes the life of an innocent person, he is violating Article 9 of the Constitution, but if the terrorist, as a retaliation, is deprived of his life by a mechanism other than through due process of law within the framework of the Constitution, it will also be violative of above Article 9**." (pages 633-634 PP) [emphasis added]

Justice Ajmal Mian hit the proverbial nail squarely on the head. Indeed no normal person can sympathise with killers who must be prosecuted and punished, but in accordance with the law and the Constitution. If we rush to convict terrorists through unconstitutional means we stoop to their level. The Constitution does not permit the trial of civilians by the military as it would contravene Fundamental Rights, which cannot be excluded by invoking clause (3) of Article 8 and placing the Army Act, the Air Force Act, the Navy Ordinance and the Protection of Pakistan Act in the First Schedule to the Constitution. Moreover, Article 4 of the Constitution is a stand alone Article and neither can it be excluded (by invoking Article 8 of the Constitution) nor can the rights encapsulated therein be infringed.

Is the Categorization – Terrorists Using the Name of Religion or Sect – a Reasonable Classification

61. The 21st Amendment and the amendments made to the Laws of the Armed Forces need to be tested against the constitutional directive that, "*All citizens are*

equal before law and are entitled to equal protection of law" (clause (1) of Article 25). The Supreme Court has interpreted this provision and that it does not mean that every citizen, must be treated in the same manner. However, to ensure that the principle is not violated, persons similarly situated or in similar circumstances must be treated in the same manner or (in the present case) whether those to be tried are reasonably classified and have not been discriminated against. The Pakistan Army (Amendment) Act, 2015 extended the ambit of the Army Act to particular civilians committing certain types of terrorist acts. According to the amendment made in sub-clause (iii) and (iv) of clause (d) of sub-section (1) of section 2 of the Army Act, those civilians who are "*claiming or are known to belong to any terrorist group or organization using the name of religion or a sect"* can be tried and courts-martialed, provided their cases have been sent for trial by the Federal Government pursuant to sub-section (4) of section 2. No criteria or measure is prescribed for the Federal Government to follow in choosing the cases that it decides to send for such trials; it thus has absolute and unfettered discretion.

62. A classification or categorization that is clearly outlined and defined and which is reasonable may be permissible, but if it is not properly classified or the classification is unreasonable then it would infringe the equality requirement prescribed in clause (1) of Article 25 of the Constitution. This Court has attended to the matter of classification and categorization in a civil matter in I. A. Sherwani v. Government of Pakistan (1991 SCMR 1041) and in a criminal matter in Government of Baluchistan v. Azizullah Memon (PLD 1993 SC 341), which pertained to the constitutionality of Criminal Law (Special Provisions), Ordinance (II of 1968). It would be appropriate to reproduce the following extract, which is equally applicable to the present case, from the judgment of Azizullah Memon:

> "(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;
>
> (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;
>
> (iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;
>
> (iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances may be unreasonable in the other set of circumstances;

> (v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
>
> (vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;
>
> (vii) that in order to make a classification reasonable, it should be based-
>
> (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
>
> (b) that the differentia must have rational nexus to the object sought to be achieved by such classification." (page 358)

Subsequently, in the case of Mehram Ali (above), a five member Bench of the Supreme Court, cited with approval what had earlier been held in the case of Azizullah Memon (above).

63. The list of 61 organizations, provided by the learned Attorney General, that have been proscribed by the Federal Government under section 11B of the Anti-Terrorism Act, include organizations that by their very name can be identified as religious, sectarian, ethnic, secessionist or political. However, the names of certain organizations do not reveal their apparent objective and identity, and whether they are religious or sectarian. Then again, and significantly, certain organizations, which according to the learned Attorney-General are terrorist organizations have not been proscribed under section 11B of the Anti-Terrorism Act. The Army Act also does not enlighten as to which organization's members involved in terrorism would be subject to courts-martial. Those sent for 'trial' under the Army Act may also state that they are not affiliated with any religious or sectarian organization. The stipulated classification of "*terrorist group or organization using the name of religion or a sect*", does not disclose who would come within its purview nor does the stated classification meet the test of reasonable classification. The Federal Government having absolute and unfettered discretion to pick and choose cases to be tried by the military, further violates the reasonable classification criteria.

64. There are also other foreseeable complications. A terrorist organization which is not religious or sectarian, may abet a religious or sectarian organization in the commission of an offence or in a series of events which culminate in a terrorist act. For instance, an ethnic organization may supply explosives or guns to a religious or sectarian organization, which then uses the same in a terrorist act; will then the

members of the said ethnic organization be tried separately in an Anti-Terrorist Court or will they also be tried by the military? The definition of religious or sectarian organizations in the Army Act, which has also been incorporated in the Air Force Act and the Navy Ordinance, does not contemplate such scenarios. The vagueness of the definition and lack of details in the definition clause gives rise to monumental jurisdictional and constitutional problems. An individual who is sent to be tried by the military may declare that he is not a religious or sectarian terrorist and contend that the exercise of discretion by the Federal Government in sending his case for trial by the military was not justified. Every law should be explicit and a meticulous effort must be made by the draftsmen to ensure that all conceivable problems are attended to. Unfortunately, there are numerous defects and lacunae in the law, some of which are noted above. Even if, for the sake of argument, it be accepted that the categorisation of such type of terrorists does not offend the reasonable classification rule or any provision of the Constitution, such challenges would undoubtedly delay the trial of terrorists rather than achieving the professed objective of ensuring that the terrorists are brought to justice promptly. The law as framed is giving them an unnecessary lifeline.

65. The power vesting in the Federal Government to pick and choose cases for trial by members of the Armed Forces further violates the equality requirement stipulated in Article 25 of the Constitution. This very question also came up for consideration before the Supreme Court in the case of Liaquat Hussain (above) where it was held, that:

> "43. As regards the violation of Article 25 of the Constitution, it may be observed that the contention of the learned counsel for the petitioners was that the impugned Ordinance contravenes the above Article, inasmuch as it gives discretion to the Federal Government to pick and choose cases which may be referred to the Military Courts. On the other hand, the learned Attorney-General has urged that the offences triable under the impugned Ordinance are those which are mentioned in section 6 and the Schedule to the impugned Ordinance and that this Court has already held in more than one case that different laws can be enacted for different sexes, persons of different age group, persons having different financial standards and persons accused of heinous crimes. No doubt, that this Court inter alia in the case of I.A. Sharwani v. Government of Pakistan (1991 SCMR 1041) has held so, which has been reiterated in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) (supra). However, in the present case the basic question is as to the vires of the impugned Ordinance on the ground of providing parallel judicial system, but at the same time **the impugned Ordinance is also violative of Article 25 of the Constitution, inasmuch as it gives discretion to the Federal Government under section 3 thereof to pick and choose cases for referring to the Military Courts** as has been held

> by this Court in the case of Brig. (Retd.) F.B. Ali (supra). There is no mandatory provision providing that all the offences mentioned in section 6 and the Schedule shall be triable by the Military Courts convened under section 3 of the impugned Ordinance" (paragraph 43, page 634). [emphasis added]

The aforesaid decision comprehensively captures the essence of the matter and in categorical terms deprecates the grant to the Federal Government unfettered power with regard to determining which cases are to be sent to be tried by the military. It also rightly castigates establishing a parallel judicial system. Needless to state, the judgment of the Supreme Court in Liaquat Hussain continues to hold the field, and there is no reason to subscribe to another view in virtually identical circumstances.

Conclusion of Whether Classification is Reasonable

66. Therefore, for the aforesaid reasons the categorisation - *"any terrorist group or organization using the name of religion or sect"*, cannot be accepted to be a reasonable classification that could be sustained in the presence of clause (1) of Article 25 of the Constitution. The grant of power to the Federal Government to pick and choose cases for trials before the military further erodes the purported classification as the power granted to the Government does not prescribe any parameters or criteria; consequently, such arbitrary power further violates clause (1) of Article 25. A person who commits an act of terrorism is a terrorist. His reason or motivation for committing the terrorist act is immaterial. Those who commit terrorist acts or spread terrorism do so in violation of the law. They must therefore be treated similarly and prosecuted with the full vigour of the law. It may also be observed that neither Islam nor any other religion permits murder or acts of terrorism, therefore, the phrase terrorism in *the name of religion* is an oxymoron, and one that cannot be accepted.

The Sequence of Enacting the 21st Amendment and the Pakistan Army (Amendment) Act and its Consequences

67. The Constitution (Twenty-first Amendment) Act, 2015 and the Pakistan Army (Amendment) Act, 2015 both came into effect on 7th January 2015. However, it transpires that the 21st Amendment was enacted first and then the Pakistan Army (Amendment) Act, as can be gathered from their respective numbering 'Act I of 2015' and 'Act II of 2015' as well as from their respective notification numbers, i.e.

'No.F.9(2)/2015-Legis.' and 'No.F.9(3)/2015-Legis.'. Consequently, the insertion of the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953 and the Pakistan Navy Ordinance, 1961 into the First Schedule of the Constitution would have taken place before the Pakistan Army (Amendment) Act had been amended to include the courts-martial of civilians. Therefore, whatever constitutional cover may have been provided by clause (3) of Article 8 from the applicability of Fundamental Rights it would not extend to the recently amended version of the Laws of the Armed Forces.

68. The learned Attorney-General responded by contending that the Pakistan Army (Amendment) Act is deemed to have come into effect on the stroke of midnight of 6th January 2015 because of sub-section (3) of section 5 of the General Clauses Act, 1897, reproduced below:

> "(3) Unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement."

69. My most distinguished colleague Justice Asif Saeed Khosa however detected the apparent flaw in the learned Attorney-General's submission and drew his attention to clause (3) of Article 75 and Article 12 of the Constitution. Clause (3) of Article 75 of the Constitution provides, that, *"When the President has assented or is deemed to have assented to a Bill, it shall become law and be called an Act of Majlis-e-Shoora (Parliament)."* Therefore, no law can be *construed as coming into operation* before the President's assent thereto. This position is reiterated by the definition of an 'Act' contained in Article 260 of the Constitution that, *"Act of Majlis-e-Shoora (Parliament) means an Act passed by Majlis-e-Shoora (Parliament) or the National Assembly and assented to, or deemed to have been assented to, by the President."* The fact that we are dealing with criminal law would also attract Article 12 of the Constitution which prohibits retrospective application of substantive law.

70. Sub-section (3) of section 5 of the General Clauses Act cannot negate the Constitution, thus rendering the learned Attorney-General's argument without any legal foundation. Enacting the 21st Amendment first would provide only the un-amended version of Army Act, 1952 with the benefit of clause (3) of Article 8. The mistake that was committed, by enacting these two enactments in reverse order, leaves the Pakistan Army (Amendment) Act without the constitutional cover that clause (3) of Article 8 may have provided. The Pakistan Army (Amendment) Act which purported to widen the ambit of the Army Act, to subject particular types of civilians to courts-martial, therefore, has no constitutional protection. This

procedural flaw similarly impacts the three other laws inserted by the 21st Amendment in the First Schedule of the Constitution.

In the 'Law of Criminal Procedure' by Justice Fazal Karim (published by Pakistan Law House, Karachi, 2010, at page 143) the distinguished author writes, that, "*the Fundamental Rights guaranteed by Articles 9 to 28 of the Constitution of Pakistan, almost 16 belong to criminal procedure, and it may as well be described as a mini-code of criminal procedure. The Fundamental Rights have both substantive and procedural contents*".

It is clarified that the aforesaid determination, that the Pakistan Army (Amendment) Act does not have constitutional protection, does not mean that resort could be had to clause (3) of Article 8 as it has already been determined (above) that the Constitution does not permit this.

Conclusion with Regard to the 21st Amendment

71. The Executive has been separated from the Judiciary and the Constitution prohibits a retrogressive step to be taken in this regard. The Proviso does not negate clause (3) of Article 175, nor does it conjure up the trial of civilians by the military or 'military-courts' under Article 175. Since provisos merely limit or qualify the main enactment, the Proviso cannot be allowed to destroy or nullify clause (3) of Article 175. Clause (2) of Article 175 also does not permit conferment of jurisdiction on the military to conduct the trial of civilians in criminal cases; the same is also not contemplated by Article 245 of the Constitution.

The insertion of the Laws of the Armed Forces and the Protection of Pakistan Act into the First Schedule contravenes clauses (2) and (5) of Article 8. The insertion of such laws into the First Schedule cannot be done through the aegis of clause (3) of Article 8 of the Constitution either. The guarantees provided by Article 4 are in addition to those prescribed in the Fundamental Rights Chapter of the Constitution.

The categorization of terrorists who use the name of religion/sect is not a reasonable classification, and the Federal Government's absolute discretion to pick and chose from amongst them further offends it; consequently, the same is discriminatory and offends the equality principle encapsulated in Article 25 of the Constitution.

Video Recordings

72. The learned Attorney-General subjected the open court to a number of video recordings; including arbitrary pronouncements of death 'sentences', followed by beheadings and a game of football with severed heads. Such histrionics and shock tactics demonstrated a reckless disregard for peoples' sensibilities, particularly the faint of heart and children who were present. We further saw members of an organization, whose self-proclaimed leader demands allegiance to a self-styled version of himself as *Khalifa* (Caliph) or *Amir-ul-momineen* (Leader of the pious); the Government states that it is in possession of evidence that confirms the said group to be an anti-state terrorist organization.

Federal Government's Failure to Proscribe Terrorist Organizations

73. The Anti-Terrorism Act, 1997 ("**the ATA**") enables the Federal Government to publish an order in the official Gazette declaring that a terrorist organization has been proscribed under section 11B of the ATA. As per the list provided by the learned Attorney-General to us in Court, there are 61 proscribed organizations. Yet astonishingly the Federal Government has not proscribed the organization mentioned in the foregoing paragraph.

Consequences of Proscribing a Terrorist Organization

74. The issuance of a notification under section 11B has consequences; the proscribed organizations' views cannot be propagated (section 11W of the ATA makes it a criminal offence entailing a maximum of five years imprisonment), it becomes a criminal offence to join the organization (section 11F ATA prescribes a five years maximum imprisonment) and the raising and giving of funds to it is prohibited (section 11H to 11K of the ATA makes it an offence punishable with a maximum of ten years imprisonment). However, a person charged is legally permitted to plead, "*that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property*" (sub-section (2) of section 11K of the ATA).

A disturbing fact has come to light; there appears to be no official website that discloses the names of even the 61 proscribed organizations. To verify if a list of the proscribed organizations was available in the public domain the Court associate conducted an internet search of the websites of the concerned authority, agency and ministries, but regretfully none displayed the information. The National Counter Terrorism Authority's website was shown to be "*under construction*" (http://www.nacta.gov.pk/), the Government of Pakistan, Federal Investigation Agency's

website was "*under maintenance*" (http://www.fia.gov.pk/resourcecenter.htm), and the websites of the Government of Pakistan's Ministry of Interior, Ministry of Defence and Ministry of Law, Justice and Human Rights did not display the same. The general public therefore may have no knowledge whether a particular organization has been proscribed and may provide money to it or even join it in all innocence. Ironically, as demonstrated by the learned Attorney-General, terrorist organizations conduct their propaganda on the internet with aplomb.

Flags of the Seal of the Prophet (PBUH) & of the *Kalima Tayyibah*

75. The recordings produced by the learned Attorney-General showed men cleaving the path of death and destruction holding aloft flags inscribed with the seal of Prophet Muhammad, Peace and Blessings be Upon Him. The Prophet is *Rehmat-ul-Aalameen* (Mercy to the Worlds), the epitome of love and affection, but there is an attempt to besmirch both his name and memory. To add insult to injury, flags with *Kalima Tayyibah* are flown by those who commit murder. Section 11G of the ATA makes it an offence punishable with imprisonment of up to 5 years if any one, "*wears, carries or displays any article, symbol, or any flag or banner connected with or associated with any proscribed organization*". It is noted that symbols extremely dear to Muslims throughout the world are blatantly used as propaganda tools by killers who audaciously associate Islam (which means 'Peace') with violence; killing of school children, worshippers, users of public transport and virtually everyone - the old, the infirm, the sick, men, women and children.

Criminal Cases are not Registered Against Terrorists

76. Another video shown by the learned Attorney-General clearly identified members of a proscribed organization who were shown to be murdering members of the Armed Forces. However, our query revealed that no criminal case had been registered against the perpetrators. Sub-section (10) of section 19 of the ATA enables trials in absentia, after compliance with the procedure prescribed therein. Therefore, even if the State fails to arrest the perpetrators they can be convicted and thus categorized as convicts. Section 27B of the ATA enables convictions, "*on the basis of electronic or forensic evidence or such other evidence that may become available because of modern devices or techniques*." Additionally, an absconder from justice can also be proceeded against, convicted and sentenced for up to ten years for remaining a fugitive under section 21L of the ATA. A conviction, even of those who have not been arrested, has advantages; extradition can be sought,

property can be confiscated, and the terrorists will bear the ignominy of being convicted for heinous crimes; undermining their appeal on impressionable minds.

Improper Investigations, Prosecutions and the Prevailing Situation

77. The Government, under section 19 (1) of the ATA, is also empowered to associate members of Intelligence Agencies and Armed Forces with investigations, but this provision is rarely, if ever, used. It appears that important matters such as the proscribing of terrorists, lodging of cases against them, collection of evidence and conducting a thorough prosecution have been largely ignored, and it has somehow been concluded that the reason terrorism continues unabated is because trials are being conducted by the Anti-Terrorism Courts, thereby, necessitating them to be supplanted with 'military-courts'. The Anti-Terrorist Courts have convicted terrorists and sentenced them to death, but the sentences were not being carried out till quite recently because of the Government's self imposed moratorium. Jail-breaks have also been reported in which a number of convicted terrorists escaped. The knee-jerk reaction in enacting the 21st Amendment and amending the Laws of the Armed Forces appears not to have taken into account the prevailing situation and the above matters.

Perceptions

78. Inexplicably, the State is not utilizing the provisions of the ATA. Instead it has embarked upon a precarious road and one which is fraught with innumerable pitfalls. Leaving aside the constitutionality of trials conducted by the military, we may pause to ponder the consequences thereof. In jurisprudence, the immemorial adage still rings true: *justice must not only be done, but must also be seen to be done*. Even if the Armed Forces personnel conducting trials had comprehensive knowledge of the law and tried the cases before them with fastidiousness, those convicted would wear the mantle of victimhood if not martyrdom; for closed trials create an aura of mystery and speculation, which some may endeavour to exploit and galvanize others to their cause. If we choose to learn anything from what has happened in our neighborhood, and continues to happen, it is that the sense of being wronged or persecuted is a significant motivator.

We may take a lesson from our own history; between November 1945 to May 1946 a few members of the British Indian Army in India were courts-martialed for being members of the 'Indian National Army' (INA) set up by Subhash Chandra Bose with the object of liberating India from British rule. INA's defence team comprised of the stalwarts of both the Indian National Congress and the All India

Muslim League, political parties that generally opposed everything the other espoused. Captain Shah Nawaz, Captain Dhillon and Captain Sahgal were tried in Delhi's Red Fort by senior British military officers and all three were found guilty of "*waging war against the King*" and sentenced to transportation for life. A ground swell of support for the three officers spread which persuaded General Auchinleck, the Commander-in-Chief of the Indian Army, to release them. The symbolism attached to courts-martial may have an effect diametrically opposite to what is sought. Mohan Singh an INA member said about the Red Fort courts-martial, that, "*What the INA failed to accomplish itself, the narrow and vindictive policy of the British accomplished it for the INA and thus its material defeat turned out to be the greatest spiritual victory for the country. For this service we are very grateful to the British*." Incidentally, internal British debate was aware of the danger of creating '*martyrs in the national cause*' (Wavell writing to Pethick-Lawrence on 22nd October 1945).

Response to Terrorists and Terrorism

79. The best response to terrorists - to isolate, thwart, and defeat them, is to uphold the principles and rights that terrorists trample underfoot. Those accused of terrorist acts must be subjected to legal due process, an independent court and evidence based convictions. If we sacrifice our principles and slip we shall come to face them in their swamp of infamy. Let us learn from countries that have successfully confronted and defeated terrorists and avoid the pitfalls of those who have exacerbated the danger. Members of European terrorist groups such as the 'Irish Republican Army' (IRA), 'Euskadi Ta Askatasuna' (ETA) and the 'Brigate Rosse' (Red Brigade) in the United Kingdom, Spain and Italy respectively were tried in courts: the Crown Courts, Audiencia Nacional Court and the Corte d'Assise. In somewhat of a contrast the United States of America has resorted to dark-hole incarceration centres and all but denied due process to internees. History has shown the success of the European methodology.

Institutions Must be Strengthened and Must Operate in their Designated Spheres

80. The focus of the Armed Forces must not be allowed to shift from combating, pursuing and capturing terrorists. They must also be insulated from any allegations of impropriety in conducting trials. Muslim majority countries, from Afghanistan to Libya, are riven with turmoil, and will it not be incorrect to observe that they faltered in developing independent and strong institutions.

The people and the country are strengthened when every institution works within its designated area of jurisdiction; the Legislature legislates, the Judiciary adjudicates and examines laws and the Constitution, the Executive maintains law and order and delivers good governance. As for example, it did not augur well for the nation when the Supreme Court, without having any jurisdiction, 'validated' constitutional deviations and violations and granted individuals the power to amend the Constitution. History stands witness to the fact that whenever an institution encroaches upon the domain of another it weakens the nation, forestalls development, and prevents people from accomplishing the goals they set themselves.

Synopsis and Decision

81. The following is a synopsis of the reasons detailed above and these petitions are allowed in the following terms:

(1) Article 239 (5) of the Constitution does not oust the jurisdiction of the Supreme Court to examine an amendment made to the Constitution.

(2) The Supreme Court also has the jurisdiction to examine an amendment made to the Constitution under clause (3) of Article 184 read with clause (2) of Article 175 of the Constitution.

(3) In interpreting the Constitution, the following rules need to be particularly considered:

(a) The Constitution should be read as a whole.

(b) Effect should be given to every word, paragraph, clause and article of the Constitution and redundancy should not be imported thereto.

(c) If there are two provisions of the Constitution attending to similar matters, the particular provision excludes the general provision.

(d) If there is a conflict between two provisions of the Constitution and one of them was inserted when the Constitution was abrogated, subverted, suspended or held in abeyance then the conflicting provision which was in the Constitution prior to the said abrogation, subversion, suspension or abeyance is to be preferred if it is closer to the provisions of the Preamble.

(e) Parliamentarians, who adorn the House after the promulgation of the 1973 Constitution or will do so in the future, do not have the constituent powers of the first parliamentarians, therefore, they cannot amend the Constitution in a manner that contravenes the provisions of the Preamble to the Constitution, and in particular any amendment

that may abolish, take away or abridge any of the fundamental rights of the people.

(f) The Constitution and its Preamble are built on a trichotomy that separates powers between the Legislature, the Executive and the Judiciary, and each one must operate within its respective domain. Thus, whilst the Legislature is fully empowered to make laws or amend the Constitution it is the superior Courts that will ascertain their constitutionality and interpret them because the Constitution itself has empowered them.

18th Amendment and 19th Amendment to the Constitution:

(4) (a) The provisions relating to the elections of non-Muslims (minorities) are contrary to the provisions of the Preamble to the Constitution as they contravene 'the principles of democracy', do not 'safeguard the legitimate interests of minorities' and deprive their right of representation through their 'chosen representatives'. (I concur with the judgment of my distinguished colleague Justice Jawwad S. Khawaja in respect of this matter.)

(b) The insertion made in sub-paragraph (iii) of paragraph (b) of clause (1) of Article 63A whereby the words, "*a Constitution (Amendment) Bill*", were added does not cont ravene the Constitution.

(c) The mode and manner prescribed in Article 175A (as subsequently amended by the 19th Amendment) for the appointment of Judges to the Supreme Court, High Courts, and the Federal Shariat Court do not contravene the Constitution. However, the Parliamentary Committee does not have the power to veto the nominee of the Judicial Commission; it may however send a written objection on a nomination for reconsideration by the Judicial Commission, as an interpretation of clauses (12) and (13) of Article 175A of the Constitution reveals.

The 21st Amendment to the Constitution

(5) (a) The 21st Amendment does not succeed in its attempt to try civilians by the military.

(b) The military, which is a part of the Executive, cannot conduct criminal trials because judicial power can only be exercised by the Judiciary.

(c) Clause (3) of Article 175 no longer envisages the exercise of judicial power by the Executive and the Proviso added thereto cannot undo

what has already taken place, i.e. the separation of the Judiciary from the Executive.

(d) To bifurcate from amongst those alleged to have committed terrorism and who are to be tried by Anti-Terrorism Courts under the Anti-Terrorism Act, 1997 a separate sub-category of those "*using the name of religion or sect*" is not sufficiently precise and is also not a reasonable classification. The same, therefore, offends the principle of equality before the law and entitlement to equal protection before law as mandated by clause (1) of Article 25.

(e) The placement of the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 in sub-part III of Part I of the First Schedule to the Constitution cannot be done pursuant to sub-paragraph (ii) of paragraph (b) of clause (3) of Article 8.

(f) Laws relating to the duties and the maintenance of discipline in the Armed Forces, the police or other forces may be excluded from the application of Fundamental Rights as stipulated in paragraph (a) of clause (3) of Article 8, but the said provision cannot be extended to provide for the trial of civilians by the military.

<u>The Pakistan Army (Amendment) Act, 2015</u>

(6) (a) The military, which is a part of the Executive, cannot conduct criminal trials of civilians because judicial power can only be exercised by the Judiciary.

(b) The Pakistan Army (Amendment) Act, 2015 takes away and abridges Fundamental Rights mentioned in Chapter 1 of Part II to the Constitution therefore the same is void.

(c) All convictions, sentences passed or acquittals made of civilians tried by the military pursuant to the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 are set aside and all such cases to be adjudicated afresh by the Anti-Terrorism Courts.

(d) All proceedings of civilians pending before the military pursuant to the Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, the Pakistan Navy Ordinance, 1961 and the Protection of Pakistan Act, 2014 to be transferred to the Anti-Terrorism Courts.

(7) There are important provisions in the Anti-Terrorism Act, 1997, which if implemented would help to stem terrorism and also ensure the conviction of terrorists.

Sd/-
(Justice Qazi Faez Isa)
Judge

Islamabad
17th July 2015
(Zulfiqar)

JUDGMENT OF THE COURT

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

Chief Justice

Judge	Judge	Judge
Judge	Judge	Judge
Judge	Judge	Judge
Judge	Judge	Judge
Judge	Judge	Judge

Judge

Announced in open Court

Sd/-
Chief Justice
5th August, 2015

"APPROVED FOR REPORTING"

*Safdar Shirazi/ **