

EMERGENCY PROVISIONS

232. Proclamation of emergency on account of war, internal disturbance, etc. (1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency ¹[:]

²[Provided that for imposition of emergency due to internal disturbances beyond the powers of a Provincial Government to control, a Resolution from the Provincial Assembly of that Province shall be required:

Provided further that if the President acts on his own, the Proclamation of Emergency shall be placed before both Houses of Majlis-e-Shoora (Parliament) for approval by each House within ten days.]

(2) Notwithstanding anything in the Constitution, while a Proclamation of Emergency is in force—

³[(a) Majlis-e-Shoora (Parliament)] shall have power to make laws for a Province, or any part thereof, with respect to any matter not enumerated in the Federal Legislative List or the Concurrent Legislative List;]

(b) the executive authority of the Federation shall extend to the giving of directions to a Provinces as to the manner in which the executive authority of the Province is to be exercised; and

(c) the Federal Government may by Order assume to itself, or direct the Governor of a Province to assume on behalf of the Federal Government, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any body or authority in the Province other than the Provincial Assembly, and make such

1 Subs. by Constitution (Eighteenth Amendment) Act, X of 2010.

2 Inst. by Constitution (Eighteenth Amendment) Act, X of 2010.

3 Subs. by P.O. 14 of 1985 w.e.f. 2 March 1985.

incidental and consequential provisions as appear to the Federal Government to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending, in whole or in part, the operation of any provisions of the Constitution relating to any body or authority in the province:

Provided that nothing in paragraph (c) shall authorize the Federal Government to assume to itself, or direct the Governor of the Province to assume on its behalf, any of the powers vested in or exercisable by a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts.

(3) The power of ⁴[Majlis-e-Shoora (Parliament)] to make laws for a Province with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties upon the Federation, or officers and authorities of the Federation, or officers and authorities of the Federation, as respects that matter.

(4) Nothing in this Article shall restrict the power of a Provincial Assembly to make any law which under the Constitution it has power to make but if any provision of a Provincial law is repugnant to any provision of an Act of ²[Majlis-e-Shoora (Parliament)] which ²[Majlis-e-Shoora (Parliament)] has under this Article power to make, the Act of ²[Majlis-e-Shoora (Parliament)], whether passed before or after the Provincial law, shall prevail and the Provincial law shall, to the extent of the repugnancy, but so long only as the Act of ²[Majlis-e-Shoora (Parliament)] continues to have effect, be void.

(5) A law made by ²[Majlis-e-Shoora (Parliament)], which ²[Majlis-e-Shoora (Parliament)] would not but for the issue of a Proclamation of Emergency have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation of Emergency has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

(6) While a Proclamation of Emergency is in force, ⁵[Majlis-e-Shoora (Parliament)] may by law extend the term of the National Assembly for a period not exceeding one year and not extending in any case beyond a period of six months after the Proclamation has ceased to be in force.

⁴ Subs. by P.O. 14 of 1985 w.e.f. 2 March 1985.

⁵ Subs. by P.O. 14 of 1985 w.e.f. 2 March 1985.

(7) A Proclamation of Emergency shall be laid before a joint sitting which shall be summoned by the President to meet within thirty days of the Proclamation being issued and—

(a) shall cease to be in force at the expiration of two months unless before the expiration of that period it has been approved by a resolution of the joint sitting; and

⁶[(b) shall, subject to the provisions of paragraph (a), cease to be in force upon a resolution disapproving the Proclamation being passed by the votes of the majority of the total membership of the two Houses in joint sitting.]

(8) Notwithstanding anything contained in clause (7), if the National Assembly stands dissolved at the time when a Proclamation of Emergency is issued, the Proclamation shall continue in force for a period of four months but, if a general election to the Assembly is not held before the expiration of that period, it shall cease to be in force at the expiration of that period unless it has earlier been approved by a resolution of the Senate.

SYNOPSIS

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| 1. Promulgation of emergency. | 5. Governor's Rule. |
| 2. Suspension of Fundamental Rights by CMLA's Order 1 of 1977. | 6. Proclamation of Emergency of 28-5-1998. |
| 3. Article 233(2)—Executive precluded from taking any action not covered by law. | 7. Proclamation of emergency dated 3-11-2007. |
| 4. Suspension of Fundamental Rights. | 8. Judicial review. |

1. Promulgation of emergency. A proclamation of emergency may be issued either when the country or any part of it is in imminent danger of being threatened by war or external aggression, or where the country's security or economic life is threatened by internal disturbances which are beyond the power of a Provincial Government to control. The President is the sole judge of the situation and it is he who has to decide whether or not the promulgation would issue. But, of course, in the parliamentary form of Government, envisaged in the Constitution, as he is bound by the ministerial advice in the field of the exercise of power relating to the issue of a proclamation, his powers under these Articles are virtually the powers of the Federal Government. There are, under the Constitution, three kinds of emergencies, which can be proclaimed.

- (a) Proclamation of emergency arising out of war etc.; (Art. 232)
- (b) Proclamation consequent upon the failure of constitutional machinery in a Province, (At. 234), and
- (c) Proclamation of financial emergency. (Art. 235)

Let us deal with each of one in view of the respective provisions in the Constitution.

- (a) Proclamation of emergency arising out of war etc. Such a proclamation is issued by the President when he is satisfied that great emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression or by internal disturbances beyond the power of a Provincial Government to control. While this type of proclamation is in operation, the Parliament will acquire the power to make laws for a Province or any part thereof, with respect to any matter enumerated in Part II of the Federal Legislative List or the Concurrent Legislative List or with respect to any matter not enumerated in either of these lists. In other words, the Parliament may invade the Provincial field as is defined in Article 141 as well as the residuary field which has been vested in the Provinces under the Constitution.

However, as is provided in Clause (4) of Article 232, the capacity or the competency of the Federal Legislature to invade the Provincial legislative and executive does not prejudice the right of the Provincial Legislature to make any law which ordinary under the Constitution it has the power to make, but if any provision of a Provincial law is repugnant to any provision of an Act of Parliament, no matter passed before or after the Provincial law, the Act of Parliament shall prevail upon the provincial law to the extent of the repugnancy, but so long only as the Act of Parliament continues to have effect, shall be void. Such a law has the further attribute of remaining alive throughout the period of the existence of emergency and six months after the cession of the operation of the proclamation of emergency; whereafter it lapses, except in respect of things done or omitted to be done before the expiration of the said period.

- (b) The executive authority of the Federation gets extended to the giving of directions to a Province as to the manner in which the executive authority of the Province is to be exercised.
- (c) The Federal Government may by order assume to itself, or direct the Governor of a Province to assume on behalf of the Federal Government all or any of the functions of the Government of the Province and all or any of the powers vested in, or exercisable by, anybody or authority in the Province other than the Provincial Assembly, and make such incidental and consequential provisions as appear to the Federal Government to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending, in whole or in part, the operation of any provisions of the Constitution relating to any body or authority in the Province.

But all this is subject to the limitation that the powers vested in or exercisable by a High Court cannot be taken away by the President.

- (d) While a proclamation of emergency is in force the Parliament may extend the term of the National Assembly for a period not exceeding one year.
- (e) A proclamation of Emergency issued under this Article is to be laid before a joint sitting of the Parliament which shall be summoned by the President to meet within thirty days of the issuance of the Proclamation. If the Proclamation is approved by the Parliament it will be continued to be in force for a period not exceeding six months at a time but if not approved it shall cease to be in force at the expiration of two months. In case the National Assembly stands dissolved at the time of the issuance of proclamation of Emergency, the proclamation shall continue in force for a period of four months but if a general election to the Assembly is not held during this period it shall cease to be in force at the expiration of the period stipulated, unless it is approved by a resolution of the Senate.

Emergency Provisions

PG - (5)

[Article 232]

Proclamation of emergency on account of war, internal...

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State of emergency includes "regime of exception" i.e. regimes which have overthrown and not merely suspended the previous constitutional order and have assumed legislative and executive powers analogous to those under a formal state of emergency. Efforts to be made to minimize emergencies and to induce the Authorities concerned to respect the Fundamental Rights. [PLD 2000 S.C. 869]

Even in case of proclamation of emergency, Government is to take steps to ensure that the fundamental rights of citizens are not affected and derogation must be proportionate to the emergency while adopting constitutional as well as extra-constitutional means. Efforts to be made to minimize emergencies and to reduce the authorities concerned to respect the fundamental rights [PLD 2001 S.C. 233] because citizens are vested with a fundamental right to hold, to own and to acquire property and their property is not to be taken away otherwise than in accordance with law. [2001 CLC 710]

When and how. Except adherence to the constitutional provisions in any situation prevailing in the country no extra constitutional steps have to be followed. [PLD 2011 S.C. 997] Supreme Court on the basis of material on record observed as under:-

- i) that violence in Karachi during the (current) year and in the past is not ethnic alone but it is also a turf war between different groups having economic, socio-political interest to strengthen their position/aggrandizement, based on the phenomenon of tit for tat with political, moral and financial support or endorsement of the political parties, who are claiming their representation on behalf of public of Karachi including components and non-components of Provincial government/Executive;
- ii) that recent violence in Karachi represents unimaginable brutalities, bloodshed; kidnapping and throwing away dead bodies and torsos in bags; as illustration, indicating toll of 306 lives in one month; detection of torture cells video of which has been produced; receiving *bhatta* to strengthen the ranks of one group against the other; grabbing land; drug mafia etc., destroying moveable and immovable properties of the citizens, establishes that the Fundamental rights of the citizens enshrined in Articles 9, 14, 15, 18 and 24 of the Constitution have not been protected/enforced by the Provincial Government/Executive authority and this failure has made the lives and properties of the citizens insecure, inasmuch as federal government/Executive has also not protected Province of Sindh against internal disturbance, thus the government of Province of Sindh, on this account, too, failed to carry out functions in accordance with the provisions of the Constitution (Article 148(3));
- iii) that both the Provincial and Federal Government/Executives have to find out solutions of the present scenario as per provisions of the Constitution;
- iv) that to come out of instant grave situation of law and order in Karachi, police force being principal law enforcing agency has to be depoliticized and strengthened so that they could, with full commitment, dedication, zeal and zest, perform its bounden duty, and unless there is a depoliticized police, the situation of law and order is likely to become more aggravated, no sooner the assistance of Rangers is withdrawn;
- v) that any further failure to protect the lives and property of the citizens is likely to cause unprecedented disaster, therefore, all efforts should be made to avoid the same in the interest of the nation and country, which is supreme as per the mandate of the Constitution and the law;

- vi) that in respect of banning any political party including MQM, against whom all the interveners mostly had voiced complaints is not within domain of the Supreme court at this stage as in terms of Article 17(2) of the Constitution every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and it is the responsibility of the Federal government to act under Article 17 for action against any party violating this Article. The Supreme court will only review such issue at any other appropriate stage or proceeding if then necessary to determine whether the actions of any party are directly or indirectly prejudicial to the sovereignty or integrity of Pakistan within the meaning of the Article. The Supreme Court will remain, in appropriate proceedings, the ultimate arbiter of this question but will not allow any government to avoid its duty under the law and the Constitution.
- vii) that as per material brought before the Court, there are criminals who have succeeded in making their ways in political parties notwithstanding whether they are components or non-components of government, and are getting political parties should denounce their affiliation with them in the interest of the country and democratic set up and they should not allow them to use their names as militant outfits of the political parties. Failure to do so may entail consequences of a penal nature against the party or person responsible, whether in office or not;
- viii) that to avoid political polarization and to break the cycle of ethnic strife and turf war, boundaries of administrative units like police stations, revenue estates, etc., ought to be altered so that the members of different communities may live together in peace and harmony, instead of allowing various groups to claim that particular areas belong to them and declaring certain areas as no go areas under their fearful influence. Subsequent thereto, on similar considerations, in view of relevant laws, delimitation of different constituencies has also to be undertaken with the same object and purpose, particularly to make Karachi, which is the hub of economic and commercial activities and also the face of Pakistan, a peaceful city in the near future. The Election Commission of Pakistan may also initiate the process on its own in this behalf.
- ix) that equal chances should be provided to different communities of Karachi to participate in economic and commercial activities instead of confining the same to different political groups on the basis of parochial, racial, tribal, sectarian, partisan and provincial prejudices;
- x) that Karachi is full of arms and ammunition of prohibited and non-prohibited bores including licensed and illicit, therefore, Karachi has to be cleansed from all kinds of weapons by adhering to the laws available on the subject, and if need be, by promulgating new legislation. All licensed arms genuinely required for security concerns and personal safety may be retained but these must also be registered with NADRA. All other licenses, where such need cannot be shown, or where multiple licences have been issued to the same individual (as distinct from security firms) if not justified, or which are used for unnecessary display at ceremonies or elsewhere for aerial firing should be cancelled after summary and expeditious proceedings in accordance with law;
- xi) that there is a need for a fresh comprehensive law to eliminate and punish land grabbers and encroachers. This is one of Karachi's greatest problems. The Court has

- already dealt with some cases *suo motu* and otherwise, and will continue to do so whenever necessary or appropriate. Sometimes Supreme Court is the last hope of the citizens or a community which turns to it for redress when all other avenues are denied to them. But overall it is the duty of both Government to formulate such law and initiate it in the appropriate Assembly; and thereafter to implement it fully without showing any favour or immunity to any person whether a political favourite, ally or for any other personal or party consideration;
- xii) that monitoring of the criminal cases should take place in view of the observations made in the case of *Sheikh Liaqat Hussain v. Federation of Pakistan* (PLD 1999 S.C. 504). Besides, the appointments of the Presiding Officers of the Anti-Terrorism Courts should also not be delayed for any reason, as it was experienced during the hearing of the case that those appointments were delayed for a period of nearly two years. However, under the direction issued by the Court, the Presiding Officers were appointed and it is expected that such delays shall not be allowed to occur in future;
- xiii) that since innocent citizens have lost their lives, number of which comes to 1310 during the current year. Similarly, a good number of citizens have been injured and/or lost their valuable property, both movable and immovable, therefore, Provincial government/Executive shall constitute a Commission to assess their losses and on its recommendation, compensation must be paid to the suffers without partisan consideration, as early as possible;
- xiv) Supreme Court directed that there must be no 'no go areas' at all in Karachi. If any is found or credibly reported to the Court the Police and, if required by the Provincial Government, the Rangers shall take strong and decisive action to eliminate it. Moreover, if such an area is proved to exist to the satisfaction of the Court, Supreme Court may require the Inspector General Police himself, and if necessary the DG Rangers also, to personally lead the operation into such areas. The Police and Rangers are therefore, expected to conduct the on-going operation across the board without showing any favour to any open and without being influenced from any quarter, be it political or otherwise. In case they are asked to obey any illegal orders, or to show leniency to any criminal, it will be their duty to bring it to the notice of the Court and appropriate orders will be passed accordingly;
- xv) that an independent and a depoliticized investigation agency be deputed to conduct investigation of cases fairly, honestly and without being influenced in any manner. Similarly, the prosecution agency comprising competent prosecutors and the Provincial Government/Executive must provide protection to the witnesses so that they may depose against the perpetrators of crimes without any fear, enabling the Courts to decide cases against them in accordance with law. The prosecutors, particularly for the Anti-Terrorism Courts should be appointed in a highly transparent manner according to the Constitution and the law. Appointments of prosecutors are required to be undertaken without any political whims and considerations;
- xvi) that DG NADRA and the Inspector General Police will set up a special joint cell with specialized officials and experts along with sufficient manpower to establish several teams to visit on the spot and identify illegal foreigners so that they may be dealt with strictly in accordance with law after a proper hearing and opportunity to present proof of their citizenship. They should attempt to conclude this exercise preferably in one year;

- xvii) that the Inspector General Police shall collect the record and facts about the disappearance or elimination of all police and other officials who took part in the Karachi operations of 1992 and 1996 or were witnesses in ethnic or related crimes and present a report to the Court within the next one month also showing whether their families were compensated or not;
- xviii) that the Provincial Government shall place on record of the Court copies of all judicial inquiries instituted in the matter of law and order in Karachi since 1985. These shall be retained for perusal and for any necessary action or appraisal of the situation at any time in the future;
- xix) that the Provincial Government/Executive shall ensure smooth running of economic and commercial activities and shall take necessary steps that provide protection to businessmen against uncalled for and illegal shutter down and strikes. During arguments, it was also brought to the Court's notice that due to illegal strikes and shutter down calls, the normal life of citizens of Karachi is paralyzed, and allegedly it causes loss of billions of rupees in a day, therefore, it is observed that the Government and the political parties shall evolve a respectable way out to avoid such a situation in future; and
- xx) that a Committee be constituted by the Provincial Government/Executive, headed by the Chief Justice of Sindh High Court, who shall be assisted by the Chief Secretary, the heads of the security agencies *i.e.*, para-military organizations and Inspector General Police, to supervise and ensure that law enforcement agencies take action indiscriminately, across the board against the perpetrators involved in causing disturbances in Karachi. The Chief Justice shall convene the meeting at least once a month to review the implementation of present judgment and copy of the proceedings shall be transmitted to the Registrar of Supreme Court for perusal of Judges and passing appropriate orders at a later stage, if need be. [PLD 2011 S.C. 997]

2. Suspension of Fundamental Rights by CMLA's Order 1 of 1977. The conditions culminating in the Proclamation of Martial Law were so grave that the very existence of the country was threatened, that chaos and bloodshed was apprehended and there was complete erosion of the constitutional authority of the Federal Government, leave alone that of the various Provincial Governments. The situation had indeed deteriorated to such an extent that it justified an extra-constitutional step, resulting in the suspension of certain parts of the Constitution itself by the Armed Forces. Such being the case, the situation was obviously at least of the kind contemplated by clause (1) of Article 232 of the Constitution. In the circumstances, the Chief Martial Law Administrator was justified in providing in clause (3) of Article 2 of the Laws (Continuance in Force) Order that the right to enforce Fundamental Rights shall be suspended. It was clearly an Order which could have been made under the 1973 Constitution. No exception can, therefore, be taken to the validity of this provision. [PLD 1977 S.C. 657 (p. 721)]

3. Article 233(2)—Executive precluded from taking any action not covered by law. Clause (2) of Article 233 of 1973 Constitution empowers the President while the Proclamation of Emergency is in force to declare that the right to move any Court for the enforcement of such of the Fundamental Rights conferred by Chapter I, Part II, as may be specified in the Order shall remain suspended. If clause (2) is interpreted to mean that the President may, by order, suspend the remedy to enforce all the Fundamental Rights contained in Chapter I, Part II, it will lead to the result that actions which are not covered by the authority to law may be

taken by the executive which will be immuned from challenge in a High Court. Article 4 which is not included in Chapter I, Part II, lays down in unambiguous terms that to be treated in accordance with law is the inalienable right of the citizens. Article 9 which is not included in the President's Order under clause (2) of Article 233 provides that no person shall be deprived of life and liberty save in accordance with law. How can it then be maintained that an action which is not covered by the authority of law and is in violation of Articles 4 and 9 can be taken by the executive. This anomaly can be avoided by reading the provisions of clauses (1) and (2) of Article 233 as complementary to each other. As seen, the Legislature may make laws which are repugnant of Fundamental Rights contained in Articles 15, 16 and 24. An action in violation of these Rights may, therefore, be taken provided it is covered by the authority of law. At the same time as these Fundamental Rights remain in force notwithstanding the making of such laws, the President is given the power to suspend the remedy to move a High Court for their enforcement. The combined effect of the aforementioned provisions of the Constitution is that even during the Proclamation of Emergency, the executive is precluded from taking any action which is not covered by the authority of law. This satisfies the mandate of Articles 4 and 9. If a contrary view is taken, clause (1) of Article 233 will become wholly redundant for there will be no necessity to make laws which are violative of Fundamental Rights 15, 16, 17, 18, 19 and 24 as, amongst others, they can be included in the Order of the President issued under clause 92). The view expressed above is not conclusive of the matter as one of the justice has come to the contrary conclusion and the Chief Justice has agreed with His Lordship. The controversy will, therefore, be resolved in some future case. [PLD 1976 S.C. 430 (p. 434)]

4. Suspension of Fundamental Rights. Limitations imposed by Constitution upon the action of the Government, both Provincial and Federal, are essential to the preservation of public and private rights, notwithstanding the representative character of political institutions in the country. Enforcement of such limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of members, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the Government. Such are the limitations upon all the powers of Government, Legislative as well as Executive and Judicial. Rights which have been conferred on a human being under the Islamic Injunctions, besides forming part of the constitutional mandate, are not only beyond the legislative restrictions and enforceable through the Courts of law and without any exception of fundamental nature. Such rights which have the element of Islamic mandate are not amenable to any change or subject to any usurpation by way of suspension for days muchless, for years together. Even if Proclamation of a state of Emergency was justified, suspension of Fundamental Rights in circumstances was not warranted. [PLD 1999 S.C. 57]

Notwithstanding the imposition of Emergency and suspension of Articles 15, 16, 17, 18, 19 & 24 of the Constitution by virtue of Article 233(1) of the Constitution, Article 199 remains available not only for the enforcement of the fundamental rights which remain unsuspended but also to enforce the rights and obligations as contained, *inter alia*, in Article 4 of the Constitution. [PLD. 1999 S.C. 1026] Courts despite proclamation of Emergency under Articles 232 & 233 of Constitution of Pakistan (1973) are not precluded from determining question as to whether an executive action is in consonance with law as required by Article 4 of Constitution of Pakistan. Even if all Fundamental Rights are suspended by Proclamation under Article 233(2) of Constitution of Pakistan (1973), provisions of Article 4 of Constitution of Pakistan (1973), would remain in field being not a Fundamental Right. [1999 CLC 280].

5. **Governor's Rule.** When Federal Government by an order under Article 232(2)(c) of the Constitution directs the Governor of the Province to assume on its behalf functions of the Government of Province and perform all or any of the powers vested in it and exercisable by any Body or Authority in the Province other than the Provincial Assembly, then Federal Government under the Constitution becomes empowered to make such incidental and consequential provisions which are necessary or desirable for giving effect to the objects of Proclamation and includes power of suspending as a whole or part the operation of any provision of the Constitution relating to any such Body or Authority in the Province. Such exercise of authority, shall not restrict the Provincial Assembly to make any law which under the Constitution it has power to make. Power pertaining to suspension of any provision referable to "any Body or Authority" in the Province does not exclude Provincial Assembly. Provincial Assembly retains its Legislative authority subject to limitations contained in the Constitution and said functions cannot be taken over by the Federal Government while assuming powers vested or exercisable by any Body or Authority in the Province. Provincial Assembly, therefore, continues to have authority to perform legislative functions within the limits prescribed by the Constitution in accordance with existing Rules and Procedure framed by the Assembly. Federal Government, whenever Emergency is imposed under Art.232(2)(c) of the Constitution, however, enjoins powers to suspend any of the provisions of the Constitution relating to Speaker or Deputy Speaker. [PLD 1999 S.C. 395] President alone is to determine as to whether or malafide. [PLD 1999 S.C. 57]

6. **Proclamation of Emergency of 28-5-1998.** Assuming the valid continuance of the said proclamation, the State may no longer be bound to make laws or take executive action in strict conformity with Articles 15, 16, 17, 18, 19 & 24 of the Constitution, nevertheless these fetters are removed only for the purpose of dealing with the State emergency declared through the proclamation and not otherwise. [2007 CLC 923]

7. **Proclamation of Emergency dated 3-11-2007.** Proclamation of Emergency dated 3-11-2007 cannot be seen in isolation but has to be examined in the context of the historical process of the country.

The Proclamation of Emergency is essentially founded on two main grounds, viz., the security situation prevent in the country and the erosion of trichotomy of powers in consequence of increased interference in the Government policies by some former Judges of the superior Courts, particularly the former Chief Justice of Pakistan, which adversely affected the economic growth and the law and order situation in the country. By letter of 3rd November, 2007, on the subject of "national security situation", the Prime Minister apprised the President of Pakistan as to the magnitude of extremism, militancy and terrorism, which were going on the country and the widespread perception of overstepping the limits of judicial authority and taking over of executive functions. Along with the letter, the Prime Minister enclosed details of law and order incidents during the period from April to October, 2007 posing grave threat to internal security of the country.

The Proclamation of Emergency of 3rd November, 2007 cannot be seen in isolation, but has to be examined in the context of the historical process of the country. [PLD 2008 S.C. 178] The judgment has been sought to be reviewed on the score that 12 Member Bench judgment in the case of *Zafar Ali Shah vs. Pervaiz Musharraf* (PLD 2000 S.C. 869) has not been examined in its true perspective, therefore the judgment of the 12 Judges would prevail. Notice issued to the concerned quarters. [PLD 2009 S.C. 393]

Court:-

"We, therefore, hold that:-

- i) The Constitution of the Islamic Republic of Pakistan, 1973 still remains to be the supreme law of the land albeit certain parts thereof have been held in abeyance in the larger interest of the country and the people of Pakistan;
- ii) The extra-constitutional steps of Proclamation of Emergency of the 3rd day of November, 2007, the Provisional Constitution Order No. 1 of 2007, the Provisional Constitution (Amendment) Order, 2007, the Oath of Office (Judges) Order, 2007 and the President's Order No. 5 of 2007 are hereby declared to have been validly made by the Chief of Army Staff/President subject to the condition that the country shall be governed, as nearly as may be, in accordance with the Constitution. All acts and actions taken for the orderly running of the State and for the advancement and good of the people are also validated. In absence of the Parliament, General Pervez Musharraf, Chief of Army Staff/President, in pursuance of the Proclamation of Emergency of the 3rd day of November, 2007 may, in the larger public interest and the safety, security and integrity of Pakistan, under the principle of *salus populi suprema lex*, may perform:-
 - a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;
 - b) All acts which tend to advance or promote the good of the people and
 - c) All acts required to be done for the ordinary orderly running of the State.

"We further hold and direct as under:-

- i) The old Legal Order has not been completely suppressed or destroyed, but it is a case of constitutional deviation for a limited transitional period;
- ii) Constitutional amendments can be resorted to only if the Constitution fails to provide a solution for the attainment of the declared objectives of the Chief of Army Staff/President, but without affecting the salient features of the Constitution, i.e., independence of Judiciary, federalism, parliamentary form of Government blended with Islamic provisions;
- iii) The President, the Federal Government and the Election Commission of Pakistan shall ensure the holding of air, free and transparent elections as required by the Constitution and the law;
- iv) The Superior Courts continue to have the power of judicial review, to judge the validity of any act or action of the Chief of Army Staff, or the President notwithstanding the ouster of their jurisdiction by the aforesaid extra-constitutional measures;
- v) The chief Justices and Judges of the superior Courts (Supreme Court of Pakistan, Federal Shariat Court and the High Courts) are subject to accountability only before the Supreme Judicial Council in accordance with the procedure laid down in Article 209 of the Constitution.
- vi) The learned Chief Justices and Judges of the superior Courts, (Supreme Court of Pakistan, Federal Shariat Court and the High Courts), who have not been given, and who have not made, oath under the Oath of Office (Judges) Order, 2007 have ceased to hold their respective offices on the 3rd of November, 2007. Their cases cannot be re-opened being hit by the doctrine of past and closed transaction; and

- vii) The Proclamation of Emergency of the 3rd day of November, 2007 shall be revoked by the President and/or the Chief of Army Staff at the earliest so that the period of constitutional deviation is brought to an end. However, this Court may, at any stage, re-examine the continuation of the Proclamation of Emergency if the circumstances so warrant. [PLD 2008 S.C. 6; PLD 2008 S.C. 178] The judgment has been sought to be reviewed on the score that 12 Member Bench judgment in the case of *Zafar Ali Shah vs. Pervaiz Musharraf* (PLD 2000 S.C. 869) has not been examined in its true perspective, therefore the judgment of the 12 Judges would prevail. Notice issued to the concerned quarters. [PLD 2009 S.C. 393]

Effect. On 15th December, 2007, through the Revocation of Proclamation of Emergency Order, 2007, the emergency was revoked, the Provisional Constitution Order No. 1 of 2007 was repealed, the Constitution as amended by the Constitution (Amendment) Order, 2007 (P.O. No. 5 of 2007) and the Constitution (Second Amendment) Order, 2007 (P.O. No. 6 of 2007) was revived and the Chief Justice of Pakistan and Judges of the Supreme Court, the Chief Justice and the Judges of the Federal Shariat Court and Chief Justice and the Judges of the High Courts holding office at the time of revival of the Constitution took oath under the Constitution in the form set out in the Third Schedule to the Constitution. The Revocation Order also provided that he said revocation or repeal shall not revive anything not in force or existing at the time of revocation or repeal or affect the previous operation of any law or anything done or purported to, or suffered to have been done under the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office (Judges) Order, 2007. The above revocation or repeal would also not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office (Judges) Order, 2007. [PLD 2008 S.C. 178] The judgment has been sought to be reviewed on the score that 12 Member Bench judgment in the case of *Zafar Ali Shah vs. Pervaiz Musharraf* (PLD 2000 S.C. 869) has not been examined in its true perspective, therefore the judgment of the 12 Judges would prevail. Notice issued to the concerned quarters. [PLD 2009 S.C. 393]

8. Judicial review. The Constitutional bar of jurisdiction certainly does not permit the Courts to dilate upon matter of the nature in which the Courts are precluded to exercise jurisdiction, including the proclamation of emergency in the country by virtue of Articles 223 to 235 of the Constitution but notwithstanding the ouster clause, the superior Courts in exercise of their power of judicial review, may examine the circumstances calling for justification of such action of the executives affecting the fundamental rights of people. The superior Courts, in case of proclamation of emergency in the country in consequence to which Constitution is held in abeyance and is made inoperative, can also exercise power of judicial review which is inherent in the superior Courts to examine the question regarding the existence of circumstances for justification of such extra constitutional action and State necessity.

The question as to whether an action taken in deviation to the Constitution, except for the sake of integrity and solidarity of the country and protection of the Constitution itself is justified, cannot be answered in affirmative in the normal circumstances and such an action is certainly subject to the judicial review of the superior Courts. There may be a situation leading to the imposition of emergency in the country through extra-constitutional measures in which the constitutional machinery of State becomes inoperative but there is no concept of proclamation of emergency while Constitution is operative except in the manner as provided under Articles 232 to 235 of the Constitution and an extra constitutional action by an executive

authority while the Constitution is operative, may have no legal and moral justification. The Courts in such situation, being custodian of the constitution, must protect the Constitution and must not condone extra-constitutional action and permit impairing of the constitutional mandate except for the integrity of country or in case of external aggression against the State. There is a difference between the emergency under the Constitution and beyond the scope of constitutional provisions and also has different purposes and consequences therefore, contention that the Executive authorities have absolute power and authority to judge the need of emergency and Court due to the bar contained in the Constitution, have no jurisdiction to interfere in the matter, is not correct interpretation of law. [PLD 2008 S.C. 735]

233. Power to suspend Fundamental Rights, etc., during emergency period. (1) Nothing contained in Articles 15, 16, 17, 18, 19 and 24 shall, while a proclamation of Emergency is in force, restrict the power of the State as defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.

(2) While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any Court for the enforcement of such of the Fundamental Rights conferred by Chapter I of Part II as may be specified in the Order, and any proceeding in any Court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the Rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan.

(3) Every Order made under this Article shall, as soon as may be, be laid before a ⁷[both Houses of Majlis-e-Shoora (Parliament) separately] for approval and the provisions of clauses (7) and (8) of Article 232 shall apply to such an Order as they apply to a Proclamation of Emergency.

NOTES

Fundamental Rights. There is no restriction, while the Proclamation of Emergency is in force, to make any law or to take any executive action in contravention of the provisions contained in Article 15, (Freedom of movement), Article 16, (Freedom of assembly) Article 17, (Freedom of association) Article 18, (Freedom of trade, business or profession) Article 19, (Freedom of speech etc.) and Article 24 Protection of property rights. However, any law so made shall to the extent it is in inconsistency, with provisions of these Articles, cease to have effect and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.

⁷ Subs. by Constitution (Eighteenth Amendment) Act, X of 2010.

As regards other fundamental rights conferred by Chap. I of Part II, it is open to the President to declare by Order that the right to enforce those rights shall remain suspended during the period of the emergency, and so long such Order remains in force, the fundamental rights specified in the Order cannot be enforced, and any proceeding in any Court in respect thereof shall remain suspended.

Every Order made under this Article is to be laid before a joint sitting of the Parliament, as soon as possible, for approval. Provisions of clauses (7) and (8) of Article 232 apply to such an Order as they apply to a Proclamation of Emergency.

234. Power to issue Proclamation in case of failure of constitutional machinery in a Province. (1) If the President, on receipt of a report from the Governor of a Province ⁸[***], is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution, the President may, or if a resolution in this behalf is passed ⁹[by each House separately] shall, by Proclamation,

- (a) assume to himself, or direct the Governor of the Province to assume on behalf of the President, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any body or authority in the Province, other than the Provincial Assembly;
- (b) declare that the powers of the Provincial Assembly shall be exercisable by, or under the authority of, ¹⁰[Majlis-e-Shoora (Parliament)]; and
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the Province:

Provided that nothing in this Article shall authorize the President to assume to himself, or direct the Governor of the Province to assume on his behalf, any of the powers vested in, or exercisable by, a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts.

(2) The Provisions of Articles 105 shall not apply to the discharge by the Governor of his functions under clause (1).

(3) A Proclamation issued under this Article shall be laid before a joint sitting and shall cease to be in force at the expiration of two months, unless before the expiration of that period it has been approved by resolution of the

⁸ The words "or otherwise" omitted by Constitution (Eighteenth Amendment) Act, X of 2010.
⁹ Subs. for "at a joint sitting" by Constitution (Eighteenth Amendment) Act, X of 2010.
¹⁰ Subs. by P.O. 14 of 1985 w.e.f. 2 March 1985.

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joint sitting and may by like resolution be extended for a further period not exceeding two months at a time; but no such Proclamation shall in any case remain in force for more than six months.

(4) Notwithstanding anything contained in clause (3), if the National Assembly stands dissolved at the time when a Proclamation is issued under this Article, the Proclamation shall continue in force for a period of three months but, if a general election to the Assembly is not held before the expiration of that period, it shall cease to be in force at the expiration of that period unless it has earlier been approved by a resolution of the Senate.

(5) Where by a Proclamation issued under this Article it has been declared that the powers of the Provincial Assembly shall be exercisable by or under the authority of ¹¹[Majlis-e-Shoora (Parliament)], it shall be competent—

- (a) to ²⁰[Majlis-e-Shoora (Parliament)] in joint sitting to confer on the President the power to make laws with respect to any matter within the legislative competence of the Provincial Assembly;
- (b) to ²⁰[Majlis-e-Shoora (Parliament)] in joint sitting, or the President, when he is empowered under paragraph (a), to make laws conferring powers and imposing of duties, upon the Federation, or officers and authorities thereof;
- (c) to the President, when ²⁰[Majlis-e-Shoora (Parliament)] is not in session, to authorize expenditure from the Provincial Consolidated Fund, whether the expenditure is charged by the Constitution upon that fund or not, pending the sanction of such expenditure by ²⁰[Majlis-e-Shoora (Parliament)] in joint sitting; and
- (d) to ²⁰[Majlis-e-Shoora (Parliament)] in joint sitting by resolution to sanction expenditure authorized by the President under paragraph (c).

(6) Any law made by ²⁰[Majlis-e-Shoora (Parliament)] or the President which ²⁰[Majlis-e-Shoora (Parliament)] or the President would not, but for the issue of a Proclamation under this Article, have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation under this Article has ceased to be in force, except as to things done or omitted to be done before the expiration of the said period.

NOTES

Proclamation consequent upon the failure of constitutional machinery in a Province. This type of emergency arises when the President, on receipt of a report from the

11 Subs. by P.O. 14 of 1985 w.e.f. 2 March 1985.

Governor of a Province or otherwise, is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution. When such a proclamation is made, the President may—

- (a) assume to himself, or direct the Governor of the Province to assume on behalf of him (the President), all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any Body or Authority in the Province, other than the Provincial Assembly;
- (b) declare that the powers of the Provincial Assembly shall be exercised, by, or under the authority of Parliament. It may be seen from this that Parliament may legislate for the Province or direct another external agency to exercise such function.
- (c) make such incidental and consequential provisions as appears to him to be necessary or desirable for giving effect to the objects of the Proclamation including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the Province.

However, such a proclamation cannot take away the powers vested in, or exercisable by a High Court of the Province or to suspend either in whole or in part the operation of any provision of the Constitution relating to High Courts.

The proclamation of emergency issued under this Article is to be laid before a joint sitting of the Parliament. The proclamation cannot remain in force more than two months unless its extension is approved by the Parliament. The proclamation can be extended for a further period not exceeding two months, at a time, but no such Proclamation in any case will remain in force for more than six months. In case the National Assembly stands dissolved at the time of issuance of proclamation under this Article, the Proclamation shall continue in force for a period of three months, but, if a federal election to the Assembly is not held during this period, it shall cease to be in force at the expiration of the prescribed period unless it is approved by a resolution of the Senate.

Where, by a proclamation issued under this Article powers of the Provincial Assembly have been declared to be exercisable by or under the authority of the Parliament, it is competent:

- (a) to Parliament in joint sitting to confer on the President the power to make laws with respect to any matter within the legislative competence of the Provincial Assembly;
- (b) to Parliament in joint sitting, or the President when he is empowered under paragraph (a), to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties upon the Federation, or officers and authorities thereof;
- (c) to the President, when Parliament is not in session, to authorize expenditure from the Provincial Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, pending the sanction of such expenditure by Parliament in joint sitting; and
- (d) to Parliament in joint sitting by resolution to sanction expenditure authorized by the President under paragraph (c).

Such a law will remain in force throughout the period of emergency and six months after the cession of the operation of the proclamation of emergency; whereafter it lapses, except in respect of things done or omitted to be done before the expiration of the said period.

235. Proclamation in case of financial emergency. (1) If the President is satisfied that a situation has arisen whereby the economic life, financial stability or credit of Pakistan, or any part thereof, is threatened, he may, after consultation with the Governors of the Provinces or, as the case may be, the Governor of the Province concerned, by Proclamation make a declaration to that effect, and while such a Proclamation is in force, the executive authority of the Federation shall extend to the giving of directions to any Province to observe such principles of financial propriety as may be specified in the directions, and to the giving of such other directions as the president may deem necessary in the interest of the economic life, financial stability or credit of Pakistan or any part thereof.

(2) Notwithstanding anything in the Constitution, any such directions may include a provision requiring a reduction of the salary and allowances of all or any class of persons serving in connection with the affairs of the Province.

(3) While a Proclamation issued under this Article is in force the President may issue directions for the reduction of the salaries and allowances of all or any class of persons serving in connection with the affairs of the Federation.

(4) The provisions of clauses (3) and (4) of Article 234 shall apply to a Proclamation issued under this Article as they apply to a Proclamation issued under that Article.

NOTES

Proclamation in case of Financial emergency. In a case the President is satisfied that a situation has arisen whereby the economic life, financial stability of Pakistan, or any part thereof, is threatened, he may, after consultation with the respective Governor or Governors, proclaim emergency to this effect. When a proclamation of this kind is issued, the Executive authority of the Federation gets extended to the giving of directions to any Province to observe such principles of financial propriety as may be specified in the directions and to the giving of such other directions as the President may deem necessary in the interest of the economic life, financial stability or credit of Pakistan or any part thereof. The President may issue directions for the reduction of the salaries and allowances of all or any class of persons serving in connection with the affairs of a Province or the Federation.

The provisions of Article 234 clauses (3) and (4) are likewise applicable as they apply to a Proclamation issued under that Article.

It may be noted from the analysis of the provisions relating to the various types of the Proclamations of Emergency and the resulting consequences therefrom that by resort to these provisions the federal character of our polity gets transformed into one of unitary form where the Federal Government becomes the paramount and supreme authority within the country. But such a situation is not a permanent feature but is of transitory nature. Moreover when the very existence of the country is endangered to part with some of the liberties is not of much

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significance. There may hardly be any country the Constitution of which has not made alike provisions.

236. Revocation of Proclamation, etc. (1) A Proclamation issued under this part may be varied or revoked by a subsequent Proclamation.

(2) The validity of any Proclamation issued or Order made under this Part shall not be called in question in any Court.

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Such a proclamation may be varied or revoked. On the expiry of the emergency the Ordinances promulgated, if not earlier repealed or made Act of Parliament, cease to have effect.

The validity of any Proclamation issued or Order made under this part is not to be called in question in any Court of law.

237. ¹²[Majlis-e-Shoora (Parliament)] may make laws of indemnity, etc. Nothing in the Constitution shall prevent ²¹[Majlis-e-Shoora (Parliament)] from making any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan.

NOTES

Imposition of Martial Law. Constitution of the Islamic Republic of Pakistan, 1973, does not admit the imposition of Martial Law in any form. This is indicated from the language employed in Article 237 of the Constitution which empowers the Parliament to make any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan. But it does not cover indemnification for acts done during the period of Martial Law. The Parliament cannot make any law indemnifying any person in the Federal Government or Provincial Government in respect of any act done by him during the Martial Law period even for the maintenance and restoration of order. The imposition of Martial Law in connection with the maintenance or restoration of order in any area in Pakistan has been done away within the present Constitution. [PLD 1999 S.C. 504]

