PART – XI

AMENDMENT OF CONSTITUTION

238. *Amendment of Constitution.* Subject to this Part, the Constitution may be amended by Act of [1][Majlis-e-Shoora (Parliament)].

NOTES

Amendment of Constitution—Procedure. Procedure for the amendment of the Constitution is provided in Arts. 228 and 239 of the Constitution, i.e. by majority of 2/3rd votes of the total number of seats of the House. *[PLD 2012 S.C.923]*

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

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

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

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

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

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

(6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the [3][Majlis-e-Shoora (Parliament)] to amend any of the provisions of the Constitution.]

SYNOPSIS

1. Power of Parliament to amend Constitution.
2. Substitution of words.
3. Courts bound by the provisions of the Constitution.
4. Is our Constitution a rigid or flexible?
5. Conflict between two provisions of the Constitution.

1. Power of Parliament to amend Constitution. In the Constitution of 1973 in its original form Article 238 provides for amendment of the Constitution and Article 239 lays down the procedure for such amendment and is composed of seven clauses. Clause (7) provided that a Bill to amend the "Constitution which would have effect of altering the limits of a Province could not be passed by the National Assembly unless approved by resolution of Provincial Assembly of that Province by votes of not less than two-thirds of total membership of that Assembly. This shows anxiety of the Constitution-makers of that time not to make it easy to alter the limits or boundaries of a Province unless Assembly of that Province consented with votes of not less than two-thirds of the total membership of that Assembly. This anxiety was justified in the aftermath of loss of East Pakistan. Article 239 was amended by P.O. No. 20 of 1985 and substituted by P.O. No. 14 of 1985 which are protected for validity by Constitution (Eighth Amendment) Act No. XVIII of 1985. Apart from other amendments in Article 239, the major amendment is in clause (6) which is substituted by fresh provision providing that for removal of doubts, it is hereby declared that there is no limitation whatever on the power of Majlis-e-Shoora (Parliament) to amend any provision of the Constitution. We are going into the question of validity of the Constitution (Eighth Amendment) Act, 1985, later but for the time being it would suffice to say that freedom bestowed upon the Parliament in clause (6) of Article 239 after amendment does not include power to amend those provisions of the Constitution by which would be altered salient features of the Constitution, namely federalism, Parliamentary Form of Government blended with Islamic provisions. As long as these salient features reflected in the Objectives Resolution are retained and not altered in substance, amendments can be made as per procedure prescribed in Article 239 of the Constitution.

The only clog in clause (4) of this Article is that if amendment requires alterations in the limits of a Province then such amendment cannot be presented to the President for assent unless it has been passed by Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership. Article 239 cannot be interpreted so liberally to say that it is open-ended provision without any limits under which any amendment under the sun of whatever nature can be made to provide for any other system of governance, for example, monarchy or secular, which is not contemplated by the Objectives Resolution. Clause (6) of

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

Article 239 provides for removal of doubt that there is no limitation whatsoever on the power of Parliament to amend any provision/provisions of the Constitution. It therefore, follows that Parliament has full freedom to make any amendment in the Constitution as long as salient features and basic characteristics of the Constitution providing for Federalism, Parliamentary Democracy and Islamic provisions are untouched and are allowed to remain intact as they are. *[PLD 1997 S.C. 426]*

It is a well settled rule of interpretation that all provisions in the Constitution have equal status unless the Constitution itself provides that some of its provisions will have precedence or primacy over the other. Therefore, an amended or a new provision inserted in the Constitution as a result of the process of amendment prescribed in the Constitution, is not a "law" within the contemplation of Article 8 of the Constitution and as such the validity of the amended or newly-introduced provision in the Constitution cannot be tested on the touchstone of Fundamental Rights contained in Part II, Chapter I of the Constitution. It is a well settled law that the validity of a constitutional provision cannot be tested on the basis of another provision in the Constitution both being equal in status. The doctrine of ultra vires necessarily implies that one of the two competing provisions or legislations, is inferior in status to the other and the validity of the inferior provision or legislation is tested on the touchstone of the superior one. There is nothing in the language of Article 8 to indicate that the Framers of Constitution gave primacy to Article 8 of the Constitution over any other provision of the Constitution. In fact Part II of the Constitution consists of Chapters 1 and 2. Chapter 1 contains Fundamental rights while Chapter No. 2 contains equally important provisions described as Principles of Policy. The State through enforcement of provisions contained in Chapter 2, Part II of the Constitution is committed to create an egalitarian Society based on the concept of Islamic Welfare State (Article 31), promotion of local Government institution (Article 32), full participation of women in national life (Article 34), protection of the institutions of marriage, the family, the mother and child (Article 35), Protection of rights of minorities (Article 36), Promotion of social justice, economic well being of people and eradication of social evils (Articles 37 and 38), creating conditions conducive for participation of people from all parts of country in Armed Forces of Pakistan (Article 39) and strengthening of the fraternal bonds with all the Muslim countries of the world and promotion of international peace (Article 40).

No doubt, the Fundamental Rights mentioned in chapter 1, Part II of the Constitution enjoy a special place in the Constitution in the sense that the Legislature is prohibited to pass a law which is contrary to the provisions of Fundamental Rights and if such a law is passed by the Parliament in spite of the prohibition, the law to the extent of inconsistency is declared void. This may justify the inference that Fundamental Rights are one of the basic features of the Constitution. However, this does not mean that the provisions contained in Chapter 1, Part II of the Constitution have been given primacy or precedence over any other provision of the Constitution. As stated above, the Principles of Policy contained in Chapter 2, Part II are equally important provisions which lay down the very object and purpose of establishment of the State. These provisions may well be described as foundational principles of the Constitution. The achievements of the ideals set forth in Chapter 2 of Part I of the Constitution, is the cherished goal of every political party voted to power by the people. To achieve these ideals, necessity may arise for legislation in the fields mentioned in Chapter 2, Part II of the Constitution and specially the matters relating to promotion of social and economic well being of people belonging to less fortunate and deprived class of the Society. Such legislation may to

some extent, has the effect of curtailing or abridging the Fundamental Rights guaranteed under the Constitution, and correspondingly necessitate appropriate amendments in the provisions contained in Chapter 1 of Part II of the Constitution. The abridgement or curtailment of the Fundamental Rights through amendment of Constitution, in such circumstances, if it is short of abrogating or taking away the Fundamental Rights, cannot be declared invalid. This, however, would not mean that the power to amend the Constitution vesting in the Parliament under Article 239 of the Constitution is unlimited and unbridled. *[PLD 1998 S.C. 1263]*

No attempt should be made to define and lay down with precision the basic and salient features of the Constitution. Any attempt in this regard is more likely to confuse the issue than to define it. As and when any amendment in the Constitution is challenged on the round that it affected or altered any of the basic features of the Constitution, such feature of the Constitution may be examined individually to determine its place in the scheme of the Constitution, its object and purpose and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance. *[PLD 1998 S.C. 1263]*

As observed by *Mr. J. Mamoon Kazi*, when the Parliament amends the Constitution, it does not exercise its ordinary power of legislation but derives special power from Articles 238 and 239 of the Constitution, which is more akin to constituent power. Validity of ordinary law is tested by reference to provisions of the Constitution, but validity of a constitutional provision is inherent in the Constitution itself. Therefore, validity of constitutional provision cannot be tested on the touchstone of any other provision or a rule or a doctrine. Constitution is the supreme law of the land, therefore, its validity lies within itself. The Constitution of Pakistan is a controlled and a rigid Constitution as amendment in the Constitution is made by a special procedure as provided in Article 239 of the Constitution while an ordinary statute can be amended by an ordinary legislative process. The power to amend the Constitution is also absolute and unrestricted. Therefore, the Parliament has full power to make additions or alterations in the Constitution or to repeal any of its existing provisions in so far as the amendment has been passed in the manner provided for in the Constitution by not less than two-third of the members in the Parliament. But the powers bestowed upon the Parliament by the Constitution does not include the power to destroy or abrogate the Constitution or to alter what has been referred to as its basic structure or essential features. *[PLD 1998 S.C. 1263]*

2. **Substitution of words.** Substitution of words "Prime Minister" by word `President' in the oaths subscribed for the members of the Care Taker Cabinet not possible without amendment in the Constitution. *[PLD 1989 S.C. 166]*

3. **Courts bound by the provisions of the Constitution.** The Courts derive their powers from the Constitution and function under it. They cannot strike down any provision of the Constitution. They are duty bound to enforce and interpret them in such a manner so that all the provisions of the Constitution may co-exist harmoniously in the consfitutional frame work. The Court cannot declare any provision of the Constitution to be invalid or repugnant on the grounds that it goes beyond the mandate given to the Assembly or it does not fulfil the aspirations or objectives of the people. *[PLD 1988 Lah. 49]* Even the Court cannot declare a provision of the Constitution to be repugnant to the other provision of the Constitution. The question that an existing provision of the Constitution transgresses the limits prescribed by Allah Almighty (within which His people were competent to make law) such a question can only

be resolved by the Parliament which can take remedial measures by making suitable amendment in the impugned provision of the Constitution. *[PLD 1992 S.C. 595]*

4. **Is our Constitution a rigid or flexible?** In order to see if a Constitution is rigid or flexible it is essential to study the various provisions made therein from the following angles:

(i) as to the procedure laid down for its amendment;

(ii) as to the Fundamental laws provided;

(iii) as to the sovereignty;

(iv) as to the power of the Courts.

A flexible Constitution is one under which every law can legally be changed with the same process and in the same manner as an ordinary law. In the rigid Constitution, on the other hand a special machinery is provided in the Constitution itself through the medium of which an amendment to the Constitution can only be made.

The Fundamental laws are laws which deal with the framework of the Constitution, and these cannot be changed or amended in the ordinary process of law making. A rigid Constitution is one which is founded on fundamental written laws. In a flexible Constitution all laws can be such laws as cannot be changed except by way of an amendment in the Constitution itself.

In a rigid Constitution the Legislature is non-sovereign law making body, its powers being defined by the fundamental laws embodied in the Constitution. In a flexible Constitution on the other hand the legislature is sovereign in as much as it has the power of making, altering or repealing laws of any description including the Constitution itself.

In a rigid Constitution, law passed by the Legislature may be declared *ultra vires* or invalid by the superior Courts if it is repugnant to the provisions of the Constitution. In a flexible Constitution there is no authority, judicial or otherwise which can declare the law passed by the Legislature as *ultra vires*. In USA if the Congress contravenes any provision of the Federal Constitution the Supreme Court may declare it as *ultra vires*, while in England no Court possesses any powers to question the validity of an Act of Parliament.

Viewed from above it can be safely be said that present Constitution is more rigid than flexible.

As provided in the Article 239, a Bill requiring an amendment in the Constitution should originate in the National Assembly and is to be passed by not less than two-third votes of the total membership of the Assembly. The Bill when passed is to be transmitted to the Senate and if it is passed by the Senate by a majority of the total membership it shall be presented to the President for assent. If the Bill is not passed by the Senate within ninety days the Bill shall be deemed to have been rejected by the Senate but if it is passed with amendments it will again be reconsidered by the National Assembly. If the amended Bill is passed by two-third votes of the total membership of the Assembly it will be presented to the President for his assent. A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be passed by the votes of not less than two-third of the total membership of that Assembly. Thus there is a special machinery provided in the Constitution itself through the medium of which an amendment to the Constitution can be effected.

Likewise the Fundamental laws provided in the Constitution cannot be abridged, altered or changed except by way of an amendment in the Constitution.

The Parliament of Pakistan is not a sovereign law making body as that of the Parliament of the United Kingdom. Its powers are defined and embodied in the Constitution. It cannot alter or repeal laws except as provided in the Constitution.

It is the responsibility of the Superior Courts to see that the provisions of the Constitution are implemented in its true sense. The Superior Courts in Pakistan have the powers to declare a law ultra vires or invalid if it is repugnant to the provisions of the Constitution. Where an Act or Ordinance is found on examination by the superior Courts to be violative of Fundamental rights as guaranteed to the citizen, the superior Courts are empowered to issue directions to the Federal Government or a Provincial Government, as the case may be, to bring the law in conformity with Fundamental Rights. *[PLD 1993 S.C. 341]*

5. Conflict between two provisions of the Constitution. In Pakistan instead of adopting the basic structure theory or declaring a provision of the Constitution as ultra vires to any of the Fundamental rights, Supreme Court has pressed into service the rule of interpretation that if there is a conflict between the two provisions of the Constitution which is not reconcilable, the provision which contains lesser right must yield in favour of a provision which provides higher rights.