



PREMIER
LAW JOURNAL

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PREMIER LAW JOURNAL

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EDITORIAL NOTE

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It is an interdisciplinary Journal of peer-reviewed research and informed opinion on various intellectual and academic issues in areas of Legal & Social Studies. Its readership includes Legal practitioners, policy makers, Judges, Teachers and Students of Law and Social Sciences. The articles published in this Research Journal undergo initial editorial scrutiny, double blind peer-review by at least two experts of the field, and further editorial review.

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Dr. Muhammad Amin
The Editor

**DOMESTIC WORKER'S RIGHTS; IN THE LIGHT
OF ILO CONVENTION NO. 189; A DIRE NEED TO
RATIFICATION AND LEGISLATION**

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ABSTRACT

International Labor Organization adopted a Convention No.189 on 16th June, 2011 concerning domestic workers. Domestic workers are actually hidden workers. ILO unhidden them first time in history in 2011 by exploring their rights and setting standards and principles. All ratifying states made and amended their existing laws in line with this convention. In Pakistan, though it has not ratified this convention but amended the Punjab employment of children act in 2011 making it in line with this convention. For Pakistan, it is difficult to solve the domestic workers problems as domestic work does not fall within ambit of regularized and contracted jobs. In public sectors, the government may increase easily the wages at certain percent ratio but the wages for are not easily increased the work being done behind the walls, can't possible to increase its prices as household employer don't like because they can have the cheapest labor due to increased number of population. This article actually is a study of domestic labor work and its problems in Pakistan in the light of ILO Convention No 189 emphasizing on a dire need of ratifying this convention and bringing domestic workers legislations in line with this convention.

Keywords: Pakistan, Domestic, Workers, Convention 189, Ratification, Legislation

INTRODUCTION

Domestic workers are actually hidden workers. These workers include Men, Women, children of every age group. This work may include tasks such as cleaning the house, cooking, washing and ironing clothes, taking care of children or elderly or sick members of a family, gardening, guarding the house, driving for the family, even taking care of house hold pets. ILO Convention No 189 defines domestic work as “work performed in or for a household or households”¹ These workers in Pakistan mostly work at low rate of wages. A woman provides services of washing of clothes for a whole family comprising about 8 to 10 members and she receives for this job about Rs 2500 to 3000 per month. If these clothes are washed at laundry market rates, the family has to pay about Rs 15000. But unfortunately, they don't pay domestic lady worker a rightly wage for this job so that she makes up a bread for herself and her children.

In subcontinent, the feudalism culture is still so strong. Waderaism and feudal lords keep the men, women and children work at their homes and dheras under their brutal clutches at daily bread and pay them no wages. Actually, these domestic workers are their slaves. In certain cases, they pay some money in advance and keep them at their houses as slaves. Children below fourteen years of age are seemed to work in kitchens. They welcome visitors by opening the home's gate, they bring groceries from shops, wash clothes and serve their master's children. People prefer the children to employ at home as they pay them cheapest wages.

A home based network in Pakistan says ``there are 20 million home-based workers in the country, of which 12 million are women. The conditions for home-based workers are unregulated and unprotected, involving repetitive and hazardous work, long shifts lasting from 14 to 16 hours, and low wages. They also have to rely on, and are subsequently exploited by, contractors or middlemen``². Home-based workers in Karachi held a protest in December calling for an end to workplace harassment and demanding wages equal to their male counterparts.³

EXISTING LAWS ON DOMESTIC WORKERS IN PAKISTAN

It is the lie that happened in spite of the Convention No 189 Prohibitions of employing children. Punjab employment of children (Amendment) Act 2011 says: “No child shall be employed or permitted to work in Institution, a membership-based network of home-based workers

¹ See for instance, the report of HRCP, 2018 p; 213.

any occupation set forth in part 1 of the schedule or in any workshop as set forth in part 2 of the schedule.”⁴ In line with manifesto of the Pakistan people’s party, the Government envisaged a Labor policy in 2010. Article 20 of this policy says “Workers between the ages of 14 and less than 18 years will not be engaged in hazardous working conditions and other working environments that adversely affect their physical and moral development. They will also be provided greater access to education and training particularly training, tailored to identify labor market needs. Children and young person’s will be withdrawn and prevented from hazardous nature of work as, for example, mining, tanneries, brick kilns, construction, and glass bangles. Special programmers will be designed to focus young domestic workers employed in private households. Payment of minimum wage will also be ensured to the young persons”⁵. The first time in history of Pakistan the Sindh Assembly passed the law for protection of home based workers. “Which would register and regularize home-based workers and ensure equal treatment to them and their dependents in cases of sickness, maternity leave, injury, or death. All home-based workers involved in the production and manufacturing of goods or provision of services at a home premises or any other place near a home would benefit from this law. The rules of business had yet to be framed”⁶. Other provinces have yet to follow suit.

Here it can be clearly seen from the report of HRCP how the number of domestic workers in Pakistan is increasing and their rights are infringed. The report says “domestic workers are roughly estimated to be over 8 million. Most of these are women and girls whose labor is undocumented, rendering the compiling of accurate statistics impossible. A high number of these workers are children. The treatment meted out by employers only comes to light when media reports highlight extreme abuse, and anecdotal accounts speak of long work hours and heavy workloads, low pay, no rest or holidays, allegations of theft, and physical and sexual abuse”⁷. The Punjab Domestic Workers Bill 2018 was tabled in

⁴ See section 3, vide Punjab employment of children (Amendment) Act X of 2011, dated 2.5.2011.

⁵ See article 20, Labor policy 2010.

⁶ In May, the Sindh Assembly passed the Sindh Home-Based Workers Act 2018.

⁷ See for instance, the report of HRCP, 2018 p; 213.

early December in the Punjab Assembly. A similar Bill was reportedly under preparation at the Ministry of Human Rights, to be tabled in parliament. The Punjab Bill finally recognizes the economic and social value of domestic workers in the country, addressing the exclusion of domestic workers from labor and the need for social protection. However, there are some anomalies in the Bill that raise concern, work for example in setting the minimum age at 15 years, and making no mention of the hazards faced⁸.

INTERNATIONAL PERSPECTIVE ON DOMESTIC WORKERS

International labor organization adopted the Convention No.189 on 16 June 2011, concerning domestic workers. This convention uses a term of decent work for domestic work. This term puts pleasant psychological effect on the minds of domestic workers as they feel that they are performing an excellent job. This convention is basically a treaty in nature adopted by the international labor conference, which is made up of government, worker and employer delegates from the 183 member's states of the ILO. This convention offers specific protection to domestic workers. It also lays down basic rights and principles and makes states bound to take steps and measures for making domestic work an honorable job and good reality for domestic workers. All ratifying states should firmly make a commitment to implement all the obligations provided in this convention. This convention may be implemented in ratifying states by extending or adopting existing laws and regulations and these states may also develop new and specific laws and regulations as required under this convention progressively. A domestic worker may work on full-time or part-time basis. He may be employed by a single household or by multiple employers. He may or may not reside in the household of the employer. All domestic workers are covered by this Convention, although countries may decide to exclude some categories, under very strict conditions. The employer of a domestic worker may be a member of the household, for which the work is performed, or any agency or enterprise that employs domestic workers and makes them available to households. The

⁸ *Ibid*; P; 213.

convention requires Government to consult with the most representative organizations of employers and workers.

Convention No. 189 affirms the fundamental rights of domestic workers. Such as support for the ratification and implementation of the Convention, promotion and protection of the human rights of all domestic workers, respect and protection of protection of rights at work and protection against all forms of abuse, harassment and violence, fair terms of employment and decent living conditions⁹.

Article 10 says “Measures aimed at ensuring equal treatment between domestic workers and workers generally with respect to normal hours of work, overtime compensation, periods of daily and weekly rest, and annual paid leave”¹⁰This convention also sets a minimum wage standards and a criteria for payment of wages in cash or in kind. The wage in cash must be paid directly to the workers, and at regular interval of no longer than one month.¹¹This convention verifies occupational safety and health as a right to safe and healthy working environment and set standards concerning child domestic worker as a minimum age for entry into domestic work. Domestic workers aged 15 years old but less than 18 year old their work should not deprive them of compulsory education.¹²This convention also sets standards for living conditions of domestic workers as they have a decent live-in that respect the workers’ privacy.¹³

This convention actually a written contract that is enforceable in the country of employment, or a written job offer. Dispute settlement, complaints, and enforcement are also set forth in this convention as an effective access to the court, tribunals or other dispute settlement mechanisms, including accessible complaint mechanisms.¹⁴

Universal declaration of human rights put emphasis in its initial phases on the right of everyone to work as the article 23 says “everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the

⁹ See for instance, articles 3, 4, 5, 11 of ILO convention No 189, 2016.

¹⁰ *Ibid*, Art 10.

¹¹ *Ibid*, Art 11, 12.

¹² *Ibid*, Art 13, 4.

¹³ *Ibid*, Art 6.

¹⁴ *Ibid*, Art 17.

right to equal pay for equal work. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interest¹⁵.

Likewise United Nation Organization Convention on the rights of the Children says that "State parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development".¹⁶ Now we see the reports of ILO on the estimation of labor force induction in public and private sector in Pakistan "estimated that around 7,096 trade unions were registered in Pakistan in December 2016. It also estimated that the total unionized workforce at the same time stood at 1,414,160, as well as 1,390 collective bargaining agents (CBAs) in the country".¹⁷

The ILO further estimates that "around 2.32% of the total workforce is organized in trade unions, independent economists believe this number is no more than 1%. Most of the trade unions in Pakistan exist only in formal sectors and, according to the estimates, only 15.55% of the informal sector workforce is organized under trade unions".¹⁸

There is another phenomena of employment in Pakistan, mostly a third party involved in employment named as "contractors" for this reason most of the people lost their jobs and became unemployed. As this situation can be seen in human rights commission report "large number of workers lost their jobs under the new mode of employment. The contract employment situation was further exacerbated with the introduction of the third-party employment system, in which the workers are employed by a private contractor to work for a particular company on a daily wage or piece-rate

¹⁵ See article 23 (1-4) Universal Declaration of Human Rights 1945

¹⁶ See for instance, article 32(1) United Nations Convention on the rights of the child.

¹⁷ See for instance, the report published in 2018 by International Labor Organization (ILO) Pakistan-A profile of trade unionism and industrial relations in Pakistan.

¹⁸ *Ibid*, P; 205.

basis. That means the workers are not employees of that company whose products they are producing and they are not provided any appointment letter or identity cards of that company, despite the fact in many cases they go to the premises to work. This third-party contract employment is now adopted by most of the industries and commercial establishments in Pakistan, which has virtually changed the employment scene¹⁹.

In December 2017 the Supreme Court of Pakistan in a historic verdict declared the third-party contract system against the Constitution and fundamental rights and ordered all the employers to retrospectively regularize their workers employed on contract or third-party contract.²⁰

Human Rights Commission of Pakistan comments on the order of the Supreme Court of Pakistan ``during 2018, no steps were taken to implement that order. The labor representatives filed a petition in the Supreme Court of Pakistan for implementation of the order, but the Supreme Court refused to entertain their petition, ordering them to file a petition in any high court under Article 199 (jurisdiction of the High Court)²¹.

Private Sector workers are the main victims of their wages payment. As the report of Human Rights Commission of Pakistan says ``private sector workers are the main victims of the current financial situation. Their workplace conditions are pathetic, where occupational health and safety standards are mostly ignored. The absence or ineffectiveness of the state's inspection system has resulted in numerous industrial accidents, many of which are unreported. Throughout the year, there were reports of deaths and injuries caused by roof collapses, cylinder blasts, and falls at factories²².

WOMEN DOMESTIC WORKERS IN PAKISTAN

Women entered into labor force in the past 15 years in Pakistan more than 50 percent as The Human Rights Commission of Pakistan report, 2018 says:

¹⁹See for instance, State of Human Rights in 2018, a report issued by Human Rights Commission of Pakistan in 2018. p; 205.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Op cit*, P; 208.

While women's labor force participation in Pakistan has increased by more than 50 percent over the past 15 years, only one out of every five women participates in the labor force. A woman's entry into the labor force in Pakistan is dependent on several socioeconomic and cultural factors—among them education levels, family and domestic restrictions, transport etc. Pakistan's labor laws do not create an enabling working environment for women and suffer from inconsistencies in the definitions of labor and labor rights, among other problems, according to a gender audit carried out by Women's Action for Better Workplaces.²³

Women entered into Agriculture sector that is also a domestic work job in nature in Pakistan. Landlords and `vaderaas` mostly keep the women working at their homes and `deraas` involved in their agriculture lands as a rural women in Pakistan Status Report, 2018 says;

With almost two-thirds of Pakistan's population in rural areas, seventy-five percent of women and girls are employed in the agriculture sector. Sixty percent of their work is being utilized as unpaid—in family farms and enterprises—while only 19% are in paid employment. The literacy rate of rural women between the ages of 15-64 years is 35 percent, while in urban areas it is 69 percent. Twenty percent of rural women are classified as own account workers. Support for microenterprises is still limited to low return skills and average loans of Rs.25, 000 per woman.²⁴

The report further says, ``rural women are not prepared to cope with the changes resulting from urbanization, climate change, environmental degradation and shocks, and technological innovations. The report concluded that legislation, policy, and activism are required to address the rights and wellbeing of women agricultural workers, and emphasized the need for research ranging

²³ See for instance, a study Gender equality in public administration jointly released in March, 2018 by the United Nations development program (UNDP) and the United Nations Entity for gender equality and the empowerment of women (UN WOMEN PROGRAMME).

²⁴ See for instance, rural women in Pakistan status report, 2018, *launched* in July, 2018 by United Nations.

from the introduction of new technologies, the value of unpaid care work and the care economy, and rural women entrepreneurs, to the links between climate change and rural women, the impact of CPEC, and violence against women`.`²⁵

DOMESTIC VOILENCE AS REGARD TO DOMESTIC WORKERS

Domestic violence can be defined as threatening behavior, violence or abuse (psychological, physical, sexual, financial or emotional)²⁶.It is widespread, common and likely to cause both physical and emotional injury not only to the victim but to children caught up in violence.

In 1992 the Law Commission in its Report on Domestic Violence had explained domestic violence thus.

The tern “violence” itself is often used in two senses. In its narrower meaning it describes the use or threat of physical force against a victim in the form of an assault or battery²⁷.

Each definition has been drafted for and takes it’s meaning from a specific context, whether homelessness applications, immigration legislation or the criminal or family law but all now recognize that domestic violence can be physical, emotional. Sexual, intimidating and is not limited to either male or female. In yemshaw Baroness Hale, talking in context of part VII of the housing act 1996 made the point that ‘domestic violence’ is not a term of art. It is capable of bearing several meanings and applying to many different types of behavior’.²⁸ She continued:

‘There may also be a concern that an expanded definition is setting the threshold too low. The advantage of the definition to adopted by the president of the Family Division is now that that it deals separately with actual physical violence, putting a person in fear of such violence, and other types of harmful behaviour .It has been recognized for a long time is dangerous to ignore what may appear to some to be relatively trivial forms of

²⁵ See for instance, rural women in Pakistan status report, 2018, *launched* in July, 2018 by United Nations.

²⁶ A definition used by the Home Office: see family document 5.3

²⁷ See Law Commission Report No.207, 1992. Para 2.3.

²⁸ UKSC3, [2011] FLR 1614, p; 27.

physical violence . IN the domestic context it is common for assaults to escalate from what seems trivial at first .Once over the hurdle of striking the first blow, apologizing and making up ,some people find it much easier to strike the second, and the third, and go on and on But of course, that is not every case. Isolated or minor act of physical violence in the past will not necessarily give rise to a probability of their happening again in the future. This is limiting factor.²⁹

The 2001 British Crime Survey (BCS) included a detailed self completion questionnaire designed to ascertain: the most accurate estimates of the extent and nature of domestic violence, sexual assault and stalking for England and Wales.³⁰ There were an estimated 12.9 million incident of domestic violence acts against women and 2.5 million against men in England and Wales in the year prior to interview.

The following risk factors can be found in domestic violence,

- Women are more at risk than men of inter-personal violence and especially of sexual assault.
- Younger people are more at risk of all forms of inter-personal violence than older people.
- It may be that poverty is associated with the onset of domestic violence, or it may be that in fleeing domestic violence or reduced to poverty.
- The presence of children in the household is associated with nearly double the risk of domestic violence for women.

The domestic violence also reported by Human Rights Commission of Pakistan as commission report says ``alleged torture of a 20-year-old maid, Anees Bibi, by police in Gujranwala was reported in January 2018. Her employer, a landlord in Bhamowali village, had alleged she had stolen some expensive items from his house. She was arrested and reportedly tortured. An

²⁹ UKSC3, [2011] FLR 1614, p; 27.

³⁰ Webley and Allen Domestic violence, Sexual Assault and Stalking: Findings from the British Crime Survey (Home Office Research Study 276, 2004).

inquiry committee appointed by the chief minister held the police officials guilty and recommended action against them³¹.

Another case of agricultural domestic violence was reported by the human rights commission of Pakistan as the report says ``the son of a former federal minister was arrested in December at the Seventy-five percent of women and girls are employed in the agriculture sector Women 177 Supreme Court on charges of detaining and abusing his maids, Yasmin and Saima, over a theft allegation. The exploitation and abuse of (mostly) female domestic employees—children number among these to an alarming extent—is an issue that is rarely brought out into the open. Considered indispensable in middle and upper class households, these women are nonetheless often subjected to long working hours, low pay, heavy workloads, no rest, no holidays and, worst of all, physical abuse. Even the more considerate employers do not have contracts for their domestic staff, which means that they are unregistered and unrepresented³².

Here you may see a case of child domestic violence in Human Rights Commission of Pakistan as the commission report says ``the case of the ill-treatment of the young maid Tayyaba captured the country's attention in December 2016. In April 2018, the Islamabad High Court sentenced an additional district and sessions judge and his wife to one year each in prison and ordered them to pay a fine of Rs50, 000 each for keeping their then 10-year-old child maid Tayyaba in wrongful confinement, burning her hand over a missing broom, beating her with a ladle, detaining her in a storeroom, and threatening her with 'dire consequences'. A week later, a division bench of the Islamabad High Court suspended the one-year jail sentences handed down to the judge and his wife. The parents of Tayyaba told the Islamabad High Court that they did not wish to pursue the case. In June, the Islamabad High Court accepted an appeal filed by the state and increased the prison sentence from one year to three years with a fine of Rs500, 000.

³³The bench observed that the criminal justice system had failed to protect the most vulnerable members of society from neglect, inhuman treatment, and the worst form of abuse, and had only

³¹ See for instance, state of human rights in 2018, a report issued by human rights commission of Pakistan in 2018, p; 177.

³² *Ibid*, P; 178.

³³ *Op cit*, P; 196.

started functioning after publicity on social media and the subsequent suo motu notice taken by the Supreme Court.

A couple were arrested in Gujjar Pura for allegedly torturing their 11-year-old maid, Sumera, clubbing and burning her with an iron rod. Another 11-year-old girl, Kinza, was beaten with blunt instruments by her employers—a woman army officer and her doctor husband. The husband was arrested in November after his interim bail expired. The wife, named as the prime suspect, was already being investigated by army authorities.

Seven-year-old Hadia was shot dead by her employer, and her six-year old sister Safia injured, when they arrived late for work. The incident took place in Lakki Marwat, in the province of Khyber Pakhtunkhwa.³⁴

The Human Rights Commission of Pakistan report comments on the alleged cases of domestic violence as “these are the tip of the proverbial iceberg—incidents that only come to the attention of the authorities and the media when neighbours report them or parents complain. Far too often, however, parents who have farmed out their children because of their own impoverished circumstances are persuaded to stay silent with financial inducements”.³⁵

MINIMUM WAGES FOR UNSKILLED DOMESTIC WORKERS

Implementation of minimum wages for unskilled workers has not been observed in the Provinces as the Human Rights Commission of Pakistan report says “after the 18th Amendment, the provincial governments were bound to announce minimum wages every year for unskilled workers under the Minimum Wages Law (each province has a separate law). Usually minimum wages are announced at the time of budget, but the former government did not announce it at federal or provincial level. After the elections, only the Sindh government announced the minimum wage for unskilled workers, increasing the amount from Rs15,000 to Rs16,200 per month. The other three provinces have kept the old

³⁴ See for instance, state of human rights in 2018, a report issued by human rights commission of Pakistan in 2018, p; 196.

³⁵ *Ibid.*

rate of Rs15,000 for the second consecutive year. Implementation of the minimum wage is still scarcely observed³⁶.

CHILD DOMESTIC LABOR

The dire situation of child labor in the country showed no signs of improvement. Pakistan Labor Force Survey shows `` It is estimated that over 12 million children are involved in child labor in the country, many of them due to poverty aged between 10 and 14 years active in child labor, 61 percent were boys and 88 percent came from rural areas. Estimates of the number of children can never be accurate because children working in unregistered small or family businesses or in domestic service are not covered by surveys³⁷.

In February, the previous Punjab administration announced a drive to eradicate child labor in brick kilns. Following this, 32 child laborers were reportedly freed and owners arrested in Sialkot. In April, activists called for detailed information on the Punjab government's Integrated Project for Elimination of Child and Bonded Labor 2014.³⁸ The following statements of HRCP are very important to see this case ``the government had apparently allocated Rs5.1bn for this project and claimed to have removed 88,000 children from brick kilns and rescued around 41,000 from child labor in other sectors³⁹. Human Rights Activists and people working with brick kiln laborers said that ``the schools were empty and children were still working. In district Sheikhpura, 204 one-room schools set up informally under this project were reported to have been closed down⁴⁰. The report further says ``previous Khyber Pakhtunkhwa cabinet in its last meeting on 24th May, 2018 approved what they said was the first every child labor policy of its kind, claiming it would discourage child labor and help in preparing a solid strategy for preventing the factors responsible for child labor``. The government is careless to check the employment of children in homes as the HRCP report says ``continues to

³⁶ See for instance, State of Human Rights in 2018, a report issued by Human Rights Commission of Pakistan in 2018. p; 204

³⁷ See for instance, Pakistan Labor Force Survey 2014-15.

³⁸ See for instance, the Report of Human Rights Commission of Pakistan 2018, p; 210

³⁹ *Ibid*, P; 211

⁴⁰ *Ibid*, P; 212

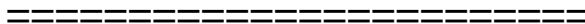
prevail unchecked and only surfaces in the media when extreme cases of neglect and abuse are reported. The regularity with which reports surface even after employers have been exposed and prosecuted demonstrates once again that legislation alone cannot eliminate child labor and it is the implementation of laws and initiatives that presents the main obstacle``.

CONCLUSION

In the end, as it is above studied and discussed the phenomena of domestic work in the light of ILO Convention No. 189, and other international laws and policies and the reports of HRCP concluded the matter that there is not a good situation in Pakistan regarding the rights of domestic workers. Pakistan is still hesitating to ratify the ILO Convention No 189. Therefore, there is a dire need to ratify the International Labor Organization Convention No. 189 and bring all existing labor laws in line with this convention and introduce new laws and legislations in the country which set standards and principles for domestic work.

BIBLIOGRAPHY

1. The definition clause for domestic work in Convention No 189.
2. Home Net Pakistan Institution, a membership-based network of home-based workers.
3. The Report of Human Rights Commission of Pakistan, 2018.
4. Vide Punjab employment of children (Amendment) Act X of 2011.
5. Labor policy of Pakistan, 2010.
6. The Sindh Home-Based Workers Act 2018.
7. Universal Declaration of Human Rights 1945.
8. United Nations Convention on the rights of the child.
9. The Report published in 2018 by International Labor Organization (ILO) Pakistan-A profile of trade unionism and industrial relations in Pakistan.
10. A study Gender equality in public administration jointly released in March, 2018 by the United Nations development program (UNDP) and the United Nations Entity for gender equality and the empowerment of women (UN WOMEN PROGRAMME)
11. Rural women in Pakistan Status Report, 2018, *launched* in July, 2018 by United Nations.
12. The Home Office family document 5.3
13. Law Commission Report No.207, 1992.
14. UKSC3, [2011] FLR 1614.
15. Webley and Allen Domestic violence, Sexual Assault and Stalking: Findings from the British Crime Survey (Home Office Research Study 276, 2004).
16. Pakistan Labor Force Survey 2014-15.



**A COMPARATIVE STUDY OF RIGHT TO
HOUSING IN THE DOMESTIC LAW OF
PAKISTAN AND INTERNATIONAL LAW**

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ABSTRACT

Housing (shelter) is an important concept which has been recognized by the domestic law of Pakistan as well as by International law under the name and style of UN Habitat agenda. In International law this right to housing has been recognized by UN Habitat agenda. If we look at the domestic law of Pakistan the right to housing has been acknowledged and incorporated under various provincial and Federal level enactments including the fundamental law of Pakistan. The present article is an attempt to explore the various aspects and angles of this right, nature of right to housing in the domestic law of Pakistan, liability of the Government of Pakistan to provide this basic necessity, efficacy of domestic law of Pakistan to provide this basic necessity to all the citizens of Pakistan. In the end of this article some suggestions to modify and improve the Legal Framework of Pakistan to achieve the goal of housing for all in Pakistan as envisaged by UN Habitat agenda.

Keywords: Constitution of Islamic Republic of Pakistan 1973, International Law, Domestic Law, United Nations Habitat Agenda.

INTRODUCTION TO RIGHT TO HOUSING IN PAKISTAN

Housing is one of the basic necessities of life. Supreme Court of Pakistan while interpreting the fundamental right to life has very clearly declared in *Shehla Zia vs. WAPDA* case that life does not mean a life like an animal or life like a vegetable. When we talk about the life of a human being it includes in it all the essentials of the life which are necessary to spend a healthy and an honorable life. Food, clothes and Housing are the basic necessities of life and without these essentials of life there is no existence of life.

Now, the question arises what is the nature of this right whether it is a positive right or a negative right? To what extent the state can be held responsible for the provision of this right? Pakistan is member of UN Habitat agenda, which envisaged the goal of housing for all, in addition to it, Pakistan is member of many International Treaties and Conventions which emphasis the member states to take steps to provide the basic necessity of housing to its citizens.

Whether the present legal framework of Pakistan is capable enough to achieve the goal of housing for all or it needs to be strengthened? If numerous people in Pakistan are deprived from this basic necessity of life, where is the problem, whether there is a problem in the distributive justice or in the corrective justice? If the present legal framework is not capable to achieve the goal of housing for all what amendments and mechanism needs to be introduced to achieve the goal of housing for all.

IMPORTANCE OF HOUSING AS A BASIC NECESSITY

By realizing the importance of housing as an important need of the human beings, the fundamental law of Pakistan, has included the right to proper housing in its Principles of Policy, so that, every new Government may formulate policies for the provision of housing.⁴¹

The Fundamental law of Pakistan also acknowledges the acquisition of property, in accordance with the provisions of law as a fundamental right and no body including the Government of Pakistan can away the property of any citizen of Pakistan except

⁴¹ See the article 38 (a) (d), The Constitution of the Islamic Republic of Pakistan, 1973.

by following the procedure of law and after payment of compensation.⁴²

Housing is a basic necessity, but before discussing it, it is important to discuss and understand the concept of right itself.

WHAT IS MEANT BY RIGHT?

Before discussing the right to housing it is better to have a look at the concept of right for better understanding. Right is an interest recognized and protected by law. It consists of two ⁴³components i.e. interest and that interest which is recognized by law of the land. Interest may be anything which has some value in terms of money and in case of violation or loss of this interest the law provides a remedy by which that interest can be restored or maintained. In the words of J. S. Mill right is a concept which imposes a duty on other members of the society to protect and respect something which is in my possession.⁴⁴ In the last five hundred years various theories have been presented by jurist about the concept of rights.⁴⁵

The contribution of Wesley Newcomb Hohfeld is worth mentioning here, who has contributed a lot in the discussion of rights. He clarified the concept of right and remove ambiguities attached with the concept of rights. He noticed that many Jurists mix the concept of right in several meanings which causes confusion for the laymen. In his view such imprecision of language shows a concomitant imprecision of thought and thus also of the resulting legal conclusions. In order to clarify the concept, he categorized it into 4 pairs of rights which are of correlative nature, reciprocal to each other. When there is a right of one person then there is a corresponding duty of some other person. It can be either liberty or privilege if there is no corresponding duty and one can do what he wants then it is outside the domain of rights.

Hence, based upon the right the right holder can claim respect and enforcement of his right from others. Under the Constitutions of various countries due to this reason there is recognition, respect

⁴² See the article 23,24. The Constitution of the Islamic Republic of Pakistan, 1973.

⁴³ Salmond, John, Sir, Salmond on jurisprudence, Ed. 2nd, Sweet & Maxwell, 1966, P; 218.

⁴⁴ Mill J.S, Utilitarianism, Sher, G, Indianapolis: Hackett.2002, P; 54.

⁴⁵ Edmundson, William, an Introduction to Rights, 2004, P; 15.

and enforcement of all civil and political rights. Citizens can participate in the civil and political areas of the state without discrimination due to these civil and political rights. These are called first generation of rights the enjoyment of which is promised by the Government to the citizens of the state. These first generations of rights are considered by one group of jurists of very limited scope to define the concept of free and equal citizenship. According to these jurists, free and equal citizenship can only be realized in the modern world if some additional set of claims, including rights to food, shelter, clothing medical care and employment are provided to the citizens by the state. These rights which are called second generation of rights when combined with the first generation of rights can prove vital in protecting the interests of the citizens.⁴⁶

With the development of human beings it was felt that merely a guarantee on the part of the state that people would not be disturbed in the enjoyment of their civil and political rights was considered as insufficient. In order to have dignified life in the modern age the citizens need more rights in the shape of economic rights i.e. right to work, right to an adequate standard of living, right to housing and in the old age when a citizen who has served the state throughout his life and if he is unable to serve in the old age he is entitled a right to pension. There is no meaning of right to a life without provision of basic necessity of life i.e. housing.

WHAT IS THE NATURE OF THIS RIGHT TO HOUSING, WHETHER IT IS A POSITIVE RIGHT OR A NEGATIVE RIGHT

Rights are of two kinds, positive rights and negative rights. Negative rights are those rights in which there is a right on the part of a person that a right available to a person is being enjoyed by a person without any interruption or disturbance on the part of other persons. There is a right on the part of one person for example one person is having a right i.e. house; the right holder should not be disturbed in the enjoyment of his right. This is called a negative right. In negative right there is a negative right on the part of one person and a negative duty on the part of the others. Negative right

⁴⁶ Cranston, Maurice, Human Rights: Real and Supposed, Political Theory and the Rights of Man, 1967, P; 43-51.

means there is a duty on the part of others that they should refrain from doing anything which can cause disturbance in enjoying that right. In many cases a person's enjoying right to housing are deprived from the enjoyment of this right. According to UN Habitat statics about twenty lakhs people are ousted from their residences per annum.⁴⁷

Permanent or temporary removal against the will of inhabitants from the homes is called forced eviction in the legal lexicon when it is done without the provision of legal protection.⁴⁸ Due to forced evictions of the people from the houses the proportion of the poverty changes in the cities into further poverty.⁴⁹ Due to forced evictions of the people from the housing units the people living in extreme poverty and destitution suffer from serious trauma and these people become further vulnerable in the society.⁵⁰ All this happens as a result of violation of negative rights and breach of negative duties on the part of others.

Positive rights and positive duties are those rights in which there is duty on the part of one person to do some overt act/ positive act and there is a right on the part of other person that some positive act may be done to enable the person to achieve/get that right. From the above said discussion it is very much clear that there are two aspects of right to housing, one is negative one and the other one is positive one.

When we talk about the negative aspect of right to housing it means those who have a housing unit should not be disturbed in the enjoyment of these rights and in this respect, there is a negative duty on the part of others. When we talk about the positive aspect of housing, it means those who have no house should be provided housing units. The Constitution of Pakistan 1973 deals with both aspects of this right, positive aspect in covered under Article 38

⁴⁷ See Global Report on Human Settlements 2007: Enhancing Urban Safety and Security UN-Habitat Agenda 2007.

⁴⁸ See also the Right to Adequate Housing, U.N Committee on Economic, Social And Cultural Rights, 6th Session, Annex 6, General Comment No.7; UN, Document. E/1998/22 (1997).

⁴⁹ See the Right to Adequate Housing, Fact Sheet Number 21, OHCHR and UN Habitat Agenda 2009, P; 5.

⁵⁰ See Forced Evictions Fact Sheet Number 25, OHCHR and UN Habitat Agenda 2014, P; 3.

and negative aspect is covered under Article 23 and 24 of the fundamental law of Pakistan.

PAKISTAN IS THE MEMBER OF UNITED NATIONS HABITAT AGENDA WHICH ENVISAGED THE GOAL OF HOUSING FOR ALL

Pakistan is associated with UN Habitat agenda. Pakistan is also striving hard to take steps to achieve the goal of housing for all. Under the legal framework of Pakistan the Government of Pakistan shall take endeavors to make available the essentials of life such as housing, food and clothing irrespective of caste, creed and sex or any other discrimination to all the citizens of Pakistan.⁵¹

Another piece of enactment which recognizes the right of housing to the low income groups of Pakistan. Twenty percent plots of the housing scheme shall be reserved in each housing society for low income group the size of the plots shall be up to 5 Marla's⁵²

The procedure for the allotment of plots reserved for the low-income group will be on the basis of first come first serve basis. The payment of plots shall be made in twelve equal installments in a time span of one year. A person who has got a plot from the category of plots reserved for low income class cannot sale the plot before the expiry of five years.⁵³

INTERNATIONAL TREATIES AND CONVENTIONS WHICH ACKNOWLEDGE THE RIGHT TO HOUSING

For overall development of human beings in the life housing is one of the fundamental elements for human dignity, physical and mental health as well.⁵⁴ Housing has been recognized and acknowledged in various International Conventions and Treaties. Universal Declaration of Human Rights (1948) recognizes housing as a right, International Convention on Economic, Social and Cultural Rights 1966, International Convention on Elimination of all forms of Racial Discrimination 1965, International Convention on the Elimination of all forms of Discrimination against Women 1979, Convention on the Rights of the Child 1989, Convention

⁵¹See article 38, the Constitution of Islamic Republic of Pakistan 1973, Ed 2nd, Irfan Law Book House, Lahore, 2005.

⁵²See Section 10 (j), Punjab Private Housing Societies and Land Sub Division Rules 2010, Ed 1st, the Manual of Development Authorities Laws, Manzoor Law Book House, Lahore, 2012.

⁵³*Ibid*, Sec; 22.

⁵⁴Lawrence Friedman, the law of the living, the law of the dead: property, Succession and society, 1966, P; 341.

relating to the Status of Refugees 1959, International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families 1990.⁵⁵

Declaration of the Rights of the Child 1959, International Labor Organization recommendation No. 115 Concerning Workers Housing 1961, Declaration on Social Progress and Development 1969, Declaration on the Rights of Disabled Persons 1975, Vancouver Declaration on Human Settlements and Action Plan 1976, UNESCO Declaration on Race and Racial Prejudice 1978, ILO Recommendation No. 162 Concerning Older Workers 1980, Declaration on the Right to Development 1986, Global Strategy for shelter to the year 2000 (1998), Vienna Declaration and Programme of Action 1993, Copenhagen Declaration and Programme of Action 1995, Beijing Declaration and Platform for Action 1995 and a very Specific International Instrument in this regard is Istanbul Declaration on Human Settlements and Habitat Agenda 1996.⁵⁶

‘Article 25 of the UDHR declares that every human being has the right to a level of living adequate for the health and wellbeing of himself and his family which includes food, clothing and housing.’⁵⁷

According to Article 14(h) of the International Convention on the Elimination of All Forms of Discrimination against Women, as per meaning of this Article All the states parties to the convention shall take measures to provide equal opportunities to women along with men to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water etc.⁵⁸

According to Article 21 of the International Convention Relating to the Status of Refugees, the contracting states shall take maximum efforts to provide as good living conditions to the refugees as are being provided to the citizens of the states without discrimination.⁵⁹

⁵⁵See Position paper on Housing Rights March, UNCHS habitat Agenda 2001.

⁵⁶See also Forced Evictions Report, *Housing Rights*, Centre on Housing and Evictions COHRE. 1998. P; 3.

⁵⁷ See Art; 25, Universal Declaration of Human Rights.

⁵⁸See International Convention on the Elimination of all Forms of Discrimination against Women, 1979 Adopted by United Nations General Assembly on September 1979.

⁵⁹See International Convention Relating to the Status of Refugees 1951 Adopted

WHETHER THE DOMESTIC LEGAL FRAMEWORK OF PAKISTAN IS CAPABLE ENOUGH TO ACHIEVE THE GOAL OF HOUSING FOR ALL OR IT NEEDS TO BE STRENGTHENED?

As per Article 38 of the Fundamental law the Governments shall take maximum efforts to provide housing facilities to the citizens of Pakistan. Principle of policy are not binding on the Government and nobody can file a writ petition in the Constitutional Courts for the enforcement of these principles as in the case of Fundamental Rights where a writ petition can be filed under Article 199 in the High Courts and a writ petition under Article 184(3) of the fundamental law of Pakistan.

So, discussion of housing under the heading of principles of policy is merely an acknowledgement of this interest (housing), but the Governments are not bound to provide. According to Article 23 of the Constitution of Islamic Republic of Pakistan 1973, every citizen has a right to purchase and sale out property in all over the country.⁶⁰

A liberty has been provided under this provision of the supreme law of the land that every person can acquire a piece of land after following the lawful process as prescribed by the law of the land. According to Article 24 of the fundamental law of Pakistan no person shall be compulsory deprived of his property save in accordance with law and if property is required by the state it can acquire it by following the process of law and after making compensation to the owners of the land.⁶¹

As earlier discussed, rights are of two kinds positive and negative rights. The above-mentioned provisions of the fundamental law provide property rights in the nature of negative rights. Negative rights mean as a general rule if somebody is having a property or house, he cannot be deprived of it. The right holder has a negative right that he should not be disturbed in the enjoyment of his rights and there is a negative duty on the part of others that they should not disturb him to enjoy that property or right in a lawful manner.

by United Nation General Assembly through Resolution No 429(v) on 28 July 1951.

⁶⁰*Ibid*, Art; 23.

⁶¹See article 24, the Constitution of Islamic Republic of Pakistan 1973, Ed. 2nd, Irfan Law Book House, Lahore, 2015.

Another piece of enactment which recognizes the right of housing to the low-income groups of Pakistan is Punjab Private Housing Societies and Land Sub Division Rules 2010 which prescribes to reserve twenty percent plots of the housing scheme shall be reserved in each housing society for low income group and the size of the plots shall be of to 5 Marla.⁶²

This provision of Punjab Private Housing Societies and Land Sub Division Rules 2010 is a first practical step towards the goal of housing for all as envisaged by the UN Habitat agenda that twenty percent plots of the housing societies should be reserved for the low income group.

The procedure for the allotment of plots reserved for the low-income group will be on the basis of first come first serve basis. The payment of plots shall be made in twelve equal installments in a time span of one year. A person who has got a plot from the category of plots reserved for low income class cannot sale the plot before the expiry of five years.⁶³

This provision is a practical step towards provision of housing units to the citizens of Pakistan. Government of Pakistan has shifted its burden to the private housing developers to provide housing units to all the citizens of Pakistan (to elite class, middle class and low-income class). Here a question arises whether this mechanism and provision is sufficient to achieve the goal of housing for all? and another relevant question arises how and why the private developers of the housing industry would provide housing units to poor and low income class people when they are purchasing the land for the housing scheme from their own resources without any incentive from the Government of Pakistan? Of course it is not a realistic view and it needs to be modified and improved.

WHAT IS THE RESPONSIBILITY OF THE STATE IN THE PROVISION OF THIS RIGHT?

If we look at the responsibility of various States in providing housing units to its citizens, the United States would be at the low end of the continuum, Singapore at the top of the list in providing the housing facility, Great Britain at low end and Israel at the high end in providing housing units. Under the fundamental law of Pakistan, right to have an access to a property or a house is a fundamental right of every citizen in Pakistan, every citizen can

⁶²See section 10 (j), Punjab Private Housing Societies and Land Sub Division Rules 2010, Ed 1st, the Manual of Development Authorities Laws, Manzoor Law Book House, Lahore.

⁶³*Ibid*, Sec; 22.

acquire a property or house in any part of Pakistan. Constitution of a Pakistan is a social contract between State and people of the State. One opinion is that the present form of a constitution the situation of provision of rights is in accordance with the demands of the modern age so there is no need for amendment in it.

Another opinion and criticism over the current position of rights provided under the fundamental law of Pakistan is that it is not in accordance with the needs of the current age and it needs to be revised and there is a need to have a new social contract between state and people of the state.

If in the modern age an analysis of the rights provided under the fundamental law of Pakistan is made, the current social contract needs to be changed because a state which is unable to provide food, shelter and clothing in the present age does not deserve to be called a state. In the current age if a state enters into a social contract with the people of the state that it shall protect the life, property and other proprietary rights only but is unable to provide food, clothing and housing to its citizens who cannot afford to have these basic facilities, such kind of social contract is outdated and it does not meets the requirements of the current age.

Food is right of all human beings, right of those who can afford to have food and right of those as well who cannot afford to have food. Should the state let them die those citizens who cannot afford? Of course, the answer would be in no. Similarly, those who cannot afford to have their own house, is there any duty or responsibility on the part of the state to provide housing units to such people, whether those citizens who are born without house should die without house?

What is the responsibility of the state? And whether such a state can claim to be a welfare state? The answer to this question cannot be found unless it is diagnosed where the problem lies, whether there is a problem in the distributive justice or in the corrective justice? Distributive justice relates to the distribution of resources as a result of legislative action and corrective justice relates to corrective action taken by the courts to rectify the distribution of resources done as a result of legislative action. Justice requires the distribution of resources as per needs.

Under the present scheme of the fundamental law of Pakistan, housing and property rights have been protected to this an extent that those who are already in possession of housing units or

property are protected under the fundamental law of Pakistan and nobody including Government of Pakistan can deprive that person from the enjoyment of that property or housing unit except in one case when property or housing unit is required by the Government for some public purpose after payment of compensation.⁶⁴

As regards to those citizens of Pakistan who are not having housing units this right has been acknowledged under the principles of policy which are not binding on the Government. No citizen of Pakistan can claim a housing unit by filing a writ petition under Article 199 or Article 184(3) of the fundamental law of Pakistan.

By mentioning housing under the principles of policy it has been acknowledged as one of the areas of consideration to enable all the future Governments to formulate unidirectional policies for the provision of housing units. Government of Pakistan has declared in very clear meaning that it cannot provide housing units to all the homeless persons because it has no financial resources, if the whole budget of public sector development programme is spent to achieve the goal of housing of all by leaving no budget for any other development work even then the Government alone cannot provide housing units to all citizens without help and support of private sector.

The role of the Government would be of a facilitator and massive investment would be invited from the private sector.⁶⁵ The present practice of the housing developers is that they purchase all the land or major land (ninety percent) for the housing scheme from their own resources on very high prices and then get it approved it from the relevant authorities of the Government after payment of prescribe fees.

The Government of Pakistan has shifted its responsibility to private housing developers that they should earmark twenty per area of the housing scheme having a plot size of five marls for low income group.⁶⁶ According to John Rawl, social and economic

⁶⁴ See articles 23&24, the Constitution of Islamic Republic of Pakistan 1973, Ed 7th, Irfan Law Book House, Lahore, .2015.

⁶⁵ See National Housing Policy 2001, Ministry of Housing, Pakistan, P; 11.

⁶⁶ See section 10 (j), Punjab Private Housing Societies and Land Sub Division Rules, 2010, the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore, 2012.

inequalities are to be arranged so that they are to the greatest benefit of the least advantaged, consistent with the just saving principle.⁶⁷

All the housing developers develop housing schemes for elite or rich class, as no person from the poor class can afford to purchase a plot for house in these housing schemes. Whether the provision of allocating twenty percent plots in the housing schemes by the developers of the housing schemes can enable the Government to achieve the goal of housing for all? The answer is no. The reason that that the elite class has no problem they can afford to have plot in all the housing schemes to build their houses, this provision of reserving twenty percent plots of the size of five Marla's cannot be helpful due to these reasons.

Firstly, the procedure of allotment of plots is vague and the authority to allocate the plots to the low income has been given to the housing societies which are a clear case of conflict of interest, this power should be exercised by the Government department. Secondly, it is a childlike thinking to imagine that the developers of the housing societies after purchasing land for the housing schemes would provide plots to the low-income groups when they are not getting any subsidy or relief from the Government side. Thirdly, even if the five Marla's plots are given to the low-income group people it cannot prove effective because the horizontal model of housing is not suitable for Pakistan the principle of optimum utilization of resources demands the vertical housing for the low-income group should be promoted. Fourthly, there arises a question whether Government can impose such kind of condition? Whether such kind of restriction is against the proprietary rights of the property owners or not? The answer to this question was provided by the apex court of Malaysia when it was prescribed for the developers of the housing industry in Malaysia to reserve 30 percent of the plots for the low-income groups. It was held by the apex court of Malaysia that Government could not impose such kind of restriction on developers of the housing industry.⁶⁸

So, the present formula of the Government of Pakistan to leave the housing industry at the mercy of the private sector developers is

⁶⁷ Rawl, John, Political Liberalism. New York, Columbia University Press, 2005, P; 182-183.

⁶⁸ Sdn Bhd Vs Mohamad Saad Bin Long, Cayman Development (K) [1999]3 AMR 3259.

not a wise move. If the Government does not want to be developer of the housing industry it should place a sound system of check and balance and a strong legal framework. The best solution of the problem is to have such kind of legal framework which contains a convergence of interest of all stakeholders (Government, developers of the housing industry, investors).

This method should not be considered in complete substitution/replacement of the present legal framework but suitable modifications plus strict application of relevant law. The present legal framework may be continued after some suitable amendments and in addition to it a new model of housing may be followed. This model of housing is based on the Quranic concept of flow of resources as per need. Major portion of the capital of the developers of the housing industry is spent in purchasing land at very high prices. If the Government of Pakistan is able to provide free land to the private housing developers and as a consideration of providing free land it may take forty percent or thirty percent land of the housing scheme in the shape of ten to eight story housing flats for the poor and low income group, the problem of housing for all can be solved to a satisfactory extent in next few years.

This area of developed flats should not be given to the developers of the housing societies as is the case for distribution of five Marla's plots reserved for low income group people but it should be distributed by the Government itself on merit to poor class citizens.

Now, coming back to the question whether housing should be a part of fundamental right instead of part of principles of policy as prescribed by the fundamental law of Pakistan? The principles of policy are not binding on the Government (no Writ Petition can be filed under the Constitution of Pakistan under Article 199 or 184(3) in the High Courts or Supreme Court of Pakistan for its enforcement) but these are like a polestar that provides direction to the Governments to formulate policies.

If housing is made part of fundamental rights in the Constitution of Pakistan then each and every citizen who is not having housing unit may file a writ petition against the Government under Articles 199 and 184(3) of the Constitution of Pakistan. This is not a practicable situation due to two reasons, firstly, if each and every citizen who is not having a housing unit would file writ petition

then it would not be practicable for the Government to run the affairs of the Government.

Secondly, no Government possess so much resources that it can provide housing unit to each and every citizen from its own resources. What Government can do is to formulate such policies that it can make it very easier for the poor class to have their own housing unit with the help of private sector.

Government should provide an access to adequate housing to all citizens of the state. It is a better but realistic view that right to housing should not be interpreted in providing housing units to all the citizens. It is not possible because state resources are limited as compare to social needs. It is however arguable that the provisions of principle of policy though not in the nature of positive rights, Principles of policy have close affinity and relationship with fundamental rights. It is because fundamental rights and principles of policy are complementary and supplementary to each other. Fundamental rights establish political democracy; the principles of policy establish economic and social democracy. No Government of Pakistan can afford to neglect these principles of policy while formulating plans and policies for the development of the country.

No Government can afford to do so because it is responsible for all its actions to the people in general. There is no legal sanction behind the principles of policy given in the Constitution of Pakistan the ultimate sanction lies with the people of Pakistan.

The people of Pakistan will never let the ruling party acquire power again if it fails to adhere to these principles of policy which includes housing in it. Thus, the Constitution of Pakistan, aims at bringing about a synthesis between principles of policy and fundamental rights and together they form the core of the Constitution. The Constitution does not preclude the enforcement of the socio economic and cultural rights which includes housing. Principles of policy given under the fundamental law of the country need not remain mere or pious declarations. It is duty of the Government to give expression to any of them through appropriate legislation whenever the occasion arises and subject to availability of resources.

Here a criticism is made that mere mentioning of housing as a fundamental right in the principles of policy is not sufficient. According to Viljoen, rights of the socio economic nature may be hidden in what we know as civil and political rights and it is

possible to make interpretation of civil and political rights in such a manner that that enhances the socio economic rights.⁶⁹ This is the reasoning which is at the root of the decision in the case of *Shehla Zia vs. WAPDA*. In this case Supreme Court of Pakistan elaborated at great length the meaning of right to life which includes all essential of life including healthy environment which is necessary for good housing. It has been established that there is a correlation between adequate housing and the rights to life and healthy living. After this land mark judgment when we talk about the Constitutional guarantee of right to life all other things including adequate housing which will assure the realization of this right ought and should be protected and guaranteed. In this regard it is very relevant to give reference of Section 26 of the Constitution of South Africa the meaning of which is as under everyone has the right to have access to adequate housing and state must take all reasonable legislative and other measures.⁷⁰ Measures should be taken to its available resources to achieve the progressive realization of this right and no one who has a housing unit should be evicted except by the order of the court and after taking into consideration all the relevant facts of the case. Housing as a right has been recognized since 1990. As per French law guaranteeing shelter constitutes a duty of solidarity for the entire nation.⁷¹ Struggle for the housing right started in India with a campaign the main aim of the struggle was to introduce a People's Bill of Housing Rights. There were two main purposes for the introduction of proposed Bill, firstly, to encourage and persuade the Government of India to recognize housing as a Fundamental Right in the Constitution of India. Just like the Constitution of Pakistan there is no explicit provision available in the Constitution of India which recognizes housing as a fundamental right. Another similarity between the Legal Framework of two countries is that

⁶⁹Viljoen, Frans, *The justiciability of socio-economic and cultural rights: Experience and problems*, Centre for Human Rights, University of Pretoria 2006.

⁷⁰ See Sec; 26 of the Constitution of South Africa.

⁷¹ See the studies on the Right to Housing a fundamental human right affirmed by the United Nations and recognized in regional treaties and numerous national constitutions brochure prepared by christophegaly, advisor to the United Nations Special rapporteur on the right to food and melikozden, director of the cetim's human rights programmed and permanent representative of the cetim to the United Nation.

right to housing has been recognized as a right in the judgments of higher courts of both countries. In the case of Pakistan, it has been recognized in the case of Shehla Zia case that life includes right to housing as well. In the case of India the case law of Bombay Pavement Case is relevant in this regard; it was held by the Supreme Court of India that to forcibly evict pavement dwellers in Bombay would deprive them of their means of livelihood due in particular to the proximity of their hutments to their source of income and employment. Right to life includes right to livelihood and housing.⁷² In another case it was held by the Supreme Court of India that right to life includes adequate nutrition, clothing and housing.⁷³ The second purpose of the struggle for housing was to introduce a bill of housing in the Parliament of India for rural as well as for urban population.⁷⁴ An International Conference on legal aspects of the Urban Shelter problem was held at New Delhi in 1988, this conference concluded with these points the adequate housing includes, housing that is secure, accessible, affordable, and nonprofit and no speculation and community controlled.⁷⁵

There is a need to create an enabling environment for the citizens by the Government that all the citizens in Pakistan can have this basic necessity of life and those who are already having this basic need are not deprived from it except in very extreme cases where a person is deprived of his property or housing unit after payment of compensation.

Keeping in view the housing as a basic necessity to the overall development of the person and the nation generally, the legal framework of Pakistan should provide some regulatory and administrative mandatory provisions and directives towards giving teeth to the Article 38 of the fundamental law of Pakistan. To be realistic it is agreed that the state cannot directly provide houses for every citizen of Pakistan without support of the private sector

⁷² Olga Tellis and others Vs Bombay Municipal Corporation and others, 1986 AIR SC 180.

⁷³ Qasim Ali Vs Hasham, 1981 SCMR 516.

⁷⁴ See a People Bill of Housing Rights, launched by the National Campaign for Housing in India, An Approach Paper, Draft;4, at 17th February 1988.

⁷⁵ See the Report by the UN Committee on Economic, Social and Cultural Rights And the right to Adequate Housing: Towards an Appropriate Approach, Human Rights Quarterly, Vol; 11, 4th Nov, 1989, P; 522-560.

and without strengthening the domestic Legal Framework of Pakistan.

Efforts should be taken by the Government of Pakistan towards addressing those issues that impedes delivery of housing units to the majority of the citizens in generally and poor class in particular. The requirements in relation to the implementation of housing rights are comprised of essentially three elements i.e., minimum core obligations of the state in relation to housing, progressive realization of the right to housing as resources permit and no regression of housing rights.⁷⁶

The major hindrance in the goal of housing for all as well as for malpractices in housing industry of Pakistan is the procedure for the acquisition of land for the housing industry. So, the state should evolve a legislative regime that ensures and enhances availability and access of land. A good, efficient and effective land policy will not only make land available and accessible but would also help the development and growth of the economy as a whole because housing activity provides job to more than forty industries.⁷⁷

Also, a good land policy administration would facilitate the growth in other industries related to housing industry. Short of recommending the creation of an enforceable right to housing the legal framework relating to housing industry should provide a foundation towards realizing the constitutional provision expressed in Article 38 of the Constitution of Pakistan.

CONCLUSION

The legal framework relating to housing industry in Pakistan needs to be strengthened keeping in view the grew areas mentioned above. In addition to efforts made for the provision of housing units to the homeless people there is a need to implement Article 24 of the fundamental law of Pakistan which deals with the protection of property rights so that no body is evicted or displaced without an order of the court and after following the due process of law. After incorporation of the above mentioned suggestion in the domestic Legal Framework of Pakistan the goal of housing for all

⁷⁶ See also Housing Rights-The new benchmarks for Housing Policy in Europe? Padraig Kenneth Urban Lawyer, Vol; 37, 1st Nov.2005, P; 87-111.

⁷⁷ See National Housing Policy, Ministry of Housing, Pakistan, P; 1-3.

can be achieved in Pakistan which has been envisaged by UN Habitat agenda.

BIBLIOGRAPHY

1. The Constitution of the Islamic Republic of Pakistan, 1973.
2. Salmond, John, Sir, Salmond on jurisprudence.
3. Mill J.S, Utilitarianism, Sher, G, Indianapolis: Hackett.2002.
4. Edmundson, William, an Introduction to Rights, 2004.
5. Cranston, Maurice, Human Rights: Real and Supposed, Political Theory and the Rights of Man.
6. Global Report on Human Settlements 2007: Enhancing Urban Safety and Security UN-Habitat Agenda 2007.
7. The Right to Adequate Housing, U.N Committee on Economic, Social And Cultural Rights, 6th Session, Annex 6, General Comment No.7; UN, Document.
8. The Right to Adequate Housing, Fact Sheet Number 21, OHCHR and UN Habitat Agenda 2009
9. Punjab Private Housing Societies and Land Sub Division Rules 2010, Ed 1st, the Manual Of Development Authorities Laws, Manzoor Law Book House, Lahore, 2012.
10. Lawrence Friedman, the law of the living, the law of the dead: property, Succession and society, 1966.
11. Forced Evictions Report, *Housing Rights*, Centre on Housing and Evictions COHRE. 1998
12. International Convention on the Elimination of all Forms of Discrimination against Women, 1979 Adopted by United Nations General Assembly on September 1979.
13. National Housing Policy 2001, Ministry of Housing Pakistan.
14. Rawl, John, Political Liberalism. New York, Columbia University Press, 2005.
15. Sdn Bhd Vs Mohamad Saad Bin Long, Cayman Development (K) [1999]3 AMR 3259.
16. Viljoen, Frans, The justiciability of socio-economic and cultural rights: Experience and problems, Centre for Human Rights, University of Pretoria 2006.
17. Olga Tellis and others Vs Bombay Municipal Corporation and others, 1986 AIR SC 180.
18. Qasim Ali Vs Hasham, 1981 SCMR 516.

- 19.** People Bill of Housing Rights, launched by the National Campaign for Housing in India, An Approach Paper, Draft;4, at 17th February 1988.
- 20.** The Report by the UN Committee on Economic, Social and Cultural Rights and the right to Adequate Housing: Towards an Appropriate Approach, Human Rights Quarterly.
- 21.** Housing Rights-The new benchmarks for Housing Policy in Europe? Pdraig Kenneth Urban Lawyer.
- 22.** National Housing Policy, Ministry of Housing, Pakistan,



**CONSTITUTIONAL RESTRAINTS IN ITS
MAKING PROCESS
IN
PAKISTAN**

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ABSTRACT

This paper is about the study of constitutional development in Pakistan in relation to the political instability or stability of the country. As the constitution provides a set of rules for people of a state who agrees to live together and it is the basic set of principles through which a state is governed, on 14th of August, 1947 the newly established state of Pakistan initially adopted the 1935 British India Act to run the affairs of the State. The process to frame a new constitution started after the Objectives Resolution in 1949, while Islamic and democratic values were considered as foundations to formulate a constitution for Pakistan. Objective Resolutions, 1949 was a base of constitutional development in Pakistan. After passing the Objective Resolutions from the Constituent Assembly of Dominion of Pakistan, Politicians in Pakistan worked together for new constitution for a country in the guidelines of Objective Resolutions. Pakistan took 9 years after independence from British rule to form its own constitution. In 1956 Pakistan made its first constitution and it will remain in the country for only 2 years when Military overthrown the elected government and suspended the constitution. Objectives Resolution was a preamble in 1956 constitution as well as in 1962 constitution and 1973 constitution.

Keywords: Pakistan, Constitution, Military, Martial Laws, suspension of Constitution, 1973 Constitution.

INTRODUCTION

Pakistan was founded in 1947 as a Dominion of United Kingdom. During its first few years of existence the British Monarch was also Pakistan's head of state, as is still in the Canada, Australia, New Zealand and British Columbia. Before writing a constitution, a Constituent Assembly passed the Objectives Resolution, on the insistence of the ulema and Jamaat-e-Islami, in March 1949 to define the basic directive principles of the new state and to declare state recognition of the sovereignty of Allah over the Universe. The Objectives Resolution affirmed the role of democracy and contained religious provisions to enable society to adhere to the teachings of the Quran and Sunnah. The Objectives Resolution has henceforth been inserted as a preamble into each of Pakistan's subsequent constitutions which are 1956, 1962, 1972 (Interim Constitution) and 1973 Constitution.

Pakistan became a republic when its first constitution was approved in 1956 but this was abrogated in 1958 after a military Coup d'état. Pakistan's second constitution was approved in 1962. It granted executive power to the President of Pakistan and abolished the office of the Prime Minister. It also institutionalized the intervention of military in politics by providing that for twenty years, the President or the Defense Minister must be a person who had held a rank not lower than that of lieutenant-general in the army. The 1962 Constitution was suspended in 1969 when Commander In Chief of Pakistan Army proclaimed martial law in both wings of the country (East and West Pakistan).

1935 BRITISH INDIA ACT AS AN INTERIM CONSTITUTION OF PAKISTAN IN 1947

Pakistan became independent of the United Kingdom in 1947, but remained a British Dominion. Under Section 8 of the Indian Independence Act, 1947, the Government of India Act 1935 with certain changes served as the working constitution of Pakistan; still, the need of a full independence and a constitution to be framed by the elected representatives of the people was all the more necessary for the free citizens of a sovereign State of Pakistan.⁷⁸ Therefore,

⁷⁸ See for instance, The Parliamentary History Archived at the Wayback Machine. Dated: 5th July, 2021 (Last visit; Date and Time 03-02-2021 / 08:40 pm)

the first Constituent Assembly was formed under the Independence Act. The powers and functions of the central legislature under the Government of India Act were conferred on the Constituent Assembly. The Constituent Assembly could, however, amend the Indian Independence Act, 1947 or the Government of India Act, 1935 and no Act of the British Parliament could be extended to Pakistan without legislation by the Constituent Assembly. The first Constituent Assembly originally consisted of 69 members; subsequently the number of members was increased to 79.⁷⁹ There made addition of ten members in the Constituent assembly of Dominion of Pakistan.

The first major step in the framing of a constitution for Pakistan was taken by the Constituent Assembly on 12 March 1949, when it passed a resolution known as Objective Resolution. It laid the foundation of the constitution and indicated the broad outline of its structure. Objective Resolution gave the basic structure and guidelines for a new constitution. It was a key step to form a new constitution for a newly established State of Pakistan.⁸⁰ The resolution was moved by the first Prime Minister of Pakistan Liaquat Ali Khan. While moving the Resolution, he said that, Sir, I consider this to be a most important occasion in the life of this country, next in importance only to the achievement of independence, because by achieving independence we only won an opportunity of building up a country and its polity in accordance with our ideals. I would like to remind the house that the Father of the Nation, Quaid-e-Azam, gave expression of his feelings on this matter on many occasions, and his views were endorsed by the nation in unmistakable terms, Pakistan was founded because the Muslims of this sub-continent wanted to build up their lives in accordance with the teachings and traditions of Islam, because they wanted to demonstrate to the world that Islam provides a panacea to the many diseases which have crept into the life of humanity today.⁸¹

⁷⁹ See for instance, Constitution of Islamic Republic of Pakistan, 1956 (Preamble)

⁸⁰ *Ibid.*

⁸¹ Kazmi, Muhammad Raza. Liaquat Ali Khan: His Life and Work. Oxford University Press, Karachi. Ed. 2003.

OBJECTIVE RESOLUTION, 1949

The Objectives Resolution was passed by the Constituent Assembly of Pakistan on 12th March, 1949. Prime Minister, Liaquat Ali Khan, had presented it in the assembly on 7th March, 1949. Out of 75 members of the assembly, 21 voted for it. All the amendments proposed by minority members were rejected. Consequently, all ten of them voted against it. The resolution proclaimed that the future constitution of Pakistan would not be modeled entirely on a European pattern, but on the ideology and democratic faith of Islam. The resolution, in its entirety, has been made part of the Constitution of Pakistan under Article 2(A). It was the first article and it was done by that time Prime Minister of Pakistan Nawabzada Liaquat Ali Khan.

SALIENT FEATURES OF OBJECTIVE RESOLUTION, 1949

- 1- Sovereignty over the entire world 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.
- 2- This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent state of Pakistan.
- 3- The state shall exercise its powers and authority through the chosen representatives of the people.
- 4- The principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.
- 5- 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.
- 6- Adequate provision shall be made for the minorities to freely progress and practice their religions and develop their cultures.
- 7- Pakistan shall be a Federation and its Provinces will be autonomous.

- 8- Fundamental rights shall be guaranteed. They include 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 the law and public morality.
- 9- Adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes.
- 10- The independence of the judiciary shall be fully secured and there will be no pressure of the Judges in the Country.
- 11- 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.
- 12- The people of Pakistan may prosper and attain their rightful and honored place among the nations of the world and make their full contribution towards international peace and progress and happiness of humanity.

Objective Resolution, 1949 combined the features of both Western and Islamic democracy, it is considered one of the most important documents in the constitutional history of Pakistan.⁸² It was strongly supported by Maulana Shabbir Ahmad Usmani, Dr. Ishtiaq Hussain Qureshi, Dr. Omar Hayat Malik, Sardar Abdur Rab Nishtar, Noor Ahmad, Begum Shaista Suhrawardy, Ikramullah, Muhammad Hussain and others. At the time it was passed, Liaquat Ali Khan called it "the most important occasion in the life of this country, next in importance only to the achievement of independence".⁸³ However, not everyone in Pakistan had such a high praise and unbounded admiration for it.⁸⁴ The non-Muslim members of the constituent assembly strongly opposed it, and all of them voted against it. Birat Chandra Mandal said that Quaid-e-Azam Muhammad Ali Jinnah had unequivocally said that Pakistan would be a secular state.

PRIME MINISTER OF PAKISTAN

⁸² See for instance, "The Objectives Resolution 1949". www.pakistani.org. 27th March, 2017.

⁸³ *Ibid.*

⁸⁴ Khan, Hamid Constitutional and Political History of Pakistan. Ed. 2005.

MUHAMMAD ALI BOGRA`s FORMULA

The Bogra Formula was a political compromise presented and proposed by Prime Minister Muhammad Ali Bogra on 7th October, 1953 before the Constituent Assembly of Pakistan.⁸⁵ Upon taking the control of the Prime Minister's Secretariat, Prime Minister Muhammad Ali Bogra announced that drafting of the codified Constitution was his main target, and within six months of a short span of a time, he announced a proposal that leads to the drafting of the constitution writ in both wings of Dominion of Pakistan. The framework proposed the establishment of more effective bicameral Parliament of Pakistan that would be composed of National Assembly and the Senate with equal representation from five provinces: Punjab, Northern Western Frontier Province (Khyber Pakhtunkhwa), Baluchistan, Sindh, and East Bengal. A total of 300 seats were to be reserved for the National Assembly on the basis of proportionate representation and 50 for the Senate that would be equal representation for all the five provinces of the country.⁸⁶ Under this framework, the larger number of constituencies was given to East Bengal which had 165 reserved seats in contrast to Punjab which had 75 seats, Northern Western Frontier Province (Khyber Pakhtunkhwa), which had 24 seats, Sindh which had 19 seats, and Baluchistan which had 17 seats reserved seats.⁸⁷ Tribal areas (Khyber Pakhtunkhwa), Karachi metropolitan area, Bahawalpur, Khairpur, Baluchistan States Union, were combined as 24 reserved seats. In this Muhammad Ali Bogra`s formula, East Bengal had given more seats due to its social homogeneity in the National Assembly than the combined reserved seats for the four provinces and the Federal Capital of Pakistan which, all were socially heterogeneous and ethnically diverse.⁸⁸ But combined the reserved seats in the four provinces were in balance with Bengal in the bicameral parliament. Both the houses were given equal power, and in case of a conflict between the two houses, the issue was to

⁸⁵ Haque, Monaz, Mir. "Mohammed Ali Bogra". www.bogra.org. Dated: 1st March, 2015. (Last visit; Date and Time 04-02-2021 / 12:40 pm)

⁸⁶ Burki, Shahid Javed. "Mohammed Ali Bogra". Encyclopedia Britannica, Inc. 5th March, 2015. (Last visit; Date and Time 04-02-2021 / 12:55 pm)

⁸⁷ Kalim, Bahadur. *Democracy in Pakistan: Crises and Conflicts*. Har-Anand Publications, New Delhi. Ed. 1998. P; 36.

⁸⁸ Hannan, Muhammad, Abdul. *Mohammed Ali (Bogra): A Biographical Sketch*. Dacca, East Pakistan. Ed. 1967.

be presented before a joint session of Parliament of Pakistan. The Muhammad Ali Bogra's formula also mentioned the check and balance to avoid the permanent domination by any five provinces where a provision was made that if the President was elected from the West Pakistan then the Prime Minister was to be elected from East Pakistan.⁸⁹ The President was to be elected for a term of 5 years from the indirect elections by the Electoral College formed by the both houses National Assembly and the Senate in Pakistan. The Supreme Court of Pakistan and High Courts of all 5 provinces were to be given more power and institutional judicial independence that would permanently replace the Islamic clergy to decide if a law was in accordance with the basic teachings of the Quran and Sunnah or not. The compromise did not settled to its ground when Governor General of Pakistan Malik Ghulam Muhammad, threatened to use his powers to dissolve the Constituent Assembly in 1954 with the support of Pakistan Military and civil Bureaucracy in Pakistan and Judiciary of Pakistan⁹⁰. Leadership in the Military of Pakistan played negative role in the politics of Islamic Republic of Pakistan. It was the first time when Military directed to Governor General of Pakistan Malik Ghulam Muhammad to dissolve the constituent assembly of Pakistan.

CREATION OF ONE UNIT

Failure on reaching concession on Prime Minister Muhammad Ali Bogra's Formula, he began working towards the controversial One Unit program that integrated the Four Provinces into a single West Pakistan Unit and East Bengal as a single East Pakistan Unit and began advocating for such idea when he quoted: There will be no Bengalis, no Punjabis, no Sindhis, no Pathans, no Balochis, no Bahawalpuris, no Khairpuris, no Kashmiris, no Gilgiti. The disappearance of these groups will strengthen the integrity of Pakistan.

⁸⁹ "Muhammad Ali Bogra". Story of Pakistan. www.bogra.org. Dated: 13th February, 2015. (Last visit; Date and Time 05-02-2021 / 10:40 am)

⁹⁰ Ali, Hamde, Syed. "Mohammed Ali Bogra". The Daily Star. Dated: 13th February, 2015. (Last visit; Date and Time 05-02-2021 / 11:40 am)

CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1956

The Constitution of 1956 was the fundamental law of Pakistan from March 1956. It was the first constitution adopted by independent Pakistan. There were 234 articles 13 parts and 6 schedules. The Constitution of 1956 was lengthy and detailed. It contained 234 articles divided into thirteen parts and six schedules. The Constitution of 1956 provided Federal Legislature system with the principle of equality between East Pakistan and West Pakistan. The Federal Legislature was to perform like the British Parliament. The Federation was invested with such powers as to take unilateral action in emergency and it could influence the provincial autonomy. The Constitution of 1956 of Pakistan provided for the Federal Parliamentary form of government, where real executive authority was vested in a cabinet, collectively responsible to the Federal Parliamentary Legislature. The cabinet was presided over by the Prime Minister. The Constitution declared that there would be only one house of parliament known as the National Assembly and equality between the both units (East Pakistan and West Pakistan) was maintained in it. The Governor General was replaced by a President, who was to be elected by the Electoral College of Pakistan composed of members of the National Assembly and Provincial Assemblies. Dominion of Pakistan changed to Islamic Republic of Pakistan in 1956 Constitution.

SALIENT FEATURES OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1956

- 1- 1956 Constitution was in written form. This is a written and lengthy document. It consists of 234 Articles divided into 13 parts and 6 schedules.
- 2- 1956 was a flexible Constitution. This constitution could be amended through a process requiring the amendment to be passed by at least a two-thirds majority of the Parliament. However the President had the right to veto the draft, which then could be overridden by simple parliamentary majority.

- 3- The name of the country was adopted as the Islamic Republic of Pakistan.
- 4- The objective resolution was included as a preamble of the constitution.
- 5- The constitution, 1956 provides for a federal system in the country. Powers was divided between the centre and the provinces. The subjects were divided into three lists. The Federal List, the Provincial List, and the Concurrent List.
- 6- The legislature would consist of a single house. Both the wings of the country were given representation in the National Assembly. The National Assembly consisted of 300 members. 150 members were drawn from each wing.
- 7- A parliamentary system was adopted, according to it the president was the head of state and the Prime Minister the head of government.
- 8- The President required being a Muslim of at least forty years of age. The tenure of his office was five years. In case of internal or external danger he could declare a state of emergency in the country. He was authorized to appoint the Governors, the Judges of the Supreme Court, Auditor General and the Advocate General.
- 9- The Prime Minister was to be the leader of the Parliamentary group and was thus indirectly elected by the people. He could choose his cabinet from the members of the National Assembly; the cabinet was answerable to the Assembly.
- 10- Provincial Autonomy Curtailed in the constitution to a great extent.⁹¹
- 11- No law would be passed against the teachings of the Quran and Sunnah.
- 12- An independent judiciary in the country. A Supreme Court interpreted the constitution, advised the state whenever required, and decided the issues whenever required.
- 13- Fundamental Rights included freedom of movement, freedom of speech and expression, freedom to choose

⁹¹ See for instance, Constitution of Islamic Republic of Pakistan, 1956, Salient Features.

profession and freedom to profess religion. Right to life, liberty, and property.

- 14- In 1956 Constitution of Islamic Republic of Pakistan it was clearly mentioned that, there will be two official languages of a Pakistan one is Urdu and second is Bengali.⁹²

SUSPENSION OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1956

On 7th October 1958, President Major General (R) Iskander Mirza staged a coup d'état. He abrogated the 1956 constitution, imposed martial law and appointed General Muhammad Ayub Khan as the Chief Martial Law Administrator and Aziz Ahmad as Secretary General and Deputy Chief Martial Law Administrator.⁹³ However, three weeks later Chief Marshall Law Administrator General Muhammad Ayub Khan who had been openly questioning the authority of the government prior to the imposition of martial law deposed President Major General Iskandar Mirza on 27 October 1958 and assumed the presidency, which practically formalized the militarization of the political system in Pakistan.⁹⁴ One of the first major steps taken by President and Chief Marshall Law Administration of Pakistan General Muhammad Ayub Khan was the appointment of a Constitution Commission on 17th February 1960. The objective of this commission was to submit proposals, as to how best democracy can be strengthened and molded according to the country's socio-political environment and Islamic principles of justice.⁹⁵ The Commission submitted its report to the government on 29th April 1961. On the basis of this report a new Constitution was framed and given to the nation on 1st March, 1962. This constitution was only made to legitimize Commander-in-Chief of Pakistan Army General Muhammad Ayub Khan's Marshall Law Government.

⁹² *Ibid.*

⁹³ See for instance, "President Iskander Mirza". Ministry of Information and Public Broadcasting, Government of Pakistan. Dated: 16th January, 2014. (Last visit; Date and Time 05-02-2021 / 12:10 pm)

⁹⁴ Khan, Hamid. Constitutional and Political History of Pakistan. The First Martial Law in Islamic Republic of Pakistan. Ed. 2009.

⁹⁵ Lentz, Harris M. Heads of States and Governments since 1945. Rutledge, New York City. P; 1896.

CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1962

The Constitution of 1962 was the fundamental law of Islamic Republic of Pakistan from 8th June, 1962 until martial law was declared in 25th March, 1969 by then Commander-in-Chief of Pakistan Army General Muhammad Yahya Khan. ⁹⁶On 17 February 1960 President and Chief Marshall Law Administrator of Pakistan General Muhammad Ayub Khan appointed a commission to report on the future political framework for the country. The commission was headed by the former Chief Justice of Pakistan, Muhammad Shahabuddin, and had ten other members, five each from East Pakistan and West Pakistan, composed of retired judges, lawyers, industrialists and landlords. The report of the Constitution Commission was presented to President General Muhammad Ayub on 6th May, 1961 and thoroughly examined by the president and his Cabinet. In January, 1962, the Cabinet finally approved the text of the new constitution.⁹⁷ It was promulgated by President General Muhammad Ayub Khan on 1st March, 1962 and finally came into effect on 8th June, 1962. The Constitution contained 250 articles divided into twelve parts and three schedules. With the enforcement of this Constitution after 44 months, martial law came to end. Pakistan was named the Republic of Pakistan. The constitution provided the federal system with the principle of parity between East Pakistan and West Pakistan. Both the provinces would run their separate provincial governments. The responsibilities and authority of the centre and the provinces were clearly listed in the constitution. The central legislature had one house known as the National Assembly. There were 157 members of the National Assembly. The equality between the two wings were maintained in it. The constitution provided for a presidential form of government, as opposed to the parliamentary form of government under the 1956 Constitution. The president, who had to be a Muslim not less than 35 years of age and qualified for election as a member of the National Assembly, was to be elected indirectly by an electoral college in accordance with the provisions

⁹⁶ See for instance, The Daily Times newspaper, Democratizing Pakistan. www.dailytimes.com. (Last visit; Date and Time 05-02-2021 / 01:00 pm)

⁹⁷ Chaudhry, G. W. Constitutional development in Pakistan. Longman London. P; Vol; 40.

outlined in the Constitution. The Electoral College formed by not less than 80,000 Basic Democrats (BD Members), equally distributed between the two provinces (40,000 from East Pakistan and 40,000 from West Pakistan). Under the Constitution of 1962, if the number of candidates for election to the office of President exceeded three, the Speaker of the National Assembly was to convene a joint session of the members of the National and Provincial Assemblies to select only three candidates for election, the remaining candidates then would not be eligible. This screening was not applicable to a person who was holding the office of the president, so if the sitting president was also a candidate the number of candidates would be four. The term of the president was five years to act as head of state as well as chief executive, solely responsible for country's administration. Governors and Ministers were appointed and removed by him. He was eligible to promulgate ordinances and veto against legislated laws only override able by two-thirds of the National Assembly.⁹⁸

SALIENT FEATURES OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1962

- 1- The Constitution of 1962 was a written document. It consisted of three schedules and 250 articles.
- 2- 1962 constitution was a rigid constitution and can only be amended through a particular process. If an amendment to the constitution is passed by at least two-thirds majority of the parliament then it becomes a part of law after authentication by the president.
- 3- A federal system was introduced in the country. It consisted of a central government and two provincial government comprising east and West Pakistan.
- 4- In 1962 constitution there was a Presidential form of government; the president was the head executive of the nation. He was empowered to nominate the ministers of his cabinet.
- 5- In 1962 Constitution there was unicameral legislature.

⁹⁸ See for instance, Constitution of Islamic Republic of Pakistan, 1962, Schedule 1, Introduction.

- 6- There was indirect method of election. The president was elected by an Electoral College comprising 80,000 Basic Democrats, equally distributed between the two provinces.
- 7- There were two provincial governments. Each of them was headed by a governor. He enjoyed powers in the province which the president enjoyed in the center. The governor was empowered to appoint provincial ministers with the sanction of the president of Pakistan.
- 8- Each province was provided with a legislature. It originally consisted of 150 members. However, later on this number was increased to 218.
- 9- Powers of president According to the 1962 Constitution the president should be a Muslim with the term of 5 years. He was eligible to promulgate ordinances and veto against legislated laws only override-able by two-thirds of the National Assembly. However, the president was not empowered to dissolve the Assembly except the cost of his office also.⁹⁹
- 10- The president was not allowed to hold any office of profit in the service of Pakistan but was not prevented from holding a managing private property.
- 11- Islamic law No law would be passed against the teaching of Quran and Sunnah and the existing laws would be made Islamic in character.
- 12- Fundamental rights The Constitution of 1962 laid down fundamental rights of speech and expression, freedom to choose profession and freedom to profess religion. With regards to civil rights, familiar rights such as the rights of life, livery and property were granted.
- 13- The Judiciary was responsible for the interpretation of laws and executive orders in the light of the principles embodied in a written constitution.
- 14- A Supreme Judicial Council consisting of two judges of Supreme Court chief justice of Supreme Court and two judges of high courts was to be established.

⁹⁹ See for instance, Constitution of Islamic Republic of Pakistan, 1962, Salient Features.

- 15- The preamble of the Constitution of 1962 was based on the Objectives Resolution.
- 16- The Constitution laid down simply that the state of Pakistan shall be an Islamic republic under the name of Islamic Republic of Pakistan.
- 17- According to the principles of policy, steps were to be taken to enable the Muslims of Pakistan individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam, and should be provided with facilities whereby they may be enabled to understand the meaning of life according to those principles and concepts.
- 18- No law shall be enacted which is repugnant to the teachings and requirements of Islam as set out in the Qur'an and Sunnah and all existing laws shall be brought in conformity with the Qur'an and Sunnah.
- 19- Only a Muslim could be qualified for the election as president.¹⁰⁰
- 20- Teaching of the Quran and Islamiyah to the Muslims of Pakistan was made compulsory.¹⁰¹
- 21- Proper organization of Zakat, waqf, and mosques was ensured.
- 22- Practical steps were to be taken to eradicate what were seen as social evils by Islam, such as the use of alcohol, gambling, etc.
- 23- A novel Islamic provision in the 1962 Constitution had introduced an Advisory Council of Islamic Ideology to be appointed by the president. The functions of the council was to make recommendations to the government as to means which would enable and encourage the Muslims of Pakistan to order their lives in accordance with the principles and concepts of Islam and to examine all laws in force with a view to bring them into conformity with the teachings and requirements of Islam as set out in the Qur'an and Sunnah.

¹⁰⁰ See also, Constitution of Islamic Republic of Pakistan, 1962, Salient Features.

¹⁰¹ Ibid.

- 24- There shall be an organization to be known as Islamic Research Institute, which shall be established by the president. The function of the institute was to undertake Islamic research and Instruction in Islam for the purpose of assisting in the reconstruction of Muslim society on a truly Islamic basis.
- 25- The state should endeavor to strengthen the bonds of unity among Muslim countries.¹⁰²

SUSPENSION OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1962

The second martial law was imposed on 25th March, 1969 by Commander-in-Chief of Pakistan Army General Agha Mohammad Yahya Khan, after General Ayub Khan handed over power to the army Commander-in-Chief, and not the speaker of National Assembly as laid down by the constitution.¹⁰³ On assuming the presidency, General Yahya Khan acceded to popular demands by abolishing the one-unit system in Pakistan on 1st July, 1970 and ordered general elections on the principle of one man one vote¹⁰⁴. However, the dissolution of one unit did not lead to the positive results that it might have occurred earlier. General Yahya Khan also made an attempt to accommodate the East Pakistanis by abolishing the principle of parity in the hope that a greater share in the assembly would redress their wounded ethnic regional pride and ensure the integrity of Pakistan. Instead of satisfying the Bengalis,¹⁰⁵

it intensified their separatism since they felt that the west wing had politically suppressed them since 1958, which caused the rise of anti West Pakistan sentiment in the East Pakistan. The first ever general elections were held in December 1970; however, the government was not transferred to the Awami League Elections. This resulted in destruction of national unity and eventual the

¹⁰² See Chief Marshall Law Administrator Order, 1969.

¹⁰³ See for Instance, Yahya Khan: president of Pakistan. Encyclopedia Britannica. 22nd July, 2020. (Last visit; Date and Time 06-02-2021 / 12:00 pm)

¹⁰⁴ *Ibid.*

¹⁰⁵ Jaffrelot, Christophe. The Pakistan Paradox: Instability and Resilience. Oxford University Press. Ed. 2015. P; 226–227.

separation of East Pakistan was fought. That was a black period of Pakistan's history when Pakistan was divided into 2 States. It was all due to again and again successive Martial Laws in the country and immaturity of Politicians who want support from General Headquarters again and again.

CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1972 (INTERIM CONSTITUTION)

The interim constitution, 1972 was that provisional document adopted by the national assembly on 17th April, 1972 and enforced on 21st April, 1972 which provided the guideline for running the administration of the country till 14th August, 1972 when the permanent constitution of 1973 became operational. The emergency declared by Yahya Khan continued and Bhutto entered into the corridors of power riding on the horse of martial law. However, the political opposition could not let him behave dictatorially and tried to rein in his authority. So, a Presidential Order, National Assembly Order 1972, authorized the assembly to draft the interim constitution before the permanent one. The interim constitution provided for a Presidential form of government. The president was required to be a Muslim of at least 40 years who was also the Supreme Commander of Pakistan Armed forces. The President elected for 5 years was assisted by a council of ministers each of which was required to be a member of the National Assembly of Pakistan. It means the 1972 Constitution afforded a Presidential system with a blend of the Parliamentary system as it made the cabinet or the council of ministers responsible to the parliament. Moreover, the office of the Vice-President was also given. A unicameral legislature empowered to legislate on all matters or subjects included in the Federal and the Concurrent lists. Similarly, in the provinces, a unicameral legislature was provided. The assemblies elected in the 1970's election were to constitute the provincial assemblies under the interim constitution. They were empowered to legislate on subjects written in the provincial legislative list and the concurrent list. Moreover, the parliamentary system was introduced at the provincial levels. Governor was the head of the provincial Executive aided by a council of Ministers headed by the Chief Minister. The council was collectively responsible to the provincial assembly. As for Martial law, it was lifted with the enforcement of

the Interim Constitution 1972 but some specified martial law regulations and orders were deemed to have become Acts. The power for amending the constitution however vested in the President of Pakistan who was empowered to make such necessary adaptation required to put it into effective operation. On the day, the Interim Constitution was adopted by the National Assembly a committee for drafting the permanent Constitution for a country was also constituted. Abdul Hafiz Pirzada was the chairman of this committee. Irrespective of all given difficulties, the permanent constitution was adopted by the assembly and replaced the interim constitution on 14th Aug 1973.¹⁰⁶

CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

The Constitution of the Islamic Republic of Pakistan is the Supreme Law of Pakistan. It was drafted by the government of President Zulfikar Ali Bhutto, with additional assistance from the country's opposition parties; it was approved by the Parliament of Pakistan on 10th April, 1973 and ratified on 14th August, 1973. The Constitution is intended to guide Pakistan's law, its political culture, and system. It identifies the state, people and their fundamental rights, state's constitutional law and orders, and also the constitutional structure and establishment of the institutions and the country's armed forces. The first three chapters establish the rules, mandate, and separate powers of the three branches of the government: a bicameral legislature; an executive branch governed by the Prime Minister as chief executive; and an apex federal judiciary headed by Supreme Court. The Constitution designates the President of Pakistan as a ceremonial Head of State who is to represent the unity of the state. The first six articles of the constitution outline the political system as federal parliamentary republic system; as well as Islam as its state religion. The Constitution also encapsulates provisions stipulating the legal system's compliance with Islamic injunctions contained in the Quran and Sunnah. The Parliament cannot make any laws which may be contrary to the Constitution; however the Constitution itself may be amended by a two-thirds majority in both the houses

¹⁰⁶ See for instance, Constitution of Islamic Republic of Pakistan (Interim), 1972.

of the bicameral Parliament, unlike the previous legal documents of 1956 and 1962.¹⁰⁷ It has been amended over time, and most recent impulses for political upgrades and reforms has been amended. Although enforced in 1973, Pakistan, however, celebrates the adoption of the constitution on 23 March, when the first set was promulgated in 1956, each and every year as Republic Day. There are 26 amendments but 23 amendments were made in constitution and three were not passed by the Parliament. The law experts, constitutional analysts, and country's reputed clergymen worked on formulating a constitution that they hoped would represent the will and desire of people. Unlike earlier attempts, the convention was not meant for new laws alterations, but for the "sole and express purpose of revising the 1956 articles. Also, the convention was not limited to the religion, exigencies of government and the preservation of the State; rather it was intended to maintain delicacy in commerce, finances, issue of loans to federation, and Separation of powers. The Constitution ultimately established a bicameral Parliament, with the National Assembly as the lower house and the Senate as the upper house. It also established the parliamentary form of government with Prime Minister as its head of Federal Government; the elected National Assembly genuinely representing the will of the people¹⁰⁸.

SALIENT FEATURES OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

- 1- Like the previous constitutions of 1956 and 1962 the Constitution of 1973 is a written document. It is very comprehensive and consists of twelve parts consisting of 280 articles.
- 2- Introductory and the Objectives Resolution It commences with an introductory which slates the Islam shall be state religion. The principles and provisions set out in the Objectives Resolution have been made substantive part of the constitution.

¹⁰⁷ See for instance, Constitution of Islamic Republic of Pakistan, 1973, first three chapters, Fundamental Rights.

¹⁰⁸ *Ibid.*

- 3- The inclusion of Islamic Provisions has given the 1973 Constitution an unprecedented Islamic character. It ensures an Islamic system in the country.
- 4- It is a rigid constitution. No Government can change it at will. It is not easy to make amendments in it. Two-third majority of both the Houses is required for this purpose.
- 5- The 1973 Constitution proposes a Parliamentary form of Government in the country. Prime Minister is the head of the Parliamentary system. He is leader of the Majlis-e-Shoora (Parliament). He is elected on direct adult franchise basis. The Prime Minister selects a cabinet of central ministers from the members of Parliament which conducts the affairs of the country. According to 1973 Constitution the Prime Minister enjoys wide powers.¹⁰⁹
- 6- The Constitution provides for the establishment of a bicameral legislature in Pakistan. The Majlis-e-Shoora (Parliament) consists of two Houses named Senate and National Assembly. The Senate or the Upper House consists of 63 members (the 8th Amendment has raised this number to 87). The National Assembly consists of 200 members (Now this number has been raised to 207). The Majlis-e-Shoora enjoys wide powers of legislature.
- 7- The 1973 Constitution ensures the following fundamental rights to the citizens of Pakistan. Security of person Safeguard against unlawful arrest and detention Prohibition of slavery and forced labor Freedom of movement Freedom of assembly Freedom of association Freedom of business Freedom of speech Freedom of profess religion Right to hold property Equality before law Right to preserve language, script and culture and Safeguard against discrimination in services.
- 8- The Constitution stresses upon the establishment of an independent judiciary. Full job security has been provided. The judges are appointed by the President. They cannot be removed from service before the end of their term except on the recommendation of the Supreme Judicial Council. In addition the Judges are paid respectable salaries.

¹⁰⁹ See for instance, Constitution of Islamic Republic of Pakistan, 1973, Salient Features.

- 9- The 1973 Constitution has declared Urdu as the national language of Pakistan. However English has been retained as the official language for 15 years. Similarly regional languages have been provided full protection.
- 10- The 1973 Constitution establishes rule of law in Pakistan. According to rule of law no person can be deprived of his fundamental rights. All the citizens of Pakistan are equal before law.¹¹⁰

ISLAMIC FEATURES OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

- 1- The official name is "Islamic Republic of Pakistan" as selected for the state of Pakistan.
- 2- Islam is declared as the state religion of Pakistan.
- 3- Enabling of living life, culture, and customs of Muslims, individually or collectively, in accordance with the fundamental principles and basic concepts of Islam.
- 4- Teachings on Arabic, Quran, and Islamiyat to be compulsory in country's institutions and to secure correct and exact printing and publishing of the Quran.
- 5- Proper organizations of Zakat, Waqf, and mosques are ensured.
- 6- Prevent prostitution, gambling and consumption of alcohol, printing, publication, circulation, pornography, and display of obscene literature and advertisements.
- 7- Required to be a Muslim to run for bid of becoming the President and/or Prime Minister. No restriction as to religion or gender on any other post, up to and including provincial Governors and Chief Ministers.
- 8- All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Quran and Sunnah and no law shall be enacted which is repugnant to such injunctions.
- 9- A Council of Islamic Ideology shall be constituted referred to as the Islamic advisory council.

¹¹⁰ See for instance, Constitution of Islamic Republic of Pakistan, 1973, Islamic Features.

- 10- The Constitution of Pakistan defined a Muslim as a person who believes in the unity and oneness of Allah, in the absolute and unqualified finality of the Prophet hood of the Islamic prophet, Muhammad, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad.¹¹¹
- 11- In keeping with this definition, the Second Amendment to the Constitution (1974) declared for the first time the Ahmadiyya Community and/or the Lahori Group as non-Muslims, since their leader, Mirza Ghulam Ahmad, claimed to be prophet of God.
- 12- However, the Fourth Amendment (1975) set aside six seats in the National Assembly for non-Muslim representatives to protect minority rights.
- 13- The state shall Endeavour to strengthen the bonds of unity among Muslim countries.
- 14- Islamic revisions were introduced into the Pakistan Penal Code.¹¹²

PARTS OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

- 1- Preamble
- 2- Introductory (Articles 1-6)
- 3- Fundamental Rights and Principles of Policy (Articles 7-40)
- 4- The Federation of Pakistan (Articles 41-100)
- 5- Provinces (Articles 101-140A)
- 6- Relations between Federation and Provinces (Articles 141-159)
- 7- Finance, Property, Contracts and Suits (Articles 160-174)
- 8- The Judicature (Articles 175-212)
- 9- Elections (Articles 213-226)
- 10- Islamic Provisions (Articles 227-231)

¹¹¹ See also, Constitution of Islamic Republic of Pakistan, 1973, Islamic Features.

¹¹² *Ibid.*

- 11- Emergency Provisions (Articles 232-237)
- 12- Amendment of Constitution (Articles 238-239)
- 13- Miscellaneous (Articles 240-280)

SCHEDULES OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

- 1- First Schedule-Laws exempted from the operation of Article 8(1), 8(2), 8(3b), and 8(4)
- 2- Second Schedule- Election of President. Article 41(3)
- 3- Third Schedule-Oaths of Office: Article 42, Article 91(5)–92(2), Article 53(2)–61,
- 4- Fourth Schedule-Legislative Lists
- 5- Fifth Schedule-Remuneration and Terms and Conditions of Service of Judges (Article 205)

AMENDMENTS IN CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

1973 Constitution OF Islamic Republic of Pakistan cannot be changed; instead constitutional amendments are passed; altering its effect. Amendments to the Constitution are made through the Parliament, where a Two-thirds majority and voting is required in both houses for a constitutional amendment to take its effect, in accordance to the Constitution. In addition to this, certain amendments which pertain to the federal nature of the Constitution must be ratified by a majority of state legislatures. As of 2019, 25 amendments have been made to the Constitution. Among the most important of these are the Eighth (1985) and Seventeenth Amendments (2004), which changed the government from a parliamentary system to a semi-Presidential system. By far the largest change to the Constitution was the Eighteenth Amendment made in (2010) which reversed these expansions of presidential powers, returning the government to a parliamentary republic, and also defined any attempt to subvert, abrogate, or suspend the constitution as an act of high treason. The latest of these amendments, the Twenty-Fifth amendment incorporated the former Federally Administered Tribal Areas into the province of Khyber Pakhtunkhwa.

SUSPENSION OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973 ON 5th JULY, 1977

On 5th July, 1977 coup by Chief of Army Staff of Pakistan General Muhammad Zia-ul-Haq, overthrowing the government of Prime Minister Zulfikar Ali Bhutto and his Cabinet. He also suspended the Country's 1973 Constitution and dissolve all the assemblies and Parliament and dismissed all Provincial Governors, Chief Ministers and their Cabinets. In announcing the coup, General Muhammad Zia-ul-Haq promised "free and fair elections" within 90 days and will restore 1973 Constitution in its original form, but these were repeatedly postponed on the excuse of accountability and it was not until 1985 that general elections were held without party based. General Muhammad Zia-ul-Haq himself stayed in power for eleven years until his death in a plane crash. 1973 Constitution was restored in the country in 1985 but not in its original form. 8th Amendment in the Constitution by General Muhammad Zia-ul-Haq made the Parliamentary Constitution into the Semi Presidential Constitution. The eighth amendment strengthened the authority of the President and also granted additional powers to dismiss the elected Prime Minister's government. These powers included the right, expressed in subsection 2(b) inserted into Article 58, to dissolve the National Assembly if, in his or her opinion, "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary." Constitution of Islamic Republic of Pakistan, Article 58(2b) with the consequence of dismissing the Prime Minister and his or her Cabinet.

PROVISIONAL CONSTITUTIONAL ORDER, 1981

After the martial law 1977, the constitution of Islamic Republic of Pakistan, 1973 was suspended. The first Provisional Constitutional Order was declared on 24th March, 1981 by then President Zia-ul-Haq. Under this new order, the senior Justices of the Supreme Court of Pakistan were asked to take an oath of office under the provisions set by the PCO. On March 1981, President Zia terminated 19 senior justices of the supreme court when they refused to take the oath. Chief Justice Dorab Patel and Senior justice Fakhrauddin Ibrahim declined to take the oath; thus opting for retirement. Senior justice Anwar-ul-Haq also resigned after

refusing to take the oath whilst the senior Judge Mushtaq Hussain who was willing to take the oath was not asked to do so. Senior justices Hussain and Haq had previously approved Bhutto's hanging were reportedly restrained to take an oath under the secretive directives issued by President Zia. All of these senior Judges were asked to tender their resignation.

SUSPENSION OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973 ON 12th OCTOBER, 1999

On 12th October, 1999 Pakistan Military takeover in Pakistan was a bloodless coup d'état initiated by the Military Staff at the Joint Staff Head Quarters working under Chairman of the Joint Chiefs of Staff Committee General Pervez Musharaf seized control of the civilian elected government of Prime Minister Mian Muhammad Nawaz Sharif. Simultaneously tenuring as the Chief of Army Staff, Chairman of the Joint Chiefs General Pervez Musharaf, who then acted as the Pakistan's Chief Executive, declared a state of emergency by issuing a controversial provisional order in a direct violation of that suspended the writ of the Constitution of Pakistan on 14 October 1999, only two days of seizing the control of the federal government from the legal advice taken from his legal team led by Sharif-ud-Din Pirzada.

PROVISIONAL CONSTITUTIONAL ORDER, 1999

Chairman Joint Chiefs of Staff Committee and Chief of Army Staff of Pakistan General Pervez Musharaf immediately imposed the martial law against the elected government of Prime minister Mian Muhammad Nawaz Sharif on 12th October, 1999. General Pervez Musharaf effectively imposed the state of emergency and suspended the constitution after introducing the Provisional Constitutional Order. Nearly, all senior Judges were forcefully required to take an oath of office under this new order, and concerns were raised that this would "erode the independence of the judiciary".¹¹³ Provincial Constitutional Order, 1999 ends the independence of Judiciary in Islamic Republic of Pakistan and forces the Judges to take oath from Chief Executive of Pakistan General Pervez Musharaf.

¹¹³ Omar, Imtiaz. Emergency powers and the courts in India and Pakistan. Kluwer Law International, England. Ed. 2002.

SUSPENSION OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973 ON 3rd NOVEMBER, 2007

A state of emergency was declared by President and Chief of Army Staff of Pakistan General Pervez Musharaf on 3rd November, 2007 and lasted until 15th December, 2007, during which the constitution of Pakistan was suspended. When the state of emergency was declared, General Pervez Musharaf controversially held both positions of President and Chief of Army Staff.¹¹⁴ He later resigned as Chief of Army Staff of Pakistan 25 days into the emergency on 28 November. The state of emergency and its responses are generally attributed to the controversies surrounding the re-election of General Pervez Musharaf during the Presidential election on 6 October 2007, including his holding of both offices of President and Chief of Army Staff at the time. Chief Justice of Pakistan Iftikhar Muhammad Chaudhry reacted promptly to the emergency declaration, convening a seven member bench which issued an interim order against General Pervez Musharaf's action. He also directed the Armed Forces of Pakistan and Police not to obey any illegal orders by General Pervez Musharaf. Subsequently, the 111th Brigade of the Pakistan Army entered into the Supreme Court of Pakistan Building and removed Chief Justice of Pakistan Iftikhar Muhammad Chaudhry and several other judges from the Supreme Court of Pakistan and arrested them.¹¹⁵ It was announced early that the state of emergency would likely end in late November or early December, 2007. After being sworn in for a second Presidential term on 29 November 2007, General Pervez Musharaf immediately declared that the state of emergency would end on 15th December, 2007.

PROVISIONAL CONSTITUTIONAL ORDER, 2007

In 2007, another Provisional Constitutional Order was issued by President and Chief of Army Staff of Pakistan General Pervez Musharaf. The Provisional Constitutional Order was issued on 3rd

¹¹⁴ See for instance, "Pakistan Judges Refuse Oath Demanded by Pakistan's Rulers". Waycross Journal. 7th May, 2011. (Last visit; Date and Time 09-02-2021 / 06:15 pm)

¹¹⁵ See for instance, "The History of Pakistan: The Kushans". Wwww.kushan.org. 30th April, 2010. (Last visit; Date and Time 09-02-2021 / 09:555 pm)

November, 2007 and later amended on 15th November, 2007. Once again Constitution of Islamic Republic of Pakistan, 1973 was suspended. All fundamental rights and liberty of citizens was also suspended it was again a black period in the history of Pakistan. ¹¹⁶Provisional Constitutional Order, 2007 was lifted on 15th December, 2007 on the serious pressure on General Pervez Musharaf by Pakistani Lawyers, social activists, civil society, politicians, students, western media and countries, print and electronic media.

18th AMENDMENT IN THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

The Eighteen Amendment in the Constitution of Islamic Republic Pakistan was passed by the National Assembly of Pakistan on April 8, 2010, removing the power of the President of Pakistan to dissolve the Parliament unilaterally, turning Pakistan from a semi-Presidential to a parliamentary republic, and renaming North-West Frontier Province to Khyber Pakhtunkhwa. This package was intended to counter the sweeping powers amassed by the Presidency under former presidents General Pervez Musharaf and General Muhammad Zia-ul-Haq and to ease political instability in Pakistan. The bill reversed many infringements on the Constitution of Pakistan over several decades by its Military Dictators. The amendment bill was passed by the Senate of Pakistan on 15th April, 2010 and it became an act of a parliament when President Asif Ali Zardari put his signature on the bill on 19th April, 2010. It was the first time in Pakistan's history that a President relinquished a significant part of his powers willingly and transferred them to Parliament and the office of the Prime Minister of Pakistan.

EFFECTS OF 18th AMENDMENT IN CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

- 1- The name of the former president of Pakistan, General Muhammad Zia-ul-Haq, has been removed from the text of Constitution.
- 2- Northern Western Frontier Province (NWFP) Province has been renamed Khyber-Pakhtunkhwa.

¹¹⁶ Rao, V, B. World history from early times to A.D. 2000. Pàgines mostrades amb permís de Sterling Publishers. Ed. 2005. P; 97

- 3- The 17th Amendment and Legal Framework Order as introduced by General Pervez Musharaf has been repealed.
- 4- The ban on third time Prime Minister ship and Chief minister ship has been lifted.
- 5- Holding constitution in abeyance is tantamount to high treason. (Article 6)
- 6- The Council of Common Interests has been reconstituted with the Prime Minister as its chairperson and the body should meet at least once in 90 days.
- 7- A Judicial Commission will recommend the appointment procedure of superior judges and the final names of judges will be decided by Parliamentary Commission
- 8- A Chief Election Commissioner of Pakistan will be appointed through consensus between treasury and opposition.
- 9- Establishment of Islamabad high court and benches of High Courts in Mingora (Khyber Pakhtunkhwa) and Turbat (Baluchistan).
- 10- Recognition of the children's right to education and insertion of a new section under Article 25A to provide constitutional guarantee that state will provide free and compulsory education to all girls and boys up to age 16.
- 11- The power to dissolve the Parliament was withdrawn from the President of Pakistan.¹¹⁷

¹¹⁷ See for instance, Milestone in the Democratic history of Pakistan, The Australian Newspaper. Theaustralian.com.au. (Last visit; Date and Time 10-02-2021 / 12:555 pm)

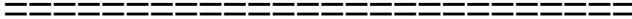
CONCLUSION

Constitution is the backbone of every sovereign state. Every State in the World has its own Constitution. Pakistan adops several constitution but 1973 Constitution was a unanimum and a final constitution in the Islamic Republic of Pakistan. After adoption of 1973 Constitution, Military dictatators suspended it 3 times. One time General Muhammad Zia-ul-Haq on 5th July, 1977 and two times General Syed Pervez Musharraf on 12th October, 1999 and 3rd November, 2007. After restoration of democracy in the country in 2008, Government and Opposition parties unanimumly pass the 18th ammendment to stop future Marshall Laws in the Islamic Republic of Pakistan.

BIBLIOGRAPHY

1. The Parliamentary History, the Way back Machine, 2021
2. The Constitution of Islamic Republic of Pakistan, 1956.
3. Kazmi, Muhammad Raza. Liaquat Ali Khan: His Life and Work. Oxford University Press, Karachi.
4. The Objectives Resolution 1949.
5. Khan, Hamid Constitutional and Political History of Pakistan, 2005.
6. Haque, Monaz, Mir. "Mohammed Ali Bogra".
7. Burki, Shahid Javed. "Mohammed Ali Bogra". Encyclopedia Britannica, Inc. 2015.
8. Kalim, Bahadur. Democracy in Pakistan: Crises and Conflicts. Har-Anand Publications, New Delhi. 1998.
9. Hannan, Muhammad, Abdul. Mohammed Ali (Bogra): A Biographical Sketch. Dacca, East Pakistan. 1967.
10. Muhammad Ali Bogra". Story of Pakistan.
11. Ali, Hamde, Syed. "Mohammed Ali Bogra". The Daily Star. 2015.
12. "President Iskandar Mirza". Ministry of Information and Public Broadcasting, Government of Pakistan. 2014.
13. Khan, Hamid. Constitutional and Political History of Pakistan. The First Martial Law in Islamic Republic of Pakistan. 2009.
14. Lentz, Harris M. Heads of States and Governments since 1945. Rutledge, New York City.
15. Chaudhry, G. W. Constitutional development in Pakistan. Longman London.
16. The Constitution of Islamic Republic of Pakistan, 1962.
17. Yahiya Khan: President of Pakistan. Encyclopedia Britannica. 2020.
18. Jaffrelot, Christopher. The Pakistan Paradox: Instability and Resilience. Oxford University Press.
19. The Constitution of Islamic Republic of Pakistan, 1972.
20. The Constitution of Islamic Republic of Pakistan, 1973.
21. Omar, Imtiaz. Emergency powers and the courts in India and Pakistan. Kluwer Law International, England.
22. "Pakistan Judges Refuse Oath Demanded by Pakistan's Rulers". Waycross Journal. 2011.
23. The History of Pakistan: The Kushans.

- 24.** Rao, V, B. World history from early times to A.D. 2000.
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**AN ANALYTICAL STUDY OF LEGAL REGIME
FOR THE FORMATION OF HOUSING
SOCIETIES IN THE PROVINCE OF PUNJAB**

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ABSTRACT

The legal framework according to which the working of the developers of the housing industry is regulated by the regulatory authorities in the province of Punjab is the main focus of this article. Pakistan is a party to the UN Habitat agenda which has envisaged the goal of housing for all. After 18th amendment in the Constitution of Islamic Republic of Pakistan 1973 the provision of housing units is the responsibility of the provincial Governments so, the role of Federal Governments is just like a facilitator. The Government of Punjab has introduced some laws to grant approval to the developers of the housing industry as well as to regulate the day to day affairs of the housing societies. This article is an effort to check the efficacy of these laws along with identification of grey areas which needs to be improved by the Government.

Keywords: Legal Framework, UN Habitat, Provincial Government, Federal Government.

1- INTRODUCTION TO THE REGULATORY REGIME OF HOUSING INDUSTRY IN PUNJAB

To achieve the goal of housing for all is the responsibility of each member state of UN Habitat agenda by introducing suitable amendments in the national laws and by introducing new laws and policies which are in conformity with human rights.¹¹⁸

To achieve the goal of housing for all as envisage by UN Habitat agenda a legal framework has been designed in Pakistan. This article consists of an introduction as well as an analysis of legal framework relating to developers of the housing industry in the Province of Punjab. The working of the housing developers is regulated by the regulatory bodies at Federal, Provincial and at a Local level.

The Legal Framework is applied by the regulatory bodies to grant an approval for the housing schemes and to regulate the day to day working of the housing developers. Some developers of the housing authorities induce general public to part with their hard-earned income on the strength of the sanctions procured for their housing societies from the regulatory authorities concerned.

Some frauds have been committed due to weaknesses in the legal framework relating to housing industry or due to weaknesses on the part of the regulatory authorities in the implementation of the legal framework relating to housing industry.

Developers of the housing industry in Pakistan have committed frauds by making allotments of plots without having any piece of land or making allotment of plots in excess of available and sectioned plots. Some developers have cheated the people by using the names of the Government departments; some have cheated the general public by not providing the basic utilities of life to the members of the housing societies.

Whenever and wherever such like frauds are committed it is not just developers of the housing societies who are liable for it but the regulatory authorities i.e. Lahore Development Authority, Capital Development Authority, Faisalabad Development Authority, Cantonment Boards etc. are equally liable and responsible for it.¹¹⁹

The UN Commission on Human Settlements (UNCHS) and

¹¹⁸See Habitat Agenda, UNO.

¹¹⁹Human Rights Case No. 5687 of 2010, PLD2011 SC 163.

Committee on Economic, Social and Cultural Rights have been emphasizing the importance of developing universally applicable criteria. A strategy for achieving the goal of housing for all is common for all states.

No one state can claim to have achieved the goal of housing for all till this date. There is a global responsibility and global commitment to handle the issue of housing for all being a common issue. Lessons learnt in achieving the goal of housing for all are of common nature. There is a need for a common set of principles, criteria and approaches applicable to all states to achieve the goal of housing for all.¹²⁰

The details requirements for the grant of approval for the formation of housing schemes are discussed below along with a brief introduction (The scope of this article is limited to the extent of province of Punjab only) of important laws relating to housing industry of Pakistan.

2- PUNJAB DEVELOPMENT OF CITIES ACT 1976.

Under this Act, the Government may, by notification declare area of any city as authority. The Government may at any time change limits of a city. The Governor of Punjab has reconstituted Rawalpindi as development authority under Punjab development Cities Act, 1976 on 29 August 2001 with the following members which have been discussed in the next heading.

2.1. Composition of the authority to regulate housing industry.

An authority shall be formed to regulate the affairs of the housing industry in the province of Punjab. It shall regulate all the functions of the developers from the sanction of the housing industry till day to day affairs of the housing developers.

The authority shall include the following members i.e., Chief Minister of the province or any person nominated by him, three members of the provincial assembly, mayor of the area concerned, chairman planning and development board or his nominee, finance secretary or his nominee, secretary housing and urban department, secretary local Government, commissioner of the area concerned,

¹²⁰See the UN Committee Report on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach, Scott Leckie, Human Rights Quarterly, Vol. 11, NO.4, 1989, P; 522-560.

District Coordination Officer (DCO) ,Director General (DG), all managing directors and 2 experts, who are nominees of the provincial Government.¹²¹

It was held by the apex court of Pakistan that when cancellation of original allotment for non-fulfillment of terms of the plot was made by the chief minister. The only authority that could pass any order regarding allotment or cancellation of the plot was the authority constituted under section 4(4) of the Punjab Development of Cities Act 1976.¹²²

The apex court of Pakistan declared that such objectives of this law can only be achieved if public functionaries entrusted with job implement this law in letter and spirit in an even handed manner.¹²³

Furthermore, to protect public safety and to ensure compliance with the Development Plan after its preparation of building control mechanism. Discretion under section 13 of the Act has been provided to stop the housing societies to violate master plan and if a situation arises for which no explicit provision has been provided, the authority by exercising the discretionary powers can cater with such kind of situation. The discretionary powers of the authority are not unbridled one. Objectives of the Act can be achieved if the powers entrusted to the authority are exercised in letter and spirit to achieve the objectives of the Act.¹²⁴

No statutory or regulatory provision exists which authorized Parks and Horticulture Authority to confer a permanent right on an outdoor advertiser. No objection certificate granted under such kind of situation is not of permanent nature and subject to cancellation by the authority as per rules.¹²⁵

A housing society could develop the area within the territory of housing society for face lifting and beautification of the society but not outside it. Public street was neither own nor vested in the authority. This area belongs to the authority created under Local Government Ordinance 2001.As per this enactment the authority

¹²¹See Section 4, The Punjab Development of Cities Act, 1976, Commented by Ch. H.A.M. Jhandyana, The Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore, 2019.

¹²²Faiz Karim Vs Multan Development Authority, 1996 SCMR755.

¹²³Haji Allah Rakha Vs Faisalabad Development Authority, 2003 SCMR 1756(a).

¹²⁴Ibid (b).

¹²⁵Mehran Advertisers and others Vs Govt. of Punjab, PLD2011(Lahore)61(a)

has been given power to acquire property, both movable and immovable as per needs of the authority, to further deal with the property as per law according to the needs of the authority from time to times.¹²⁶

To undertake any works and incur any expenditure for the authority, to procure machinery, instruments or any other material required by the authority from time to time, to enter into contracts to meet the day to day requirements of the authority. Cause studies, surveys experiments, technical researches or contribute towards the cost of any such studies, surveys, experiments or technical researches made by any other agency to achieve the objectives of the Act, to issue interim development order for the area for which a scheme is under preparation and restrict or regulate by general or special order, any change in the use of land and alteration in building structure and installation for better housing services.

The authority under this enactment may seek input from other departments to perform its duties under this Act. The authority may establish other institutions to assist it in the performance of its functions.¹²⁷

Authority is an engineering organization which is required not only to carry out functions of professional engineers but also to provide engineering services whenever regulating the affairs of a housing society or other work of such nature.¹²⁸

2.2. Preparation and execution of Housing Scheme.

The housing plans prepared by the authority shall be submitted to Government for approval, except those housing societies for which no loan is required from the Government.

Notification shall be issued by the authority for every housing society sanctioned by the Government.¹²⁹

When land is required for a housing scheme, Government is a sole judge to decide whether land is required for a public purpose or not. The owners of the land cannot raise the plea that another piece of land owned by the Government is available which can be acquired by the Government for the establishment of a housing scheme. Any person from the entire general public can purchase

¹²⁶Muhammad Munir Vs LDA, PLD 2000(Lahore) 744(b).

¹²⁷*Ibid*, Sec. 7.

¹²⁸Khurram Nawaz Siddiqui Vs Deputy Director Faisalabad Development Authority, 2014 PLC (C.S) 900(c).

¹²⁹*Ibid*, Sec. 12.

house in the housing scheme. Individual interest must be given way to the interest of the general public.¹³⁰

Whether acquisition of individual land under the Land Acquisition Act 1894 is against Shariah (Islamic Law) is a question which is in the purview jurisdiction of Shariat court and it is beyond the jurisdiction of High Court.¹³¹ Approval under sub-section (3) shall be conclusive proof of the fact that the scheme has been duly framed and sanctioned. Acquisition of land for a project in which limited and specified segment of the society was beneficiary was declared to be a public purpose.¹³²

Planning or development scheme can be prepared with the concurrence of the Authority. Sanction of Government for housing schemes prepared by authority was necessary in respect for which loan or grant was required or provisional estimated cost exceeded 20 lakhs of rupees.

There is no need to meet such kind of requirement if the housing scheme is being launched on the basis of self-finance for such housing scheme only sanction of the authority is required.¹³³

2.3. Acquisition of Land for the Housing Society.

The authority may acquire any land or property within the area in accordance with law.¹³⁴ Whether land has been acquired with malafide object and ulterior motives, High Court could check whether land was being acquired with malafide, unjust unfair, oppressive and illegal manner so it could grant relief to the owners of the land if the peculiar circumstances of the case so required.¹³⁵

Powers under the law available to the authority should be exercised without any malafide on the part of authority. Land for the establishment of private housing society was purchased by the developer. An application was filed to Lahore Development Authority (LDA) for the grant of approval (sanction) to start a housing society. The authority kept the application pending and

¹³⁰Muhammad Shafi Vs Multan Development Authority through its D.G, 2010YLR 1161(c).

¹³¹Ghulam Murtaza Vs Multan Development Authority through its D.G, 1986 MLD (Lahore) 670(a).

¹³²Ibid, 1986 MLD (Lahore) 670(b).

¹³³Abdullah Vs Multan Development Authority through its D.G, 1986 CLC (LAH) 2073 (a).

¹³⁴Ibid, Sec. 24.

¹³⁵Naseem Zahra Vs Multan Development Authority, 1991CLC (Lahore) 1001(b).

then issued a notification under Section 4 of Land Acquisition Act 1894 for acquisition of same land to develop a housing society of the authority (LDA). The notification was challenged in the court it was held by Lahore High Court that idea of developing its own housing scheme by the Authority (LDA) was not a valid reason to turn down the request of the private developer.

Mere issuance of notification under Section 4 of the Land Acquisition Act 1894 does not create any proprietary right in favor of acquiring agency. Under the present condition the action of Lahore Development Authority to demolish the infrastructure of the private developer and to establish its own housing society on same land is based on malafide and discrimination on the part of the authority. High Court declared the acts of taking over the land of the private developer as illegal and void ab inito.¹³⁶

Government is at the same footing to pay compensation for acquisition of land for housing purpose as a private developer is responsible to pay compensation. Land was required by Multan Development Authority for the construction of bypass. For this purpose, a notification was issued under Chapter six of the Punjab Development of Cities Act 1976. The question was whether Provincial Government was liable to pay compensation for it or not. As by pass was being constructed by the Provincial Government and it was the beneficiary of this acquisition of land so Provincial Government was liable to pay compensation to the land owners.¹³⁷

2.4. Conversion of a property to a different use.

If any person converts a property to use or purpose other than provided under a housing scheme, master plan of the housing scheme or classification map without getting the written approval of the authority he shall be punished with an imprisonment of one year or fine at the rate of ten thousand rupees per day or both sentences.¹³⁸

¹³⁶Mian Rifat Mehmood Vs D.G Lahore Development Authority, 2016 CLC 408.

¹³⁷Naseem Zahra and others Vs Multan Development Authority and others, 2015 SCMR 1440.

¹³⁸Punjab Private Site Regulations, Sec. 37.

Similar kind of restriction has been imposed on the management of the housing society. Society is bound to develop the housing society as per approved layout plan of the housing society.

Open spaces in the housing society could not be allotted for residential or commercial purpose.¹³⁹ Allegation against the accused person was that he made allotment of plots reserved for the graveyard for commercial purposes which was a clear violation of master plan and layout plan of the housing society. The accused was sentenced up to five years of rigorous imprisonment and disqualified to hold any public office for a period of ten years under Section 9(a) of National Accountability Bureau 1999.¹⁴⁰

Residential plot was allotted to lessee subject to the condition that the plot shall not be sub divided except with the approval of the authority. The lessee approached the lessor for the sub division of the plot which was done by following the legal process of law. After that the lessee applied for the commercialization of the plot which was done but the due process was not followed. As per clause 3 of Schedule D to Regulation 26 of Karachi Building and Town Planning Regulations 1979, when use of land was to be changed or converted for any purpose, an application had to be made to the Commissioner. In the present case the due process was not followed so it was not a valid transfer in the instant case.¹⁴¹

Residential Plot cannot be converted from residential to commercial use by the housing society without getting approval from Karachi Development Authority and as per rules.¹⁴²

It would be miscarriage of justice and abuse of the process of law if a developer of the housing society is developing his society in violation of Punjab Private Site Regulations 2005 by not mortgaging 20 percent area in the name of the authority.

Grant of an interim injunction to a developer who is violating law is not in accordance with law when he was constructing the housing society without approval of layout plan of the housing society. No injunction can be issued in such like circumstances.¹⁴³

Relocation of a residential plot at the initial stage of the housing

¹³⁹Farzana Chaudhary Vs Province of Punjab, 2016 MLD1453.

¹⁴⁰Malik Deen Vs Chairman National Accountability Bureau, 2019 SCMR 372.

¹⁴¹Muhammad Sadiq and others Vs Federation of Pakistan, 2013 SCMR1665.

¹⁴²Works Cooperative Housing Society Ltd and others Vs Miss Najma Saleem, 2015 YLR2719.

¹⁴³T.M.A Samundri Vs Abdul Ghafur, 2013 CLC (Lahore) 333.

society which would help to eliminate congestion and to supply the basic utilities services to all the members of the housing society such proposed change which does not injure public interest if made as per law can be allowed.¹⁴⁴

2.5. Power to make regulations.

The authority may make regulations as may be necessary to carry out the purposes of this Act but these regulations should not be against the provisions of this Act or rules made for this purpose.¹⁴⁵

3. The Punjab land use (classification, reclassification and redevelopment) Rules, 2009.

In exercise of powers conferred by section 191 of the Punjab Local Government Ordinance 2001, the Government of Punjab vide notification number SOR(LG)38-18/2009 dated 27,2009, these rules have been issued to regulate the activities of the developers of the housing industry in the province of Punjab. These rules are applicable to the whole area of the Punjab except the controlled area or city area in a city district.¹⁴⁶ Under these new rules, a city district Government or a tehsil municipal administration shall classify the land into the following classes i.e., residential, commercial, industrial per urban, agricultural and notified area.¹⁴⁷

A residential area shall be classified by the city district Government and tehsil municipal administration into following two classes i.e. approved scheme and established built up area.

Approved area includes RA1 area: means a residential area which consists of housing plots of more than 2 kanals with a passage of fifty feet to two hundred and twenty feet and a typical right of way of sixty feet, RA2: means the area consisting of plots from 1 kanal to 2 kanal with a passage from 30 feet to 180 feet and a typical right of way of 30 feet, RA3: this class consists of plots from 10 maralas to 1 kanal with a passage of 30 feet to 120 feet and a typical right of way of 30 feet, RA4: this class consists of a plot size of less than 10 marlas with a right of way from 20 feet to 80 feet.

¹⁴⁴ Mansur Sharif Hamid and others Vs Shafiq Rehman and others, 2015 SCMR 1172.

¹⁴⁵ *Ibid*, Sec. 44.

¹⁴⁶ The Punjab Land Use (Classification, Reclassification and Redevelopment) Rules, 2009, Sec. 1, Ed 2nd, Manzoor Law Book House, Lahore, 2019.

¹⁴⁷ *Ibid*, Sec. 4.

A typical right of way of 30 feet, Established built up area includes RA1: this class consists of plots size with an area of more than 1 kanal with a right of way of roads from 40 feet to 220 feet and a typical right of way of 40 feet, RA2: this class consists of plots from 10 marlas to 1 kanal with a road side from 30 feet to 120 feet and a typical right of way of 30 feet, RA3: this class consists of plots from 5 marlas to 10 marlas with a road side size ranging from 20 feet to 60 feet and a typical right of way of 30 feet, RA4: this class consists of residential area with plot size ranging of less than 5 marlas and with a right of way of roads of 40 feet and a typical right of way of 20 feet.¹⁴⁸

The relevant city district Government or tehsil municipal administration is under the statutory duty to divide the residential area into three categories i.e. permitted uses, permissible uses and prohibited uses. Permitted uses includes detached house, semidetached house, town house, residential apartment, neighborhood level park, place of worship, burial place and horticulture. Permissible uses include daycare centers, primary school, secondary school, dispensary, guest house, small size corner shop, office of professionals.¹⁴⁹

It is a statutory duty of the city district Government or a tehsil municipal administration to prepare a land use classification map of the area concerned by using satellite images within a time period of 6 months.¹⁵⁰ After a careful scrutiny of the land use classification map, District Coordination Officer of the city district or Tehsil Municipal Officer shall submit the map and minutes of the meeting to Zila (District) Council or the tehsil council for its approval.¹⁵¹

4 The Punjab private housing schemes and land subdivision Rules, 2010.

Under the notification number SOR (38-2/2004-P, dated March 13, 2010). In exercise of powers conferred under the Local Government Ordinance 2001, the Governor of the Punjab is pleased to make the following rules to regulate the affairs of the

¹⁴⁸ The Punjab Land Use (Classification, Reclassification and Redevelopment) Rules, 2009, Section. 1, Ed 2nd, Manzoor Law Book House, Lahore, 2019.

¹⁴⁹ *Ibid*, Sec. 6.

¹⁵⁰ *Ibid*, Sec 19.

¹⁵¹ *Ibid*, Sec. 22.

housing industry. Under this new enactment the scope of the housing developer has been enhanced by including a firm conducting housing society and an owner of the land forming a housing scheme in addition to cooperative housing societies and housing companies, so, it has a wide scope as compare to the definition of developer given under the Punjab Private Site Regulation 2005.¹⁵²

Under the new enactment a developer (cooperative housing society, housing company, a firm or an owner of land) desirous to form a new housing society shall file an application to a town municipal administration or to a tehsil municipal administration or a development authority as per territorial jurisdiction for initiating a new housing scheme.¹⁵³ An application for the formation of a housing society should be accompanied with a certified copy of national identity card, mailing address of the developer, a photocopy of the electricity bill, a certificate of registration of the developer, a location plan of the proposed housing scheme, details about the land whether owned by the developer or if not owned by the developer and if not owned by the developer then bank statement of the developer indicating amount available to purchase the land.¹⁵⁴

The rules are silent with respect to the status of the land proposed for the housing scheme whether it is free from the encumbrances or not. The rules are silent about the location whether it is a consolidated land or a scattered land. The housing scheme can be granted permission to proceed with the housing society if the area of the housing scheme is not less than 100 kanals, the size of the road is not less than 60 feet in city district and not less than 40 feet in other areas, site is not under the threat of flood, the land of the housing scheme is not required to the Government for any other public purpose and the proposal of the housing scheme is in accordance with the master plan of the housing scheme.¹⁵⁵

¹⁵² See Rules, 2010, Section 2(9), the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

¹⁵³ *Ibid*, Sec. 4.

¹⁵⁴ *Ibid*, Sec. 5.

¹⁵⁵ See Rules, 2010, Section 6, the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

The rules are silent with respect to seismic aspect which is a very serious deficiency in the rules. Pakistan has already faced a very serious earthquake in 2005 and many earthquakes of minor intensity after it. The geographical location of Pakistan is such that most of the areas of Pakistan are on the fault line. The application for housing scheme shall be processed by the town municipal administration or tehsil municipal administration depending upon the case, the application for new housing scheme shall be forwarded by the tehsil municipal officer or by the town municipal officer within a time period of 10 days from the date of receipt of it to district officer dealing spatial planning, within 10 days this application shall be forwarded to district planning and design committee by the district officer.

The decision of district planning and design committee to accept or reject the application should be intimated by the district officer spatial planning to the relevant initiating forum of the application in 5 days, within 5 days from the receipt the town municipal administration or the tehsil municipal administration shall intimate the developers about the fate of the application.

The application of the new housing scheme shall be forwarded to the water and sanitation department and the department shall issue no objection certificate or refuse it in 10 days, the application shall be forwarded within 5 days to the planning department which is under duty to respond within 5 days in positive way or in a negative way.¹⁵⁶

This is a welcome provision in the new rules that a time period has been prescribed for each and Every office to respond to the application for the formation of the new housing society and it would be helpful to avoid unnecessary delay on the part of the Government officials. After this exercise if the housing scheme is feasible, a preliminary no objection certificate is issued to the developer of the housing scheme.¹⁵⁷

It has been observed that most of the developers misuse this initial no objection certificate(NOC) and invite applications from the general public to make investment in the plots of the housing society as the general public do not know the difference between final permission and initial no objection certificate. An application

¹⁵⁶ *Ibid*, Sec. 7.

¹⁵⁷ *Ibid*, Sec. 8.

shall be entertained by the town municipal administration or the tehsil municipal administration if it is accompanied by, copy of the national identity card, a document indicating the proof of ownership, khasra plan or aks-e-shajra certified by the tehsildar, non- encumbrance certificate issued by the relevant department, location plan signed by the certified town planner, layout plan of the housing society, details of the land yet to be acquired and it should not be more than 10 percent of the total land and it should be acquired by adopting the process of Land Acquisition Act1894.¹⁵⁸

This is the most important provision of the rules. As per this provision the developer of the housing society is required to purchase 90 percent of the land for the new housing scheme from its own pocket and file an application for the grant of permission of housing scheme.

A question arises how a developer of the housing scheme (housing company, cooperative housing society or owner of the land) would help the Government of Pakistan to achieve the goal of housing for all as envisaged by the United Nations Habitat agenda by providing plots at the cheap rates after purchasing land at very high rates from its own resources?

The answer of this question shall be sought out in the fourth chapter of the thesis relating to critical analysis of the legal framework. Another problem with this condition of purchasing 90 percent land before the start of housing scheme is that normally private housing companies due to financial resources can afford to purchase the 90 percent land in one go but he cooperative housing societies cannot afford to purchase 90 percent land in one go because the cooperative housing societies are formed by the poor people so this seems to have closed the last door opened to the poor members of the housing scheme to have their housing units.

Another problem with this condition is that when the developers proceed to acquire the remaining 10 percent land under Land Acquisition Act 1894 the prices of the land owners of this piece of land are dictated by the owners of this 10 percent landowners when

¹⁵⁸ See Rules, 2010, Section 9, the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

they change the nature of their lands from agriculture to commercial in connivance with the land revenue officials.

This condition of 90 percent of land seems to be an obstacle in the way of the policy of housing for all. A housing scheme shall include 7 percent in the shape of open space or park, 2 percent as a graveyard, 5 percent as a commercial area, 5 to 10 percent as public buildings, 1000 square yard would be the maximum size of the plot, approach road should not be less than 60 percent in city districts and not less than 40 percent in other areas, minimum size of internal roads should be 40 feet and 20 percent of the land shall be earmarked for the low income group which contains plots of the size of 5 marlas each.¹⁵⁹

It is very un-thoughtful policy and it cannot help to achieve the goal of housing for all. How the poor people can afford to purchase a plot of 5 Marlas in a very costly housing scheme (when a developer has purchased land for the housing scheme from his or its own pocket). Why a developer would like to provide 5 marlas plots on cheap and subsidized rate when the developers are not getting any kind of subsidy from the Government side?

Before the issuance of sanction for the housing scheme the developer is required to deposit scheme approval fee, submit a transfer deed consisting of area reserved for road, open space, park, 1 percent of scheme area reserved for public buildings in favour of TMA and mortgage 20 percent area of the total land in the name of the tehsil municipal administration or town municipal administration as a guarantee to complete the development of the housing scheme within the time frame, the developer of the housing society is also required to submit no objection certificate from the environmental protection department, it is a welcome step but the rules are ambiguous and vague about the criterion and aspects are to be considered by the environment department while granting no objection certificate.¹⁶⁰

It has been observed that many housing societies do not mortgage and transfer the stipulated portion of land in the name of Tehsil

¹⁵⁹ See Rules, 2010, Section 10, the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

¹⁶⁰ See Rules, 2010, Section 17, the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

Municipal Administration and if the land is mortgage after completion of the development work the mortgage portion of the land is not redeemed timely to the developers.

In order to invite the general public to purchase the plots in the housing society when an advertisement is made the developer is required to include in it the total area of land along with location plan, details of the residential and commercial plots, the area or plots mortgage with the sanctioning authority, the proposed time period to complete the housing scheme, name of the sanctioning authority and the manner of allotment of the plots.¹⁶¹

The rules are silent with respect to the procedure to refund the amounts of the unsuccessful applicants and the mechanism to return these amounts. The advertisement for the housing scheme should include the details about the total area of the land of the housing scheme along with the layout plan of the housing scheme, the details about the residential and commercial plots, complete information about the plots mortgage with the development agency, estimated time period to complete the housing scheme.

The details about the development agency granting approval and clear information about approval number, the mechanism about the allotment of the plots, balloting or any other method, the procedure of cancellation of plot.¹⁶²

Plots of the housing society were issued by the Government of Punjab on the basis of auction. From the date of auction of plot the successful bidder was required to submit one third of the price within seven days. The bidder submitted the price on eighth day it was held by the court that the day of auction of the plot was not to be counted towards calculating the days of submission of auction price.¹⁶³

Still there is a room for further improvement in this rule total area should also mention whether the land is scattered or consolidated, to further clarify the process of allotment of the plots the plot numbers should be very clearly mentioned, fixation of the period for the development of the housing scheme is a welcome step but there is a need to prescribe some surcharge or penalty for not completing the development work within the time line.

¹⁶¹ *Ibid*, Sec. 20.

¹⁶² *Ibid*, Sec. 21.

¹⁶³ Abdul Rehman and others Vs Govt. of Punjab through Secretary and others, 2014 CLC1677.

If the development charges are not paid on time, the regulatory authority cannot cancel the approval unilaterally without providing an opportunity of hearing. It was held by the Sindh High Court that when layout plan was approved by the development authority after payment of fifty percent charges and the remaining fifty percent charges were to be paid after six months which were not paid by the administration of the housing society as the amount of charges have been increased.

It was held by the court that development authority could not increase the development charges after grant of approval and as settled between parties and furthermore on failure to pay development charges it could not cancel the approval of the housing society without giving an opportunity of hearing.¹⁶⁴ With respect to procedure for the cancellation of plot, no housing society could cancel any plot without providing an opportunity of hearing. No housing society can cancel the plot of any member without providing an opportunity of hearing. Cancellation of allotment of plot could not be held to be valid as being violation of principle of natural justice.¹⁶⁵

The petitioner was granted a house under Punjab Government Servants Housing Foundation Rules, 2005 but failure to make installments the allotment was cancelled. Lahore High Court directed the housing foundation to re-allot the plot on payment of additional payment.¹⁶⁶

The mechanism for the allotment needs to be mentioned there is a need to mention the mechanism for return of amounts of the unsuccessful applicants the time period during which the amounts shall be returned. The developer shall ensure that the allottee of the plot becomes the member of the housing society, this rule can be more effective if some penalty is imposed for those who do not occupy and develop the plot within the prescribe time this step would help to put a check on the people who invest money for speculation purposes.

¹⁶⁴ M. Hanif Khan through Attorney and others Vs Malir Development Authority through its D.G and others, 2016 YLR 1652.

¹⁶⁵ Hafiz Muhammad Ashraf Vs Lahore Development Authority, 2018 CLC 176.

¹⁶⁶ Shahida Mohsin Vs Chief Secretary Govt. of Punjab and others, 2013 CLC1566.

Allotment of plots should not be cancelled without reason and intimation to the allottee. This condition is in accordance with the principles of natural justice that nobody should be condemned unheard. If there is a delay on the part of the developer the developer is bound to pay 2 percent amount paid by the investor to the developer for each month of delay.

As per rules if default is made in the payment of the installment of the plot then 1 opportunity should be given to the investor, it is a welcome step and instead of one there should be two opportunities. As per rules if there is default in payment of development charges 2 opportunities should be given this rule is good and if instead of 2 opportunities, 3 opportunities are provided it would be more better. As per rules development charges should be clearly mentioned and these charges should not be increased without written approval of the development authorities.

As per rule 10 of the rules, 20 percent area is reserved for the low income people, as per rule 22 of the rules, the size of the plots shall be up to 5 marlas and these plots shall be allotted on first come first serve basis and the plot holders are not allowed to sale the plots before the expiry of 5 years. This provision seems to be a first serious attempt to achieve the goal of housing for all in Pakistan. But still there are many issues attached with this initiative.

A similar kind of provision is found in the shape of Section 106 of the English Town and Country Planning Act 1990, which demands the developers of the housing industry in England to contribute towards affordable housing by the local planning authorities. From the coming into force of this Act special power has been granted to the Local Planning Authorities to reject the application of the developer if the developer of the housing industry is not contributing towards low income housing. Planning permission for the housing society is granted which is a kind of an agreement in the shape of Section 106.¹⁶⁷

As per rules plots reserved for the low income people should be allotted on the basis of first come first serve basis and the plot holders are not allowed to sell the plots before the expiry of five years.¹⁶⁸

¹⁶⁷ Calavita, N & Mallach, A, *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion and Land Value Recapture*, Cambridge, MA: Lincoln Institute of Land Policy, 2010, P; 423-438.

¹⁶⁸ *Ibid*, Sec. 22.

But here a question arises whether this rule i.e. rule 22 is sufficient and capable enough that Pakistan can achieve the goal of housing for all as envisaged by UN Habitat agenda?

The answer to this question is no due to many reasons, firstly, as developers of the housing societies are bound to purchase a major chunk of land from their own resources without any subsidy from the Government so under this situation to expect from the developers that they would allot plots to the poor and low class people is not understandable especially when there is no check and balance from the Government side to check the mode of delivery of plots to poor people, secondly, the condition of first come first serve for the allotment of plots is very vague as the developers would themselves determine it and this allotment process contains a situation of conflict of interest and it has provided an opportunity to the developers to accommodate their friends and relatives, so, this provision is opening a door for favoritism and nepotism.

Thirdly, housing activity horizontal wise is not the solution of the problem and not an optimum level of utilization of resources are possible if housing is done on horizontal pattern, as the solution of housing shortage lies in vertical housing pattern. A housing developer is required to submit 4 sets of the approved scheme to the town municipal administration or tehsil municipal administration as the case may be, a copy of sanctioned layout plan, location map, traffic plan, soil tests, land use analysis etc.¹⁶⁹

The above mentioned set of documents shall be forwarded to the respective agencies for approval within a period of 7 days. The relevant agency shall intimate the developer about the objections within a period of 20 days. After removal of the objections the agency shall convey its decision regarding approval or rejection within 15 days.¹⁷⁰

Within a time period of one year the developer shall submit the landscape including plan for parks and open spaces and solid waste management system of the housing scheme.¹⁷¹ As per rules the developer is under statutory duty to submit electricity and gas plan

¹⁶⁹ *Ibid*, Sec. 26.

¹⁷⁰ See Rules, 2010, Section 27, the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

¹⁷¹ *Ibid*, Sec. 28 and 29.

within one year and telephone plan within in three months.¹⁷² As per rules the developer is under statutory duty to develop the housing scheme within a period of 5 years.¹⁷³

After the sanction of the scheme by the relevant agency it is the responsibility of the relevant tehsil municipal administration or town municipal administration to ensure that there is no deviation from the approved housing scheme and for this purpose it can pay surprise visits to the housing site from time to time, in case of violation it can take action as per law, if the developer has failed to develop the housing scheme within the time period tehsil municipal administration or town municipal administration may take over the housing scheme.

The housing scheme shall be developed by the tehsil or town municipal administration and in case of shortage of funds the deficit money shall be recovered by the tehsil municipal administration as an arrear of land revenue, the time period for the development of housing scheme can be extended only when 80 percent of the development work has already been performed by the developer of the housing scheme.¹⁷⁴

As per rules the town municipal administration or the tehsil municipal administration as the case may be shall redeem 25 percent mortgaged plots on completion of water supply, sewerage and drainage, 25 percent plots shall be redeemed on completion of 100 percent completion of road networking within the housing scheme.

Remaining 25 mortgaged plots shall be redeemed on completion of 100 percent completion of electricity and streetlights works, 15 percent mortgaged plots shall be released on completion of sui gas supply work and 10 percent of the mortgage plots shall be redeemed on 100 percent completion of horticulture and solid waste management work, similarly bank guarantee shall be released on proportional development work being done.¹⁷⁵

It is a kind of an internal check and balance on the efficiency and working of the developers of the housing society but it has been

¹⁷² *Ibid*, Sec. 30, 31 and 32.

¹⁷³ *Ibid*, Sec. 34.

¹⁷⁴ *Ibid*, Sec. 35.

¹⁷⁵ See Rules, 2010, Section 36 and 37, the Punjab Private Housing Schemes and Land Sub Division the Manual of Development Authorities Laws, Ed 1st, Manzoor Law Book House, Lahore.

observed that in many of the cases the mortgaged plots are not released on completion of development work so this rule has a negative aspect as well.

The developer shall pay a preliminary planning permission fee at the rate of 5000 rupees for a housing scheme up to 2000 kanals and fee at the rate of 10000 rupees if the housing scheme is having an area above 2000 kanals, another fee shall be paid by the developer for sanction of the housing scheme at the rate of 1000 rupees for each kanals, the Government may change the fees from time to time.¹⁷⁶

An appeal can be filed within 30 days by the developer of the housing scheme to the secretary to local Government and community development in case of an impugned order passed by the town or tehsil municipal administration and if an order has been passed by the development authority then an appeal can be filed to secretary housing, urban development and public health engineering department. The decision on appeal of the developer shall be made within 90 days.¹⁷⁷

¹⁷⁶ *Ibid*, Sec. 38.

¹⁷⁷ *Ibid*, Sec. 47.

CONCLUSION

From the above said discussion it can be concluded the Government of Punjab has taken a good initiative by introducing some laws to grant sanction as well as to regulate the day to day affairs of the developers of the housing industry in the province of Punjab. But, still there is a room for further improvement and modification in the laws to achieve the goal of housing for all in the province of Punjab. After 18th amendment in the Constitution of Pakistan 1973, housing is the exclusive domain of the provinces so; each province of Pakistan is trying to introduce a Legal Framework to effectively regulate the affairs of the housing societies. After strengthening the Legal Framework relating to housing industry in the province of Punjab the goal of housing for all as envisaged by the UN Habitat agenda can be achieved in the province of Punjab.

BIBLIOGRAPHY

1. UNO Habitat Agenda.
2. Human Rights Case No. 5687 of 2010.
3. The UN Committee Report on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach, Scott Leckie, Human Rights Quarterly.
4. The Punjab Development of Cities Act, 1976,
5. Faiz Karim Vs Multan Development Authority, 1996 SCMR755.
6. Haji Allah Rakha Vs Faisalabad Development Authority, 2003 SCMR 1756.
7. Mehran Advertisers and others Vs Govt. of Punjab, PLD2011.
8. Muhammad Munir Vs LDA, PLD 2000.
9. Khurram Nawaz Siddiqui Vs Deputy Director Faisalabad Development Authority, 2014.
10. Muhammad Shafi Vs Multan Development Authority through its D.G, 2010, MLD.
11. Ghulam Murtaza Vs Multan Development Authority through its D.G, 1986, MLD.
12. Abdullah Vs Multan Development Authority through its D.G, 1986, MLD.
13. Naseem Zahra Vs Multan Development Authority, 1991.
14. Miah Rafat Mehmood Vs D.G Lahore Development Authority, 2016.
15. Farzana Chaudhary Vs Province of Punjab, 2016.
16. Malik Deen Vs Chairman National Accountability Bureau, 2019.
17. Muhammad Sadiq and others Vs Federation of Pakistan, 2013.
18. Works Cooperative Housing Society Ltd and others Vs Miss Najma Saleem, 2015.
19. T.M.A Samundri Vs Abdul Ghafur, 2013.
20. Mansur Sharif Hamid and others Vs Shafiq Rehman and others, 2015.

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**WILLFUL DEFAULT IN FIO 2001 AND
PROCEEDINGS AGAINST CUSTOMERS WITH
RESPECT TO WILLFUL DEFAULT**

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ABSTRACT

Willful default, sometimes referred to as willful misconduct, occurs when a party in a contract, agreement, or any obligation fails to do what they were supposed to or ordered to do. The person who was under obligation to do something – the obligor – intentionally failed when there is willful default. Willful default is more than carelessness or negligence. If you are careless or negligent, you may not have failed deliberately. The word ‘willful’ means that the person failed on purpose – it was their will. When they did whatever it was in breach of the agreement or obligation, they knew it was wrong, but went ahead regardless.

Keywords: Willdul default, Legislature, Banks, agreement, obligations.

INTRODUCTION

Willful default, sometimes referred to as willful misconduct, occurs when a party in a contract, agreement, or any obligation fails to do what they were supposed to or ordered to do. The person who was under obligation to do something – the obligor – intentionally failed when there is willful default. Willful default is more than carelessness or negligence. If you are careless or negligent, you may not have failed deliberately. The word ‘willful’ means that the person failed on purpose – it was their will. When they did whatever it was in breach of the agreement or obligation, they knew it was wrong, but went ahead regardless.

Willful default is a conscious abstention by an obligor from doing that which reasonably and under the terms of the obligation he should have done. The words "willful default" imply more than negligence or carelessness. The word willful means intentional and the word default means transgression. Willful default, as the term is used in a trust instrument means more than involuntary, inadvertent, negligent, mistaken, careless, or accidental default. It means an intentional designing failure to do or not to do something required an affirmative wrong. Willful default means intentionally making away with the trust property and a willful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a willful violation of duty

WHY WILLFUL DEFAULT WAS MADE AS AN OFFENCE IN FIO, 2001 THROUGH AMENDMENT OF 2016

1- Objective behind to introduce this term willful default

The objective behind inclusion of the term Willful Default in FIO, 2001 is to safeguard the rights and interests of the Financial Institutions. The defaulters have been successfully using the loopholes in our judicial system and are benefitting from the delays in our legal system. The defaulted customers hire a good law firm, pay them hefty amount of fee and the law firm uses all the measures to delay the legal initiatives taken / to be taken by the Financial Institutions in order to recover the Non-Performing Loans.

2- Knowledge and status of customers

It is very much in the knowledge of the customers that when the account was in Regular Status, they were paying the mark-up @ KIBOR plus bank’s spread and in case they default in payment of

their due liabilities they would only have to pay a meager amount of Cost of Funds in future (the rate of Cost of Funds of TOP FIVE Banks is below 50% of the 3-months KIBOR RATE plus banks' spread). On long term basis, the liabilities grow at a slower rate as compared to growth in the value of mortgaged land. In the above scenario, there was a dire need that all those willful defaulters should be prosecuted with iron hands as the rights and interests of Financial Institutions were seriously being jeopardized. The customers were growing their assets and the legal system was also supporting them to delay the repayments to the banks as there were no apparent pressures on the defaulting customers as a result of which the defaults of banks were increasing manifold. Although, similar provision of Willful Default is found under Section 5 (r) of NAB Ordinance, however, the legislature with the intent to bring that offence within the ambit of FIO, 2001 and to accomplish one of the goals of Punishment that is deterrence has put the said offence at a high degree of Punishment as compared to other offences under FIO, 2001 as the said offence was directly impacting the economy of Pakistan. The Banking Industry is the heart of our country as it mobilizes the public funds to different sectors of economy enabling them to contribute towards Gross Domestic Product of the country. Owing to defaults which are not attributable to genuine losses, Banks are now reluctant in lending to even well corporate.

3- Evaluation of the cases of banking courts

A study has recently been conducted by Sindh Judicial Academy wherein they evaluated the causes of delays in disposal of cases in Banking Courts. One of the alarming findings of the study was that in 99% of the criminal complaint cases, the accused were acquitted, so the conviction rate is only 1%. It clearly shows that the defaulters have no pressure whatsoever of the list of offences mentioned in FIO, 2001 that is why most of them are dealing with the mortgaged / hypothecated / pledged assets with the intention to misappropriate the same and also not to repay the loan despite having the repayment capacity and valuable assets available within or outside Pakistan.

ROLE OF LEGISLATURE AND BANKING INDUSTRY

The legislature was not only fully cognizant of the situation prevalent in the country where the willful defaulters were avoiding the repayments to the Banking Industry, but also the judgments passed by the superior courts on the term “Willful Default”. Hence, a more stringent law was introduced and FIA has been empowered to investigate the referred cases and if the accused was found involved in any one of the categories mentioned in section 2 (g) (i) (ii) or (iii) the agency will submit the report / challan to the banking court; and accordingly after trial the accused will be sentenced.

DEFINITION OF WILLFUL DEFAULT

“Willful Default” has been defined in the FIO, 2001

The term “Willful Default” has been defined in the Financial Institutions Ordinance, 2001 for the first time¹⁷⁸.

Section 2(g) of Amended FIO, 2001 defines Willful Default as follows:-

“Willful default” means

- i. Deliberate or intentional¹⁷⁹ failure to repay any finance, loan, advance or any financial assistance received by any person from a financial institution after such payment has become due under the terms of any law or an agreement, rules or regulations issued by the State Bank of Pakistan;
- ii. Utilization of Finance, Loan, advance or financial assistance or a substantial part thereof, obtained by any person from a financial institution for a purpose other than that for which such finance, loan, advance or financial assistance had been obtained and payment in part or full not made to the financial institution; or
- iii. Removal, transfer, misrepresentation or sale of any assets collateralized to secure a finance, loan, advance or financial assistance obtained from a financial institution without permission of such institution.

¹⁷⁸ See definition clause, Financial Institutions Ordinance, 2001. This Ordinance Amended by the Parliament and published in the Official Gazette of Pakistan on 15-08-2016..... Financial Institutions (Recovery of Finances) (Amendment) Act (XXXVIII of 2016)

¹⁷⁹ Wherever the term Willful Default is used in this article, I meant section 2 (g) (i) that relates to “deliberate or intentional failure to repay” unless specifically mentioned otherwise.

WILLFUL DEFAULT AS DEFINED BY THE COURTS IN DIFFERENT JUDGEMENT IN PAKISTAN

In case of BOP Vs. Acro Spinning¹⁸⁰ etc. in a Writ Petition - Mr. Justice Khalid Mahmood Khan referred Black's Law Dictionary in order to define the terms "Default" and "Willful" separately.

"Default :By its derivation, a failure. An omission of that which ought to be done;.....Specifically, the omission or failure to perform a legal or contractual duty, to observe a promise or discharge an obligation (e.g. to pay interest or principal on a debt when due); or to perform an agreement.....The term also embraces the idea of dishonesty, and of wrongful act, or an act of omission discreditable to one's profession....."

Example of Willful Default

If the default / failure are without any intention it will be a simple default but if it is intentional it will amount to willful:-

"There is a sharp difference in the meaning of the word "default" and "willful default" or "willful failure". There can be no cavil with the meaning of "default" as stated by the learned Authority, but will this meaning apply to "willful default" or "willful failure". The fact that the word "failure" has been qualified by the word "willful" indicates that the 'failure' or 'default' should be wrongful or intentional. 'Willful failure' as it is apparent, will occur when a party has purposely failed to comply with the provisions or intentionally avoided to comply, knowing well that he is duty-bound to do so. In such cases the party knows that he has to do a certain act but intentionally persists to follow a different course. If the failure is without any intention it will be a "default" or "failure" simplicity, but if it is intentional it will amount to "willful default" or "willful failure"¹⁸¹

The following instances may fall in the definition of Willful Default:-

- A- Client has removed / misappropriated the hypothecated, pledged assets without the permission of the banks.
- B- The client has sold the mortgaged property without the permission of the bank.

¹⁸⁰ BOP Vs. Acro Spinning, 2012 CLD 1819 LHC (WP) Single Bench.

¹⁸¹ Saleem Akhtar J - Haji Ismail Dossa Versus Monopoly Control Authority 1984 PLD Karachi 315

- C- The client has demolished and sold the mortgaged building without permission of the bank.

CASE LAWS ON WILLFUL DEFAULT LIABILITY

(i) In case of **“Seema Sherazi & Others Vs. NAB & others”**¹⁸² the Division Bench of Sindh High Court held as follows:-

“Joint and several liabilities of petitioner being a borrower were determined through judicial disposition as compromise decree was drawn by High Court in banking suit against petitioner and three other judgment debtors, which had attained finality. Petitioner and others were jointly and severally held liable to pay decretal amount along with cost of funds from the date of default till realization and mechanism provided under National Accountability Ordinance, 1999, could be invoked. Loan amount released by financial institution was not repaid by petitioner and others and the same constituted act of Willful Default.”

(ii) In case of **“BoP Vs. AMZ Ventures etc.”**¹⁸³ It was also held as follows:-

In this case the court held that once banking court decrees the suit, only then bank is armed with impeachable evidence to get borrower declared as a willful defaulter. Hence, in absence of decree favoring bank, borrower can't be declared as willful defaulter only on the basis of notice under NAB Ordinance.

(iii) In another case of **“BoP Vs. Acro Spinning etc.”**¹⁸⁴

The civil litigation initiated by Bank of Punjab was at Non Decreed Stage and a notice was sent by BoP to the client under section 31-D of NAB Ordinance. Client challenged that notice in a Writ Petition filed before Lahore High Court and a detailed order was passed by Mr. Justice Khalid Mahmood Khan.

The court held that till date BoP's case is not decreed by court of competent jurisdiction, the bank's claim remains the claim. Hence court was of the view that the “amount due” is the outcome of adjudication by court of law. Court further emphasized that the circumstances of country is the most important factor for deciding

¹⁸² Seema Sherazi & Others vs. NAB & others, 2015 CLD 918 DB KHI - Before Ahmed Ali M. Sheikh and Syed Muhammad Farooq Shah, JJ-.

¹⁸³ Bop Vs. AMZ Ventures etc 2013 CLD 2033 DB KHI - Before Mushir Alam, C.J. and Sadiq Hussain Bhatti, JJ -.

¹⁸⁴ BoP Vs. Acro Spinning etc, 2012 CLD 1819 LHC (WP) Single Bench Justice Khalid Mahmood Khan -.

the question of willful default. Finally, it was held that declaring a customer willful defaulter is the jurisdiction of banking court hence the operations of notice of BoP under willful default were suspended till final disposal of suit.

(vi) In another Judgment of Division Bench of LHC in case titled **“Taj International vs. FBR”**¹⁸⁵

Where one of the questions to be decided by the court was whether the criminal prosecution under the Sale Tax Act can only be initiated after the tax liability of the tax payer is duly assessed under the said Act. The court while deciding many Writ Petitions through a single order held as follows:-

“While assessment of tax liability is characteristically a civil proceeding, tax evasion or tax fraud, etc. can also be a tax crime and attract both civil, as well as, criminal penalties. ...we hold that the pre-trial steps including arrest and detention cannot be given effect to unless the tax liability of the taxpayer is determined in accordance with section 11 of the Act. In this background, criminal proceedings initiated against the petitioners, and documented as the First Information Report in this case and cases mentioned in Schedule-A is quashed as being unconstitutional, violative of fundamental rights, ultra vires the Act and hence illegal and without lawful authority. For the above reasons all these petitions are allowed”

WILLFUL DEFAULT AS TO CIVIL AND CRIMINAL LIABILITY

While keeping me confined to the issue of Willful Default, it is to be noted that if any customer of any bank / financial institution, defaults in discharge of his obligation then a recovery suit can be filed under section 9 of FIO, 2001. This is called civil liability. However, if the customer not only defaults in its obligations but also deliberately or intentionally does not pay the amount due, (that is called criminal liability - which fact will be investigated by FIA) then that single act has triggered both civil and criminal proceedings. Both these proceedings are independent and mutually exclusive.

In the case of Taj International supra as well as in many other judgments of superior courts it is now settled law that criminal and

¹⁸⁵ Taj International Vs. FBR, 2014 PTD 1807 DB LHR -Syed Mansoor Ali Shah & Mamoon Rashid Sh. JJ-.

civil proceedings can co-exist and proceed side by side. In cases where the subject matter of both the proceedings is so closely interrelated, so that the outcome of the civil proceedings can have a material bearing on the criminal proceedings, a safer course to adopt is to stay the criminal proceedings till the finalization of the civil matter. It is also held by Supreme Court in the case of *M. Akbar Vs. State*¹⁸⁶ that the matter of staying the criminal proceedings is purely a matter of discretion. In exercising this discretion the guiding principle should be to see as to whether the accused is likely to be prejudiced if the criminal proceeding is not stayed. Court gave the example of disputes related to title of properties where it is difficult to draw a line between a bona fide claim and the criminal action alleged; a stay can be made in the proper exercise of that discretion.

The above judgments clearly settle the principles that it is the discretion of the court to decide, in view of the facts of each case, as to whether both the proceedings (civil as well as criminal) should continue or otherwise. There is no hard and fast rule for stay of criminal proceedings till decision of the civil suit.

Whether Willful Default is a Continuing Offence?

Let's take the example of NAB Ordinance where the subject issue was raised in various cases. The offence of Willful Default was made as an offence under section 2(v) of NAB Ordinance IV of 2000 which was made effective from 3rd February, 2000 and whereby clause (r) embodying 'Willful Default' was added to section 5 (Willful Default) of NAB Ordinance XVIII of 1999. The question now arises whether the Defaults committed by the borrowers before inclusion of the term "Willful Default" in NAB Ordinance will be hit by Section 12 of the Constitution of Pakistan i.e. "Protection against Retrospective Punishment".

It would be necessary to reproduce Article 12 of the Constitution of Pakistan:-

Article: 12 Protection against retrospective punishment:-

- (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

¹⁸⁶ *M. Akbar Vs. State*, 1968 PLD Supreme Court 281 – S. A. Rahman, C. J., Fazle Akbar JJ-.

(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.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, and an offence.

While dilating upon the above issues, the courts in Pakistan referred some judgments from Indian Jurisdiction in order to understand the concept of “Continuing Offence”. The speaking part of one of the judgments is reproduced below:-

(i) It was held that a Continuing Offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. The distinction between the two kinds of offences is between an act and omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all¹⁸⁷.

The issue of Continuing Offence was also discussed at length in the following judgments of Superior Courts of Pakistan:-

1. Next judgment is also a Landmark Judgment of Supreme Court of Pakistan that is “KHAN ASFANDYAR WALI and others Vs. FEDERATION OF PAKISTAN”¹⁸⁸ whereby almost all the clauses of NAB Ordinance were challenged and the issue of Willful Default retrospectively was settled. One of the questions decided by the court was whether Section 2 of the NAB Ordinance whereby it deems to have come into force with effect from 01-01-1985 and it is a violation of Article 12 of the Constitution in so far as it creates a new offence of Willful Default with retrospective effect.

The court observed that although at the time of default in payment of finance there was no punishment prescribed by law but it does not mean that the duty of the customer to repay had expired. The

¹⁸⁷ State of Bihar v. Deokaran Nenshi AIR 1973 SC 908 -

¹⁸⁸ Khan Asfandyar Wali and others Vs. Federation of Pakistan PLD 2001 Supreme Court 607 - Before Irshad Hasan Khan, CJ. Muhammad Bashir Jehangiri, Ch. Muhammad Arif and Qazi Muhammad Farooq, JJ -

duty continues till the loan is repaid. Hence court termed that within the contemplation of section 5 (r) as a continuing breach of duty or obligation and hence it was a continuing default. So if it is continuing then there is a fresh starting point of limitation every day as the wrong continues. Thus on every occasion the default occurs and recurs, it constitutes an act or omission which continues and is therefore a fresh act. Court also referred Section 23 of Limitation which prescribes that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. From this perspective, court reached to the conclusion that there is no limitation and no question of retrospectively involved as long as the duty remains undischarged¹⁸⁹

Now coming to the question that whether Section 5 (r) is hit by Article 12 of the Constitution, the court observed that the legislature had all the powers to enact any law which was retrospective in nature. Article 12, however, provides that no law shall authorize the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or 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. Seen from this perspective court held that willful default is an act committed after 30 days of serving notice under NAB Ordinance. Therefore, it was held to be a continuous wrong converting into offence prospectively i.e. in a case where such wrong / willful default continued even after the expiry of 30-days of the promulgation of NAB Ordinance and not retrospectively. Hence court held that by no stretch of imagination offence of Willful Default can be termed as retrospective in operation.

2. In a latest judgment of Three Member Bench of Supreme Court of Pakistan in case titled “State vs. Asif Saigol”,¹⁹⁰ the term “Willful Default” was interpreted and retrospectively discussed. Through appeal before SC, Mr. Asif Saigol challenged the

¹⁸⁹ See the judgment of Khan Asfand yar Wali, Reference para at 215 & 216.

¹⁹⁰ State Vs. Asif Saigol, 2016 PLD 620 Supreme Court -Justice Gulzar Ahmed, Justice Dost Muhammad Khan and Justice Qazi Faez Isa-.

judgment of Division Bench of Lahore High Court¹⁹¹ which had dismissed three Criminal Appeals against his conviction by the Accountability Court but reduced the sentence of imprisonment. The question arose that Whether the criminality of the offence is to be determined on the basis of the phrase Willful Default contained in the (original) NAB Ordinance or as the term was subsequently defined pursuant to the insertion of clause (r) in section 5 of the NAB Ordinance.

Court observed that the offence of willful default was required to be considered in the light of the law at the time, which was before the insertion of clause (r) into section 5 of the NAB Ordinance. At that juncture to constitute the offence of willful default the prosecution, in addition to establishing the subsistence of a default, had to also prove that the default was willful. The aforesaid case law confirms that in order to constitute a willful default, there must be a deliberate and calculated refusal to pay, i.e. a conscious and intentional act. The mere inability to pay did not constitute the offence of willful default. The prosecution however made no attempt to establish that the default was willful.

¹⁹¹ 2003 PLD 686 LHR DB -Justice Ali Nawaz Chowhan and Justice Rustam Ali Malik-.

CONCLUSION

The fresh inclusion of the offence of Willful Default in FIO, 2001 is a ray of hope for the financial institutions as it will help to speedily recover the defaulted loans, which is also in consonance with the objective behind enactment of FIO, 2001 as well as the pervious recovery laws. Since, it is a new enactment hence the courts will interpret this clause according to facts and circumstances of each case referred to them and it will take some time to settle the law on different propositions. It is, however, noted that in recovery related litigations which have not yet been decreed, that is either at arguments stage on leave to defend application of the defendant(s), or PLA has been allowed to the defendants; it is prudent that the banks should wait for the decree in their favor and then invoke section 2 (g) (i) of FIO, 2001. Moreover, it is also settled now that the offence of Willful Default under the above referred section is a continuing offence hence Section 23 of “Law of Limitation Act No. IX of 1908” which deals with continuing breaches and wrongs comes into play.

BIBLIOGRAPHY

1. Financial Institutions (Recovery of Finances) (Amendment) Act 2016.
2. Single Bench - BOP vs. Acro Spinning, 2012.
3. Salim Akhtar J - Haji Ismail Dossa Vs Monopoly Control Authority, Karachi, 1984.
4. Seema Sherazi & Others vs. NAB & others, DB KHI, 2015.
5. Bop Vs. AMZ Ventures etc. DB KHI, 2013.
6. Bop Vs. Acro Spinning etc. LHC, 2012.
7. Taj International vs. FBR DB LHR, 2014.
8. M. Akbar vs. State 1968.
9. State of Bihar v. Deokaran Nenshi. 1973.
10. Khan Asfandiyar Wali and others Vs. Federation of Pakistan. 2001.
11. The judgment of Khan Asfandiyar Wali.
12. State Vs. Asif Saigol. Supreme Court- 2016.



**DOCTRINE OF NECESSITY
AND CONSTITUTIONAL HAZARDOUS IN
PAKISTAN**

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ABSTRACT

This article is about doctrine of necessity maxim used several times in Pakistan. First time this maxim was used in Pakistan by Justice Munir and its 5 member's bench of Federal Court of Pakistan in favor of Governor General Ghulam Muhammad and Federation of Pakistan. This was the bad precedent set by the most superior court in Pakistan. In Pakistan military dictators took over the control of country four times and every time they validated their rule by superior courts of Pakistan. Superior courts validated Marshall Law's on the this famous maxim of doctrine of necessity. In this maxim it is clearly mentioned that extra constitutional steps can be taken by any powerful authority in the state of emergency. Doctrine of necessity has been used in many developing and under developed countries. This maxim is an enemy of Constitution and democratic values. During the last few years, the governments of many emergent nations have been overthrown through violent revolutions, bloodless coups d'état, or other forms of upheaval. Many of these countries have been long unstable due to ethnic, religious, political, or economic differences. In countries with a strong commitment to constitutional government, a coup is particularly traumatic because acceptance of the revolutionary government effectively invalidates the constitution. A new regime cannot lawfully exist within a constitutional framework if it came to power in direct contravention of it. ^{If the new government continues to function, it becomes the} functional governing body ^{of the country;} the constitution continues to exist in name only. New un-elected government can run the county on basis of doctrine of necessity.

Keywords: Doctrine of Necessity, Pakistan, Military Dictators, Marshall Laws, Supreme Court

INTRODUCTION

State or civil necessity is a common law doctrine which provides a justification for otherwise illegal government conduct during a public emergency. Courts must severely circumscribe this common law defense because a loosely-imposed standard of necessity makes it possible to justify substantial violations of constitutional rights and alterations of the governmental structure. This doctrine is inappropriate to any judicial consideration of the legitimacy of a coup, revolution or other acute governmental upheaval. Necessity is a doctrine which bridges the sometimes considerable gap between what the law allows the government to do and the government's actual response to an emergency. It has no relevance where emergency state action is taken pursuant to specific statutory or constitutional authorization. Rather, it is only relevant where an injured party can show a prima facie that the government has violated the law.

The doctrine of necessity is a term used to describe the basis on which extra constitutional actions can be taken by administrative authority, which are designed to attain power on the pretext of stability, are found to be constitutional even if such an action would normally be deemed to be in contravention to established norms or conventions. It also includes the ability of a private person to violate a law without punishment where the violation of law was necessary to prevent even worse harm. The maxim on which the doctrine is based originated in the writings of the medieval jurist Henry de Bracton, and similar justifications for this kind of extra-legal action have been advanced by more recent legal authorities, including William Blackstone.

In modern times, the doctrine was first used in a controversial 1954 judgment in which Pakistani Chief Justice Muhammad Munir validated the extra-constitutional use of emergency powers by Governor General, Ghulam Mohammad. In his judgment, the Chief Justice cited Bracton's maxim, 'that which is otherwise not lawful is made lawful by necessity', thereby providing the label that would come to be attached to the judgment and the doctrine that it was establishing.¹⁹² Federation of Pakistan and Governor

¹⁹² See for instance, "Governor General's Case, PLD 1955 Federal Court of Pakistan 477.

General Ghulam Muhammad challenged the decision of Chief court of Sind in Federal Court of Pakistan.¹⁹³

DOCTRINE OF STATE OF NECESSITY, FIRST TIME USED IN PAKISTAN

1- MOULVI TAMMEZ.U.DIN VS FEDERATION OF PAKISTAN AND GOVERNOR GENERAL

On 19th October, 1954 Governor General Ghulam Muhammad dismissed Constituent assembly of Pakistan and dismissed Prime Minister Khawaja Nazimuddin and its Cabinet which was publically elected. Moulvi Tameez.u.Din who was President of Constituent assembly challenged the decision of Governor General in Chief Court of Sind. Chief Court of Sind restore the assembly and Government and declared Governor General's decision unlawful.¹⁹⁴

Chief Justice Muhammad Munir and 5 member's bench heard the case. And after hearing the case Federal Court declared Chief Court Sind order null and void and said that Governor General and Federation are sovereign bodies and they made their decision in emergency powers.¹⁹⁵ Justice Munir and its 4 member's bench gave their verdict on the state of doctrine of necessity.¹⁹⁶ While Justice Alvin Robert Cornelius disagreed with the judgment and written in his disagreeeed note that there is no importance of doctrine of state of necessity and constitution is most important and it cannot be violated. Justice Cornelius dissented on the necessity issue, asserting that the Governor-General's actions went too far beyond his authority under the existing constitutional framework.¹⁹⁷ Although the justice recognized that during an emergency state necessity may justify interference with the rights of citizens, he stated that it cannot justify "interference with constitutional instruments." Cornelius contended that the sources

¹⁹³ See for instance, Judgment Order of the Chief Court of Sindh, PLD 1955 Sind 96. Dated: 9th February, 1955.

¹⁹⁴ Khan, Hamid. Constitutional and Political History of Pakistan. Oxford University Press, Karachi. Ed. 2005. P; 86.

¹⁹⁵ See for instance, Moulvi Tameez-u-Din Case; PLD 1955 FC 240. Dated: 24th October, 1954.

¹⁹⁶ http://www.pja.gov.pk/system/files/CONSTITUTIONAL_HISTORY.pdf

¹⁹⁷ Wolf-Phillips, Leslie. "Constitutional Legitimacy: A Study of the Doctrine of Necessity." Third World Quarterly, Vol. 1, No. 4 (October 1979) 98.

which the majority cited to uphold executive exercise of legislative powers were anachronisms which no longer should be accorded any precedential weight.¹⁹⁸

AFTER EFFECTS OF CHIEF JUSTICE MUNIR'S JUDGEMENT

The verdict dealt a blow to the notion of parliamentary supremacy in Pakistan. The irony was that Pakistan was an independent dominion created by the Indian Independence Act 1947.¹⁹⁹ The British parliament enjoyed parliamentary supremacy in its own realm. But the Federal Court's verdict stripped Pakistan's parliamentary supremacy, even though Pakistan itself was an independent realm of the British monarchy.²⁰⁰ The verdict paved way for the future judiciary to support unconstitutional and undemocratic actions, such as military coups. The doctrine of necessity was applied by successive Pakistani and Bangladeshi courts to validate the actions of martial law authorities.²⁰¹ This doctrine of State of Necessity was a base for every Martial Law in Pakistan as well as in Bangladesh. This Doctrine of State of Necessity has very vast implications on third world countries.²⁰² And Military dictators of third world countries forced courts in their countries to validate unlawful government on the basis of doctrine of necessity.

2- DOSSO VS FEDERATION OF PAKISTAN

Dosso vs. Federation of Pakistan was the first constitutional case after the promulgation of Constitution of Pakistan of 1956 and an important case in Pakistan's political history. The case got prominence as it indirectly questioned the first martial law imposed by President Iskander Mirza in 1958.

¹⁹⁸ Newberg, R Paula. *Judging the State: Courts and Constitutional Politics in Pakistan*. Cambridge University Press. Ed. 1995. P; 35-41.

¹⁹⁹ See for instance, Chief Justice Muhammad Munir: his life, writings, and judgments. Research Society of Pakistan. Ed. 1973.

²⁰⁰ Newberg, R Paula. *Judging the State: Courts and Constitutional Politics in Pakistan*. Cambridge University Press. Ed. 1995. P; 25-35.

²⁰¹ Omer, Imtiaz. *Emergency powers and the courts in India and Pakistan*. Martinis Nijhoff Publishers. Ed. 2002. P; 55-60.

²⁰² Munir, Muhammad. *From Jinnah to Zia*. Vanguard Books. Ed. 1980, 2018. P; 79.

Dosso was the tribal person from district Loralai in Baluchistan then under Provincially Administered Tribal Areas who committed a murder and got arrested by tribal authorities and handed over to Loya jirga which convicted him under Frontier Crimes Regulation (FCR). Relatives of Dosso challenged the decision in Lahore High Court then West Pakistan High Court which ruled in favor of Dosso. Federal Government went on to the Supreme Court of Pakistan which reversed the High Court's decision by referring to the Hans Kelsen theory of legal positivism famously the doctrine of necessity.²⁰³

“Dosso a resident of tribal district Loralai committed a murder and got arrested by the Levis Forces which handed him over to the tribal authorities where he was tried by Loya Jirga. He was charged for murder under the section 11 of the FCR 1901 and was convicted for it by Loya Jirga. Dosso's relatives challenged the decision of Loya Jirga in Lahore High Court. The High Court considered the case according to the 1956 constitution of Pakistan and ruled in favour of Dosso. The High Court declared that FCR is against the constitution and Dosso is entitled to equality before law under article 5 & 7 of the constitution. Loya Jirga's decision was declared null and void. Federal Government of Pakistan filed an appeal in Supreme Court of Pakistan against the verdict of High Court”.

Relatives of Dosso filed a petition against his conviction by Loya Jirga in West Pakistan High Court that he is the citizen of Pakistan and being a citizen of Pakistan he must be tried according to the Pakistani laws, not the FCR. Articles 5 of the Constitution of Pakistan of 1956 states that all citizens are equal before law and under article 7 enjoy equal protection of the constitution. Dosso's relatives also challenged the relevant provisions of FCR considering them against the article 5 and 7 of the constitution. West Pakistan High Court decided the case in favor of Dosso and declared that FCR is against the 1956 Constitution. The Constitution of Pakistan ensures the equality and protection of

²⁰³ See for Instance, Noorani, Ahmad. The News International. "Embarrassing verdicts in Pakistan's history". 19th December, 2019. (Last visit; Date and Time 08-04-2021 / 03:40 pm)

citizens and declared the proceedings of Loya Jirga as null and void.

The effect of West Pakistan High Court's decision was that after declaring Frontier Crimes Regulations against the constitution and proceedings of Loya Jirga as null and void, the cases which were decided since the promulgation of new constitution of 1956 were in question. It was said that if conviction of Loya Jirga in Dosso case is declared null and void then what about the previous convictions of Loya Jirga after promulgation of Constitution in 1956.

Federation of Pakistan challenged against the decision of West Pakistan High Court in the Supreme Court of Pakistan and Supreme Court set the hearing date for the case on 13 October 1958. On 7 October 1958, a harsh change came in the political history of Pakistan. President General Iskander Mirza imposed first martial law in the country and made Commander-in-Chief of Pakistan Armed Forces General Muhammad Ayub Khan as Chief Martial Law Administrator of a country. All of the government machinery; legislatures, central and provincial were dissolved.

After three days of martial law, an order named Laws (Continuance in Force) Order, 1958 was issued by Chief Marshal Law Administrator, Commander-in-Chief of Pakistan Armed Forces General Muhammad Ayub Khan. This order was a new legal order which replaced the old legal order that is The Constitution of Pakistan 1956. The legal order validated all the laws other than constitution of 1956 and restored the jurisdiction of all courts. Martial law impacted the case significantly and raised some technical points that if Supreme Court maintains the decision of West Pakistan High Court, it meant that constitution was still in force because the West Pakistan High Court decided the case under article 5 and 7 of the Constitution of Pakistan 1956. Also if the constitution was still in force then what will be the status of martial law regulations and Laws (Continuance in Force) Order 1958 as it also challenged the martial law administration. The Supreme Court of Pakistan after restoration decided the case against the decision of West Pakistan High Court with single member dissenting note by Justice Cornelius. Supreme Court bench headed by Justice Munir based its decision on Hans Kelson's General Theory of Law and State.

AFTER EFFECTS OF DOSO`S CASE JUDGEMENT BY SUPREME COURT OF PAKISTAN

The judgment legitimized the martial law of 1958 as a bloodless coup and a kind of peaceful revolution which was not resisted or opposed by the public implied that public is satisfied with this change or revolution, so therefore this martial law is legit. According to the Supreme Court, Laws (Continuance in Force) Order 1958 is the new legal order instead of Constitution of Pakistan 1956 which got abrogated and the validity of a law is determined by this new legal order. Furthermore, it was held that the constitution is abrogated; therefore Frontier Crimes Regulations 1901 is in force according to the Laws (Continuance in Force) Order 1958 which validated the decision of Loya jirga. Dosso case has a far reaching effect on the political history of Pakistan.²⁰⁴ The recognition of martial law and with the reborn of Kelsen's theory which afterwards was applied in many other cases in Pakistan as well as in the outer world. Judgment of this case made Pakistan an uncivilized state in the eyes of the west. Furthermore doctrine of necessity was used second time in the political history of Pakistan. The Judgment given by Supreme Court of Pakistan in Dosso case greatly impacted the politics in Pakistan and opened the doors for the future martial laws in the country. Legitimization of martial law given power to Chief Marshall Law Administrator General Muhammad Ayub Khan who used it to rule the country for 11 years²⁰⁵. Democratic process in the country was destroyed which had recently been on the road after the promulgation of first constitution in 1956 and made the country to run on the track of dictatorship. Military was encouraged by it for future interventions which occurred three times afterwards. The decision also deprived country of its first constitution just after two years of its promulgation after the struggle of nine long years. Abrogation of the 1956 Constitution also disturbed the ties between East and West Pakistan which were recently settled by establishing parity between both wings and

²⁰⁴ See for Instance, Qazi, Sabina. "Necessity as the mother of laws". The Dawn newspaper. 19th December, 2019. www.dawn.com.pk (Last visit; Date and Time 08-04-2021 / 05:05 pm)

²⁰⁵ Khan, Hamid. Constitutional and Political History of Pakistan. Ed. 2009.

incorporating both Urdu and Bengali as national language. Legitimization of Marshall Law made Bengalis angry and they started their struggle for fundamental rights. The decision of the Supreme Court re-validated the British implied legacy of Frontier Crimes Regulation, which was known as the Black Law continued to be enforced in the tribal region till 2018. The decision of the Supreme Court of Pakistan was a serious blow to the independence of judiciary and judiciary was bound to render its service under new legal order. The decision also deprived the courts to hear appeals against the action of government. The judiciary once again bowed down in front of executive in this case and concept of separation of powers further diminished.

3- ASMA JILLANI VS FEDERATION OF PAKISTAN

There were two appeals, one filed by Miss Asma Jilani in the Lahore High Court for the release of her father Malik Ghulam Jilani, and by Mrs. Zarina Gohar in the Sindh High Court for the redemption of her husband Althaf Gohar, under Article 98 of the Constitution of Pakistan 1962. The restraint of Malik Ghulam Jilani and Althaf Gohar had been made under the Martial Law Regulation No.78 of 1971. So the restraint of these persons was challenged in Lahore and Sindh High Court respectively. The High Court adopted that it had no jurisdiction because of the clause 2 of the Jurisdiction of Courts Order No.3 of 1969 banned the courts from questioning the validity of any act committed under the Martial Law Regulation No.78 of 1978. Asma Jilani petition to Supreme Court which held that this country was not a foreign country which had been affected by any army with General Agha Mohammad Yahiya Khan as its Head, nor was it an foreign territory which had been occupied by the said Army. Martial Law could not have founded in the situation. Pakistan had its own legal doctrine-The Qur'an, and the Objectives analysis. Therefore Martial law was never above to the Constitution. After listening arguments Supreme Court gave its observation that acts done by Military dictator were unlawful but they took support of Kelson`s theory of Doctrine of necessity and said that Chief Marshall Law Administrator and President of Pakistan General Agha Muhammad Yahiya Khan as head of Federation, Government and Armed Forces can promulgate Marshall Law and have power to suspend

or amend constitution or any law in the country.²⁰⁶ Unfortunately when Judgment of Supreme Court of Pakistan released General Agha Muhammad Yahya Khan was not in power and Zulfiqar Ali Bhutto was in Power and he was President of Pakistan, Head of Government and civilian Chief Marshall Law Administrator. Supreme Court further held that neither Yahya Khan was neither a victor nor a Pakistan was an occupied territory and thus declared him a 'usurper' and all his actions were also declared illegal. Asma Jilani's case paved the way for the restoration of democracy in the country. Due to the Judicial pronouncement in the case of Asma Jilani, Zulfiqar Ali Bhutto was compelled to remove the Martial law and restore the democracy in the country.

4- BEGUM NUSRAT BHUTTO VS CHIEF OF ARMY STAFF OF PAKISTAN

The promulgation of martial law was shocking for whole of Pakistan as well as rest of the world. Pakistan People's Party who was democratic elected government of that time has been overthrown by that time Chief of Army Staff General Muhammad Zia-ul-Haq. Pakistan People's Party decided to challenge it in court. Pakistan People's Party know that the seat of Chief Justice of Pakistan's would now be occupied by a Chief of Army Staff General Muhammad Zia-ul-Haq friendly judge Justice Anwar-ul-Haq. Justice Anwar-ul-Haq was replaced as Chief Justice of Pakistan by Chief Justice Yakoob Ali Khan on Sept 20, 1977. The same day as Nusrat Bhutto made a petition in the Supreme Court of Pakistan to challenge dictatorship was filed. The constitutional petition was filed by Begum Bhutto under Article 184 (3) against the Chief Martial Law Administrator and Chief of Army Staff of Pakistan General Muhammad Zia-ul-Haq, challenging the validity of the Chief of Army Staff to promulgate martial law, as well as the detention of Former Pakistani President and democratically elected that time Prime Minister Zulfiqar Ali Bhutto and 10 other Pakistan People's Party leaders who were arrested on Sept 17, 1977 under Martial Law Regulation No 12. The application was admitted for hearing. A nine member bench was constituted to hear the constitutional petition; the judges included Chief Justice

²⁰⁶ See for instance, Ali Shah, Syed Akhtar. "Tailor made laws". The Express Tribune. 19th December, 2019.

Anwar-ul-Haq, Justice Waheedudin Ahmad, Justice Mohammad Afzal Cheema, Justice Mohammad Akram, Justice Dorab Patel, Justice Qaisar Khan, Justice Mohammad Haleem, Justice G. Safdar Shah and Justice Nasim Hassan Shah. In her petition, Begum Nusrat Bhutto took the plea that the Chief of Army Staff of Pakistan General Muhammad Zia-ul-Haq had no right to overthrow the elected government and that all his actions were illegal. The petitioner contended that the Chief of Army Staff had no legal authority under the 1973 Constitution to impose martial law in the country or to promulgate the Laws (Continuance in Force) Order, 1977. This intervention, Begum Bhutto argued, amounted to an act of treason as stipulated by Article 6 of the 1973 Constitution. As a consequence, the proclamations of martial law on July 5, 1977, and the laws promulgated, were all without lawful authority. Since the martial law government had no authority, the petition said, the detention of Zulfiqar Ali Bhutto and 10 other Pakistan People's Party leaders was also illegal. The Federation was represented by A.K. Brohi, who based his arguments over the post March election scenario. He claimed that as a result of Zulfiqar Ali Bhutto's massive rigging, his government had lost whatever constitutional validity it earlier had. The ensuing widespread disturbances amounted to a repudiation of Zulfiqar Ali Bhutto's authority to rule and the specter of civil war was averted only thanks to the timely action by the Chief of Army Staff General Muhammad Zia-ul-Haq on July 5, 1977. Senior lawyer Sharif-ud-Din Pirzada said that General Zia's action on that day was not a coup, but was valid based on the old Roman doctrine of state necessity, as the only proper means of ousting a usurper who had illegally assumed power as a result of massive rigging.²⁰⁷

After hearing both sides, the court delivered its verdict on Nov 10, 1977, referring to the doctrine of necessity, the court dismissed the petition, saying it was not maintainable.²⁰⁸ The Supreme Court of Pakistan said that the legal consequences of an abrupt political change, by imposition of martial law, have to be judged not by application of an abstract theory of law in vacuum but by

²⁰⁷ See for instance, The Dawn newspaper. "Necessity as the mother of laws". www.dawn.com.pk. 19th December, 2019. (Last visit; Date and Time 08-04-2021 / 07:45 pm)

²⁰⁸ See for instance, Constitutional History of Pakistan. www.pja.gov.pk. (Last visit; Date and Time 09-04-2021 / 11:50 pm)

consideration of the total milieu preceding the change.²⁰⁹ The court held that the “objective” political situation prevails at the time, its historical imperatives, compulsions, motivations of persons bringing the change and the extent of preservation of suppression of old legal order all needed to be considered. In paragraph IX of the verdict, the court said that the true position emerging out of the facts of the case and the law applicable there to is that the 1973 Constitution still remains the supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance on account of State machinery.²¹⁰ The mere fact that the judges of the superior courts have taken a new oath after the proclamation of martial law does not in any manner derogate from the position as the courts had been originally established under the 1973 Constitution and have continued in their functions in spite of the proclamation of martial law.²¹¹ The Chief Marshal Law Administrator General Muhammad Zia-ul-Haq assuming power by means of an extra-constitutional step was held to be a matter of state necessity and was deemed as being a step taken for the welfare of the people.²¹² He was now entitled to perform all acts and promulgate all legislative measures. The verdict recalled events that took place during and after the March 7, 1977 polls, and the allegations of rigging.²¹³ The verdict added that given the broken state of law and order, and the shattered economy, the Chief Marshal Law Administrator took over administration for a short time to arrange for fresh elections within the shortest possible time.²¹⁴ The new arrangements dictated by consideration of state

²⁰⁹ Newberg, R Paula. *Judging the State: Courts and Constitutional Politics in Pakistan*. Cambridge University Press. Ed. 1995. P; 165.

²¹⁰ Wolf-Phillips, Leslie. "Constitutional Legitimacy: A Study of the Doctrine of Necessity". Ed. 1979. Vol. 1, P; 98

²¹¹ See for Instance, Qazi, Sabina. "Necessity as the mother of laws". The Dawn newspaper. 19th December, 2019. www.dawn.com.pk (Last visit; Date and Time 11-04-2021 / 12:05 pm)

²¹² Omer, Imtiaz. *Emergency powers and the courts in India and Pakistan*. Martinis Nijhoff Publishers. Ed. 2002. P; 55.

²¹³ Munir, Muhammad. *From Jinnah to Zia*. Vanguard Books. Ed. 1980, 2018. P; 82.

²¹⁴ See for instance, The Encyclopedia Britannica "Mohammad Zia-ul-Haq President of Pakistan". (Last visit; Date and Time 12-04-2021 / 12: 35 pm)

²¹⁸ Christina. *Waiting for Allah: Pakistan's Struggle for Democracy*. Penguin Books, London. Ed. 1992. P; 74-76.

necessity and welfare of the people of Pakistan and restoration of democratic institutions in Pakistan, and were therefore justified on the basis of doctrine of necessity.²¹⁵

5- ZAFAR ALI SHAH VS CHAIRMAN JOINT CHIEFS OF STAFF COMMITTEE GENERAL PERVEZ MUSHARAF

On 12th of October, 1999 Chairman Joint Chiefs of Staff Committee General Pervez Musharaf with other Army Corp Commanders overthrew the elected government of Prime Minister Mian Muhammad Nawaz Shareef and detained Mian Muhammad Nawaz Shareef with other party members in various jails of a country.²¹⁶Zafar Ali Shah a senior lawyer and a senior member of Pakistan Muslim League files a constitutional petition in the Supreme Court of Pakistan against the Coup of Pervez Musharaf with his Army fellows.²¹⁷The Supreme Court of Pakistan led by Chief Justice Arshad Hasan Khan and also including later Chief Justice Iftikhar Muhammad Chaudhry not only “rejected” the petition but also empowered the fourth dictator of Pakistan General Pervez Musharaf to himself amend the constitution, a relief which was not even sought.²¹⁸This black judgment pushed Pakistan into a blind alley. The backbone of country’s economy was broken and incompetent dictators and his associates played havoc with country’s energy and all other sectors.²¹⁹Pakistan became one of the leading countries worst hit by terrorism. No plans were made to meet electricity shortage and future gas requirements. The Supreme Court of Pakistan validated the martial law in a view of "doctrine of necessity" but provided its legality only limited to three years; But Musharaf remained in the power for almost 9

²¹⁶ Baxter, Craig. Pakistan on the Brink: Politics, Economics, and Society. Lexington Books, Oxford. Ed. 2003. P; 56-59.

²¹⁷ See for instance, The Newspaper of BBC "How the 1999 Pakistan coup unfolded". Dated; Oct. 13th 1999. News.bbc.com.uk (Last visit; Date and Time 12-04-2021 / 12:45 pm)

²¹⁸ Hirschl, Ran. Constitutional Theocracy. Harvard University Press. Ed. 2010. P; 15-25.

²¹⁹ Jan, Abid Ullah. "The Height of Collective Helplessness". The Musharaf Factor: Leading Pakistan to Inevitable Demise. Trade Paperback Books. Ed. 2005. P; 21-41.

years with brutal decisions made by him.²²⁰ Pakistan suffered a lot because of every dictator and especially of General Pervez Musharaf. His decisions there are totally kayos in the country.²²¹ It was held by the Supreme Court that on 12th of October 1999 a situation arose for which the Constitution provided no solution and intervention by the Armed Forces through an extra-Constitutional measure became inevitable and the said act was validated on the basis of the doctrine of state necessity. It was further held that the 1973 Constitution would remain supreme law of the land subject to the condition that certain parts thereof would be held in abeyance on account of state of Doctrine of Necessity.²²²

EFFECTS OF DOCTRINE OF NECESSITY IN ZAFAR ALI SHAH CASE

Supreme Court of Pakistan given their judgment against Zafar Ali Shah and once again took shoulder of Doctrine of necessity. Because of this General Pervez Musharaf became President through a referendum held in April 2002, not an election where there would be other candidates. At the general elections held in October 2002, the Muttahida Majlis-e-Amal (MMA), an alliance of religious parties and the pro-Musharaf Pakistan Muslim League (Q) won comfortably. In 2003, the Seventeenth Amendment to the Constitution validated the various acts done by Musharaf, including the revival of the President's power to dissolve Parliament. The President to Hold another Office Act, 2004 (PHAA) permitted Musharaf to be both President and Chief of Army Staff.

PAKISTAN LAWYERS FORUM VS FEDERATION OF PAKISTAN

Pakistan Lawyers Forum challenged both the Seventeenth Amendment and the PHAA in the Supreme Court of Pakistan. The petitioners relied on Zafar Ali Shah's case where the Court had

²²⁰ Aziz, Mazhar. "The politics of military coup d'état theoretical implications". *Military Control in Pakistan: The Parallel State*. Rutledge, London. Ed. 2008. P; 79-96.

²²¹ Shah, Aqil. "From Zia to Musharaf". *The Army and Democracy*. Harvard University Press, Stanford. Ed. 2014. P; 381.

²²² Aziz, Sartaj. *Between Dreams and Realities: Some Milestones in Pakistan's History*. Oxford University Press, Karachi. Ed. 2009. P; 408.

held that the Constitution had certain ‘salient features’. The Supreme Court validated both the Seventeenth Amendment and the PHAA. Having referred to the mandate that Musharaf received at the referendum, the Court stated that it was no longer correct to think of the Constitution of Pakistan as providing for a purely parliamentary system according to the Westminster model. ‘Instead, what can be seen is that over time, Pakistan has evolved its own political system so as to suit the political conditions found here. No objection can now be taken to the said system on the basis that it provides for a balance of powers (as opposed to concentrating all powers in the hands of the Prime Minister). As such, the vehement protests of the petitioners that the impugned provisions have destroyed the basic structure of the Constitution appear to be considerably overwrought and no weight can be placed on those arguments.’ The Court observed that even though there were certain salient features of the Constitution, it has been the consistent position of the court ever since it first enunciated the point in Zia’s case (PLD 1973 SC 49) 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 and not by the judiciary²²³. The position adopted by the Indian Supreme Court in *Kesavananda Bharati* case (AIR 1973 SC 1461) 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. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the positions that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. Clearly, the Court was now extending the doctrine of state necessity. The basic features doctrine enunciated in *Zafar Ali Shah*’s case that stood in its way was not followed. ‘In legitimizing the power of the military and executive over the Parliament, this case further strengthened the popular perception of the subservience of the Supreme Court to the military regime.’ Pakistan being a jurisdiction with post-enactment judicial review, it is difficult to see how the power of review would not extend to

²²³ Aziz, Sartaj. *Between Dreams and Realities: Some Milestones in Pakistan's History*. Oxford University Press, Karachi. Ed. 2009. P; 408.

the review, in the absence of a specific constitutional provision to that effect. This was all done because of doctrine of necessity which was firstly given in 1955 by that time Supreme Court. Every Marshall Law Administrator pressurized the Superior Courts to legitimate their illegal government on the basis of Doctrine of Necessity.

GENERAL PERVEZ MUSHARAF WANTS DOCTRINE OF NECESSITY AGAIN

On 09 March 2007, President and Chief of Army Staff General Pervez Musharaf suspended the Chief Justice of Pakistan, Justice Iftikhar Mohammad Chaudhry, and giving rise to lawyers' protests all over the country. On 20 July 2007, a 13member Bench of the Supreme Court of Pakistan unanimously reinstated the Chief Justice. On 03 November 2007, President and Chief of Army Staff General Pervez Musharaf declared a state of emergency and again suspended the Constitution and Parliament. Supreme Court judges were locked up. A Provisional Constitutional Order was issued prescribing a special oath for judges of the Superior Courts as a requirement for continuing to hold office. 13 out of the 18 judges of the Supreme Court and 61 out of 93 Judges of the various High Courts did not take the oath. General Pervez Musharaf thought that he will suspend Chief Justice of Pakistan and validate his actions by Supreme Court of Pakistan on the grounds of Doctrine of Necessity but that time Judiciary was not in position to accommodate General Pervez Musharaf.²²⁴

DOCTRINE OF NECESSITY IS BURRIED IN PAKISTAN

After the general elections in February 2008 in which General Pervez Musharaf supported Pakistan Muslim League (Q) was badly defeated, the Constitution was restored and an elected Government revived. General Pervez Musharaf resigned in August 2008. In September 2008, several of the deposed Judges rejoined the Court, and finally, on 16 March 2009, Justice Chaudhry was reinstated as Chief Justice.

²²⁴ Aziz, Sartaj. *Between Dreams and Realities: Some Milestones in Pakistan's History*. Oxford University Press, Karachi. Ed. 2009. P; 408.

1- PRIME MINISTER OF PAKISTAN SYED YOUSAF RAZA GILLANI'S CASE

Prime Minister of Pakistan Syed Yusuf Raza Gillani case was on 19th June, 2012, the Supreme Court of Pakistan refused to resurrect 'the malignant doctrine of necessity which has already been buried, because of the valiant struggle of the people of Pakistan.'²²⁶

2- FEDERATION OF PAKISTAN VS GENERAL (R) PERVEZ MUSHARAF (HIGH TREASON CASE)

When General (R) Pervez Musharaf was tried for high treason; he issue of the legality of his actions came up before the Special High Court which refused to invoke the doctrine of necessity to validate his actions. Referring to former Chief Justice of Pakistan Justice Muhammad Munir original invocation of the doctrine, the Special High Court stated: 'Had the honorable Superior Judiciary, at that time, not invoked the Doctrine of Necessity, and had proceeded against usurpers, abrogators, subvertors, the Nation would not have seen this day at least, where an officer in uniform repeats this offence'.²²⁷

3- CHIEF JUSTICE OF PAKISTAN MIAN SAQIB NISAR

Addressing a judge's conference on 02 February 2019, the then Chief Justice of Pakistan, Mian Saqib Nisar said that the infamous doctrine of necessity that had given the judicial nod to successive martial laws in the country now lay buried. He furthermore added that this harmful doctrine will not use ever in the Pakistan.²²⁸ Pakistan bearded a lot of loss due to this doctrine. Because of this doctrine Pakistan splits into two countries Pakistan and Bangladesh.

PRESSURE ON THE JUDGES OF SUPERIOR COURTS TO USE DOCTRINE OF NECESSITY IN PAKISTAN

²²⁵ Aziz, Sartaj. *Between Dreams and Realities: Some Milestones in Pakistan's History*. Oxford University Press, Karachi. Ed. 2009. P; 409, 410.

²²⁶ *Ibid.*

²²⁷ See for instance, The Jang newspaper, 5th February, 2019. www.jang.com.pk (Last visit; Date and Time 12-04-2021 / 12:50 pm)

²²⁸ See for instance, The Dawn newspaper, 4th February, 2019. www.dawn.com.pk. (Last visit; Date and Time 12-04-2021 / 12:555 pm)

On 22 April, 1960, speaking to the Lahore High Court Bar Association on his retirement, Former Chief Justice of Pakistan Muhammad Munir referred to the controversial cases he dealt with and stated that holding against the Governor General would have entailed enforceability issues and caused bloodshed. ‘The mental anguish caused to the judges by these cases is beyond description and I repeat that no judiciary anywhere in the world had to pass through what may be described as a judicial torture’, he added. In 1962, Munir accepted a Cabinet position in Ayub Khan’s regime under a Constitution which did not have fundamental rights. In his book ‘From Jinnah to Zia’ published in 1979, Justice (R) Muhammad Munir does not utter a word about his infamous judgments or about the doctrine, probably out of remorse.²²⁹

According to Mark M. Stavsky

He warned against the dangers of the doctrine’s application in constitutional law. ‘Doctrinally, courts should be reluctant to permit deviations from constitutional norms. Approval must be reluctant because courts, in reviewing a state necessity claim, must consider the legitimacy of readjusting fundamental political, social, and legal values. This consideration must be made in cases where the challenged state action affects individual rights as well as in cases involving changes in the governmental structure.’²³⁰

²²⁹ Aziz, Mazhar. "The politics of military coup d'état theoretical implications". *Military Control in Pakistan: The Parallel State*. Rutledge, London. Ed. 2008. P; 133, 189.

²³⁰ See for instance, The Jang newspaper, 5th February, 2019. www.jang.com.pk (Last visit; Date and Time 12-04-2021 / 01:33 pm)

CONCLUSION

The use of the necessity doctrine to legitimize a coup d'état or other revolutionary alteration of the government is inappropriate. This application of the doctrine is incorrect for two reasons. First, the assumption that the court will be able to influence the regime by using the doctrine in this manner is not realistic. Second, the court's action validates the new regime and gives it the appearance of legitimacy. The Supreme Court OF Pakistan did not act in the national interest in its use of the necessity doctrine in the Bhutto case. The court upheld, as constitutional, actions by the regime which undermined the *raison d'être* of the Pakistani Constitution. The court's action legitimized the removal of a popularly elected government and the disenfranchisement of the population. While the court might have been removed after such a ruling, Zia would have had to assuage a country committed to democratic rule without the assistance of the court. Without the court and constitution behind him, Zia may have been compelled to make concessions to bolster his then fledgling regime. Instead, the regime became entrenched to the point where the judicial system is now firmly under Zia's control. This all done because of Supreme Court's verdict which gave on the Kelson's theory of doctrine of Necessity.

BIBLIOGRAPHY

1. "Governor General's Case, PLD 1955 Federal Court of Pakistan 477.
2. Judgment Order of the Chief Court of Sindh, PLD 1955 Sind 96. 1955.
3. Khan, Hamid. Constitutional and Political History of Pakistan. Oxford University Press, Karachi. 2005.
4. Moulvi Tameez-u-Din Case; PLD 1955 FC 240. 1954.
5. http://www.pja.gov.pk/system/files/CONSTITUTIONAL_HISTORY.pdf
6. Wolf-Phillips, Leslie. "Constitutional Legitimacy: A Study of the Doctrine of Necessity." *Third World Quarterly*, 1979.
7. Newberg, R Paula. *Judging the State: Courts and Constitutional Politics in Pakistan*. Cambridge University Press. Ed. 1995.
8. Chief Justice Muhammad Munir: his life, writings, and judgments. Research Society of Pakistan. 1973.
9. Omer, *Imtiaz*. *Emergency powers and the courts in India and Pakistan*. Martinis Nijhoff Publishers. 2002.
10. Munir, Muhammad. *From Jinnah to Zia*. Vanguard Books. Ed. 1980, 2018
11. Noorani, Ahmad. *The News International*. "Embarrassing verdicts in Pakistan`s history". 19th December, 2019.
12. Qazi, Sabina. "Necessity as the mother of laws". *The Dawn newspaper*. 19th December, 2019. www.dawn.com.pk.
13. Ali Shah, Syed Akhtar. "Tailor made laws". *The Express Tribune*. 19th December, 2019.
14. *The Dawn newspaper*. "Necessity as the mother of laws". www.dawn.com.pk. 19th December, 2019.
15. *The Encyclopedia Britannica* "Mohammad Zia-ul-Haq President of Pakistan".
16. Christina. *Waiting for Allah: Pakistan's Struggle for Democracy*. Penguin Books, London. Ed. 1992.
17. Baxter, Craig. *Pakistan on the Brink: Politics, Economics, and Society*. Lexington Books, Oxford. Ed. 2003.
18. *The Newspaper of BBC* "How the 1999 Pakistan coup unfolded". Dated; Oct. 13th 1999. News.bbc.com.uk
19. Hirschl, Ran. *Constitutional Theocracy*. Harvard University Press. Ed. 2010.

20. Jan, Abid Ullah. "The Height of Collective Helplessness".
The Musharaf Factor: Leading Pakistan to Inevitable
21. Demise. Trade Paperback Books. Ed. 2005.
22. Aziz, Mazhar. "The politics of military coup d'état
theoretical implications". Military Control in Pakistan: The
Parallel
23. State. Rutledge, London. Ed. 2008.
24. Shah, Aqil. "From Zia to Musharaf". The Army and
Democracy. Harvard University Press, Stanford. Ed. 2014.
25. The Jang newspaper, 5th February, 2019.
www.jang.com.pk.

