

Rights & Constitutional Fundamental Rights in Pakistan

Salmond has defined 'right' as a legally recognized and protected interest. Any interest which law recognizes or enforces whatever be the nature or extent of that recognition or enforcement is a legal right. It is not necessary that a legal right has been created by the State but it should be such that law Courts would recognize it and would protect it in their decisions and State would employ its machinery to enforce it.

The term 'right' in civil society is defined to mean that which a person is entitled to have, to do, or to receive from others, within the limits prescribed by law. In its legal sense a right is an interest, which is created and enforced either by the Constitution or by ordinary law. In the former case, it is a constitutional right, which can only be taken away by an amendment of the Constitution; in the latter, it is an ordinary right, which may be enlarged, abridged or destroyed by ordinary law.

What are human rights?

"Maybe we're all born knowing we have rights - we just need to be reminded"
--- Romanian HRE trainer

Human Rights can be defined as those basic standards without which people cannot live in dignity as human beings. Human rights are the foundation of freedom, justice and peace. Their respect allows the individual and the community to fully develop. They are "rights and freedoms to which all humans are entitled". Human rights are certain moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees "rights" suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary.

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Universal and inalienable

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations.

Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Interdependent and indivisible

All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

Equal and non-discriminatory

Non-discrimination is a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights.”

Both Rights and Obligations

Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.

Human rights are basic freedoms and welfare of all world citizens, with which governments have no rights to interfere. Every person has to live his or her life in accordance with the Universal Charter, The human rights had not existed since always they were created or declared on December 10 of 1948 and before this happened humanity had already lived barbaric episodes, had lived in misery and with fear. Everybody wanted to be treated equally but there was nobody to defend it so people were prejudiced and damned to slavery to death.

The human rights were created to defend all the rights that any person owned including free opinion, right to property, be treated equally by the law, right to live and be free, free of beliefs and right of education as the most important of the 30 articles.

All the countries members of the United Nations Organization (ONU) without any exception have the obligation to make public this declaration in the teaching establishments in all their territory.

What are fundamental rights?

Fundamental rights are what have traditionally been known as ‘Natural Rights’ of human beings. These rights as generally understood today date back to the time when the Magna Carta was introduced in 1215 AD through which an absolute monarch was made to acknowledge that the subjects possessed certain rights, which could not be violated by an all powerful sovereign.

There is now an acceptance among the international community about the centrality of human rights and their importance in democracy and development. A functional democracy that accommodates diversity is increasingly becoming the planet’s best bet against the concentration of power in the hands of a few and the abuse that inevitably

results from it. Most nations of the World have chosen democracy as their preferred form of government and this is affirmed in the official position that undemocratic nations are not welcome in the community of nations wedded to the principles of liberty and democratic political processes. Yet the challenge before us today is to deepen this democracy from just its basic electoral form into a common enterprise between people and government. While the strength and level of democracy in different parts of the globe may vary, the human rights framework offers the key means to move from basic electoral democracy to the fully-fledged version.

The principle that 'all power ultimately rests with the people and must be exercised with their consent' lies at the heart of democracy. Democracy is premised on the recognition and protection of people's right to have a say in all decision making processes which is itself based on the central principle of equality of all human beings. The exercise of this fundamental political right requires a guarantee of crucial freedoms –to express one's thoughts and opinion without fear, to seek and receive information, to form associations and to assemble in a peaceful manner to discuss public affairs amongst others.

Accommodation of the views of minorities is essential to prevent democracy from degenerating into despotism by the majority. The purpose of democracy like that of human rights protection is to uphold the dignity of every individual and to ensure that the voices of the weakest are also heard. Its core values –freedom, equality, fraternity, accommodation of diversity and the assurance of justice underpin the norms of human rights as well.

The goals of human rights are sometimes summed up as freedom from fear and want and to be able to develop one's potential. These are also the aims of governance. Governance is much more than the business of running the State machinery to keep one's borders safe and the law and order situation under control. States also have the mandate to eliminate inequalities and inequities entrenched in society that results in the exploitation and the marginalization of certain groups, depriving them of basic rights to a life of dignity. In addition, States have, at the international level, undertaken to guarantee protection for the human rights of all citizens. The test of governance is the degree to which the State machinery delivers on these commitments. Every human right corresponds to a human aspiration and a norm of treatment to which everyone is entitled. The international human rights regime, which is continuously evolving with the progress of time, provides universally accepted legal standards against which the performance of the State machinery can be measured. At a minimum, parliamentarians in a democracy must actively work to promote people's welfare, rejecting all forms of discrimination and exclusion, facilitate development with equity and justice, and encourage the most comprehensive and full participation of citizens in decision-making and action on diverse issues affecting society.

Good governance requires that all work of the State be informed by fundamental democratic principles underpinning human rights. The five pillars of good governance – transparency in decision-making processes, ensuring people's participation, responsibility in the exercise of power, accountability of the decision-makers and responsiveness to people's needs – uphold the edifice of sustainable democracy. Anything less will result in despotism and tyranny of power. A human rights lens on democracy and governance not only privileges justice and equity above all but most importantly takes the provision for human well-being by governments from mere promises into the realm of precise legal obligation.

Human rights standards provide the benchmarks against which success of development policies must be measured. Setting targets based on human rights allows policymakers to create realistic frameworks for achieving rights and making informed evaluations of the effectiveness of their policies and programmes. Situating development and poverty alleviation within a human rights framework gives primacy to the participation and empowerment of the poor, insists on democratic practices, and ensures that the rationale of poverty reduction no longer derives only from the fact that the poor have needs, but is based on the rights of all through entitlements that give rise to obligations on the part of international community, nation-states, the commercial sector and local communities and associations as enshrined in law.

Fundamental rights as per Pakistan Constitution

 The Fundamental Rights, as embodied in our Constitution, are the bed-rock of Pakistan democracy, and the rights to constitutional writs, contained in Articles 185 and 199 of the Constitution, is one of the formidable instruments in the hands of the Pakistan Citizens to assert their rights.

During the last 64 years, Pakistani Courts, and particularly the Supreme Court, have in many cases interpreted the Constitutional provisions relating to the Fundamental rights. In several of them, they have defined the nature and scope in the changing contents of our political, social and economic life. A thorough study of these provisions and the scope and trends, which emerge from judiciary pronouncements, are necessary in a growing democracy

In Pakistan, the Fundamental Rights are enshrined in Part (II) Chapter (1) of the Constitution of Pakistan, 1973 (the 'Constitution') and relate to Security of person (Article 9); Safeguards as to arrest and detention (Article 10); Right to fair trial (Article 10A); Slavery, Forced labour prohibited (Article 11); Protection against retrospective punishment (Article 12); Protection against double punishment and self incrimination (Article 13); Inviolability of dignity of man (Article 14); Freedom of movement (Article 15); Freedom of assembly (Article 16); Freedom of association (Article 17); Freedom of trade, business and profession (Article 18); Free speech (Article 19); Right to information (Article 19A); Religious rights (Article 20); Safeguard against taxation for purposes of any particular religion (Article 21); Safeguards as to educational institutions in respect of religion (Article 22); Provision as to property (Article 23); Protection of property rights (Article 24); Equality of citizens (Article 25); Right to education (Article 25A); Non-discrimination in respect of access to public places (Article 26); and Safeguards against discrimination in services (Article 27); Preservation of language, script and culture (Article 28)

The Chapter 2 of the constitution (Article 29 to 40) sets out the Principles of Policy, whereby and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority. It provides responsibility of the State with respect to Principles of Policy; Steps for Islamic way of life; Promotion of local Government institutions; Parochial and other similar prejudice to be discouraged; Full participation of women in national life; Protection of family; The State shall protect the marriage, the family, the mother and the child; Protection of minorities; Promotion of social justice and eradication of social evils; Promotion of social and economic well-being of the people; Participation of people in Armed Forces and Strengthening bonds with Muslim world and promoting international peace.

In case *Jabindera Kishore v. Province of East Pakistan* (PLD 1957 SC 9), it was observed that no right can be properly described as fundamental if the legislature can take it away by a law not involving an amendment of the Constitution, or unless its suspension or surrender in a national emergency is specifically provided by the Constitution itself.

In case *Province of East Pakistan v. Mehdi Ali Khan and others* (PLD 1959 SC 387), it was observed that the essential characteristic of fundamental rights is that they impose limitations, express or implied, on public authorities, legislative, executive and judicial, prohibiting them from interfering with their exercise.

Fundamental rights have no real meaning if the State itself is in danger and disorganized. If the State is in danger the liberties of the subjects are themselves in danger. It is for these reasons of State that an equilibrium has to be maintained between the two contending interests at stake, one, the individual liberties and the positive rights of the citizen which are declared by the Constitution to be Fundamental and the other the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of the society (*Nasrullah Khan v. District Magistrate – PLD 1965 Lahore 642*).

A right to be fundamental must be such as is enforceable by judicial or some other process. Any action taken by the Legislature or the Executive in violation of fundamental right is void in law and the courts are bound to make a declaration accordingly and to give suitable relief to the aggrieved party. This duty is the very essence of what is called judicial review of legislation (*Abul ala Maududi v. Govt. of West Pakistan - PLD 1964 SC 673*).

Only a few of these rights can be stated in the form of absolute propositions. Most of them require qualification in

the general interests of society, (Nasruallah Khan v. District Magistrate – PLD 1965 Lahore 642) particularly in a social Welfare State, where the individual's interest of society, particularly in a social welfare state, where the individual's interest is considered to be subordinate to the public welfare.

The very essence of fundamental right is that it is enforceable either through Court or other tribunal against the public authority contravening it.

In our constitution, fundamental rights are neither indefeasible (that cannot be defeated, revoked or made void. This term is usually applied to an estate or right which cannot be defeated) nor permanent, for their operation may be suspended after a proclamation of emergency under Part X, and like any other statutory right they, being the creation of the Constitution, may be taken away or abridged by an amendment of the Constitution (Province of East Pakistan v. Mehdi Ali Khan and others PLD 1959 SC 387).

Article 8 of the 1973 Constitution

Laws inconsistent with or in derogation of Fundamental rights to be void (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(3) The provisions of this Article shall not apply –

(a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or

(b) any of the

(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) other laws specified in Part I of the First Schedule.

and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

(4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring laws specified in Part II of the First Schedule into conformity with the rights conferred by this Chapter.

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

Explanation – If in respect of any law Majlis-e-Shoora (Parliament) is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

Amendment - The words 'or as amended by any of the laws specified in that schedule' at the end of sub-clause (b) of clause 3, were added by the Constitution (First Amendment) Act, 1974 Act (XXXIII of 1974).

General

Fundamental right is one, which is protected and guaranteed by the constitution of a state. While ordinary rights could be changed by the legislature in its ordinary process of legislation, a fundamental right being guaranteed by the constitution, cannot be changed by any process shorter than that required for amending constitution itself. The essential characteristic of fundamental rights as described in Mehdi Ali Khan's case is that they impose limitations, express or implied on public, legislature, executive and judicial, prohibiting them from interfering with their exercise. These fundamental rights operate like a double-edge sword. They not only destroy those portions of existing laws, which are in conflict with these rights but they also operate to render any state action void which has the effect of taking away or abridging any of the fundamental rights. Article 8 of our Constitution states that any law to the extent of such contravention would be void. Ordinary legal rights are available against private individuals whereas fundamental rights are available to an individual against the state, hence no organ of state can act in contravention of them. However, they may be taken away through constitutional amendment.

The classification of fundamental rights under the constitution are 22 and these could be divided into six major categories:-

- i) Personal Rights
- ii) Civil Liberties (Social Rights)
- iii) Religious/Educational Rights
- iv) Economic/Financial Rights
- v) Equality Rights
- vi) Cultural/Language Rights

As they are available to an individual against state hence, they could only be enforced against state or its functionaries. Article 8 is the most important of all and is the blanketing Article of the Articles relating to Fundamental Rights. Whereas Article 4 is separate therefrom in that sense that where there is no fundamental right and remedy available to a person under any law or there is no law providing remedy then it comes into play by giving such person the right to be treated in accordance with law. So, two major situations emerge:-

a) Where the action is based on law but inconsistent with the Fundamental Rights then Article 8 read with relevant infringed fundamental right and Article 199 (1)(c) will come into play. Further remedy will be under Article 185(3) before the Supreme Court.

b) Where the action is not based on law or is void abinitio, or there is no law providing remedy, then Article 4 will be invoked for treatment in accordance with law together with five writs available under Article 199 (1) (a) & (b).

It will be noticed that while in clause (1) the word 'inconsistent' is used, clause (2) uses the word 'contravention', the reason being that while the former embraces existing as well as future laws, the latter, as would appear from the words 'shall not make', only applies to future laws, and since the position envisaged by clause (2) is one where a future law comes in conflict with an existing fundamental right, the word 'contravention' has been deliberately used to indicate the violation of an existing right. Clause (2) contemplates cases, where inadvertently not deliberately, because no legislature would intentionally disregard a constitutional prohibition, the legislature enacts a law which collides with a fundamental right. But the result here is precisely the same as in the case of an existing law which is covered by clause (1). The law is void to the extent of such contravention and not void abinitio like legislation which

suffers from the incident of an inherent lack of power. The law is void only to the extent of the inconsistency or contravention and not the whole of it, if its other parts are severable from the offending part. If the other parts are not separable in the sense that they cannot be worked without the offending part, or if the offending part embodies a vital part or the object and principle of the legislation, the whole law would be void. The question whether the truncated or excised law can still operate depends upon whether the legislature would have considered such law worth enacting.

Once the Supreme Court of India drew a distinction between laws that become void under clause (1) and those that become void under clause (2) by describing the latter as still born i.e. dead from the very beginning and incapable of revival under the doctrine of eclipse. But it seems that there is no distinction between the two, because future laws may still operate in the Tribal Areas and may revive either by an amendment of the Constitution or by the withdrawal of the Proclamation of Emergency which temporarily eclipses them. They are not, therefore, dead laws, through when they come in conflict with a fundamental right in the decision of a case, they must be ignored.

As the Constitution is the supreme law, the fundamental law of the land, it is paramount to other laws. Therefore, if there be a law, existing or future, not in conformity with the Constitution, it must, in its application to particular case, yield to the superior law, namely, the constitutional provision.

It will be incorrect to say that all laws inconsistent or conflicting with fundamental rights have been repealed by the Constitution. The true solution to the position where the ordinary law conflicts with a provision of the Constitution has thus been stated by Chief Justice Marshall of USA in *Marbury v. Madison*:

Forum to challenge a law under Article 8: Any law or any custom or usage having the force of law can be validly challenged on the ground of its being inconsistent with the Fundamental Rights conferred by the Constitution, even in a civil suit and it not a legal or constitutional requirement that such challenge is necessarily to be made only through a petition under Article 199 of the Constitution.

Presumption in favour of constitutionality: The presumption is always in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the fundamental rights or constitutional principles whether it is a pre-constitution or a post-constitution law.

Power of legislature when statute declared unconstitutional: When a statute is declared unconstitutional by a court, the legislature cannot directly override that decision and pronounce the statute to have been valid or anything done under that statute to be valid on the date of decision. Legislature, however, can make fresh law free from unconstitutionality and then provide that anything done under the offending law shall be deemed to have been done under the new law and subject to its provisions.

No writ of mandamus against Legislature: Despite the fact that Article 8 contains an express prohibition directed against the State including Parliament and Provincial Assemblies not to make any law which takes away or abridges the fundamental rights, there is no known method provided in the Constitution whereby the legislature can be prevented from enacting a law which is inconsistent with the rights guaranteed in the Constitution. No mandamus can lie to compel the legislature to do or refrain from doing any act. In an Indian case titled *Chotey Lal v. The State of UP* (AIR 1951 All 228), the position was explained with considerable lucidity in the following words:

“It is necessary to understand exactly how and in what circumstances courts declare laws invalid or unconstitutional. Until a bill has become law, the legislative process not being complete, courts do not come into picture at all. It is not the function of any Court or judge to declare void or directly annul a law the moment it has been promulgated. Courts are not supervisory body over the Legislature. Their approval or disapproval is not needed for an Act passed by the Legislature to have the force of law. Their function is interpretative. In other words, upon any particular case

coming before them in which right of any party is involved, they decide whether the Act or any part of it, is to be disregarded on the ground of its incompatibility with the Constitution.”

Inconsistent existing laws whether void ab initio: The Article does not make the existing laws, which are inconsistent with the fundamental rights void ab initio. The Article is prospective in operation. The existing laws are rendered void only with effect from the commencement of the Constitution and are not to affect past and closed transactions. The Article also does not affect the enforcement of rights and liabilities that had accrued under the ‘inconsistent laws’ before the commencement of the Constitution (Keshawan v. State of Bombay – 1951 SCR 228). The unconstitutional procedure laid down by a pre-constitutional law is, however, not to be followed in respect of pending proceedings (Lachmandas v. State of Bombay – 1952 SCR 710).

Law Means

The word ‘law’ which is repeatedly used in the Article is not defined but it. It of course includes, but does not seem to be confined to, statute or enacted law. Personal law and customs, to the extent they are recognized by statute, and international law as adopted by conventions and incorporated in the domestic system are laws, as the word seems to have been used here in its general sense.

Salmond explains the term law as under:

The term law is used in two senses, which may be conveniently distinguished as the abstract and concrete. In the abstract application we speak of the law of England, the law of libel, criminal law and so forth. Similarly, we use the phrases law and order, law and justice, courts of law. In its concrete application, on the other hand, we say that Parliament has enacted or repealed a law, we speak of the bye-laws of a railway company or municipality, we hear of the corn law or the navigation laws. In the abstract sense we speak of law or of the law, in the concrete sense we speak of a law or of laws. The distinction demands attention for this reason, that the concrete term is not coextensive and coincident with the abstract in its application. Law or the laws does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws, but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England. It is one of the sources of law in the abstract sense. A law produces statute law or some other form of enacted law, just as judicial precedent produces case law. There is much law recognized, applied and enforced in the Courts of justice, which has not been enacted by any law.

In the context of this Article law means law of the land, that is to say, a rule of National Legal system, as interpreted, recognized and enforced by the Court or administered by other agencies or officials, subject to the interpretation by the Courts. In Asma Jilani’s case, the Supreme Court has gone thoroughly into the definitions, origins, requisites and enforceability of ‘Law’ as conceived by different jurists but the present Article refers to the law of the National legal system, statutory as well as judicial principles laid down by the Superior Courts. It does not include the law of God or law of nature or principles of natural justice unless such laws or principles find a place in the legal system or by judicial interpretation have been included in that system.

In the case of Ch. Manzoor Elahi v. Punjab Government (PLD 1975 SC 66) it was laid down that expression law as used in Article 2 of 1962 Constitution (corresponding to the present Article 4) was not necessarily confined to statute law or positive law but also covered juridical principles laid down from time to time by the superior courts and judicial norms obtaining in Pakistan. Since then the Supreme Court had in a number of cases expressed opposite view and the wider construction of the word law used in this Article as adopted in Manzoor Elahi’s case has been rejected by majority decision by F.B. Ali v. The State (PLD 1975 SC 506) relying on the rule laid down in Asma Jilani’s case (PLD 1972 SC 139) where, after a very instructive and illuminating discussion on the subject, Hamoodur Rehman, CJ, declared that meaning of word law used in the Article is restricted to positive law. In other words connotation of expression law meant a formal pronouncement of the will of a competent law-giver and did

not include what were mere legal precepts or theories.

The expression law as appearing in Article 4 of the Constitution again came up for its interpretation before the Supreme Court in *Federation of Pakistan v. United Sugar Mills Ltd.* (PLD 1977 SC 397), Muhammad Gul, J., who wrote the judgment of the court after elaborate discussion of the precedents existing on the construction the term law came to the conclusion that the term law as used in Article 4 as also in Article 8 of the Constitution has been used in contradistinction with any custom or usage having the force of law, and thus must be given limited connotation.

Void defined

Osborn has defined void in his Law Dictionary as 'of no legal effect; a nullity'. According to Webster it is null, void, useless, of no legal force or effect. In Black's Law Dictionary it is described as ineffectual, having no legal force or binding effect, unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it.

In *Province of East Pakistan v. Muhammad Mehdi Ali Khan* (PLD 1959 SC 387), the expression void came for construction. The court ruled that the term void as used in Article 4 of the Constitution 1956 meant as 'not in operation' or 'not enforceable' or 'in abeyance' so long as the supreme law holds the field.

The term void again became subject for construction by Supreme Court in *Abul-ala Maudoodi's case* (PLD 1964 SC 673). Their Lordships observed that it only meant 'ineffective in the premises' and not obliterated or repealed to the extent of inconsistency. Their lordships were of the view that the when a law is declared void on the ground of its being inconsistent with a fundamental right, it becomes ineffective but remains on the statute book in a state of hibernation (temporary eclipse) becoming operative again if that fundamental right disappears.

Our constitution uses the word void in respect of law in at least four of its provisions namely Article 8(1), 8(2), 143 and 232(4). In order to find out what the Constitution-makers had in their mind when the word void was employed in the above provisions of the constitution, one shall have to go deeper into the matter and try to find out from different authorities sources what this expression implied in judicial parlance.

Effect of Article 8 is not to obliterate the inconsistent law from the statute book for all times or for all purposes or for all people. It remains good, even after the commencement of the Constitution, as regards persons, who have not been given fundamental rights e.g. aliens.

Post-Constitutional laws inconsistent with fundamental rights shall be void ab initio under Article 8(2) any law made by any legislature after the commencement of the Constitution which contravenes any of the fundamental rights shall to the extent of the contravention be void.

"Shall be void" – Connotation: expression 'shall to the extent of such contravention or inconsistency, be void' as occurring in clause (1) and (2) of the Article 8 does not mean that an inconsistent law becomes void without any declaration from the Court to that effect. But once a statute is declared invalid for contravention of fundamental right, the invalidity attaches to the law from the date of commencement of the Constitution in the case of pre-constitution law and from the date of its enactment in the case of post-constitution law.

Principle of judicial review: Article 8 embodies the principle of judicial review. The theory of judicial review is based on the concept of two laws. Organic and ordinary. Implicit in the assumption that there is a paramount law which constitutes the source and basis of all other legislative authorities is the idea that any enactment made by the ordinary law-making authority which derogates and conflicts with the paramount law, must be void. If we hold the constitution as paramount and ordinary law as subordinate, the result will automatically follow that any enactment

made contrary to the provisions of the Constitution would be invalid and void.

Conclusion: From the above discussion of the views expressed by courts in Pakistan on the construction of the term 'void' as used in the constitution, it appears that the existing laws or provisions which are inconsistent with the fundamental rights do not die and are neither still born or non est, nor are they effaced or obliterated from the statute book. These laws are applicable to the pre-constitutional matters and also to those persons who do not enjoy fundamental rights and get revived as soon as the fetters are removed viz. fundamental rights or the supreme law ceases to be effective.

void and repeal

In case of Abul ala' Maudoodi, it was argued before Supreme Court of Pakistan that when a law is declared void on account of its conflict with the constitutional provision it should entail consequences, similar to those of repeal. Repelling the contention, S.A. Rehman J., made the following observations:

"I am not at all persuaded that this is so or that Article 250 (of the 1962 Constitution) of the Constitution is attracted to such a situation. That Article expressly deals with the effects of repeal but leaves the case of a law declared void under the Constitution untouched. It would therefore not be correct to regard the offending Act to be still available for giving effect to liabilities incurred under the Act before the promulgation of the fundamental rights. The word 'void' clearly implies that its provisions have become totally unenforceable to the extent of its repugnancy to the Constitution".

Under Article 8, the fundamental rights act like double-edged weapon. They not only declare void those provisions of law, which are inconsistent with these rights, they also render void and ineffective 'state-action' whether in the executive or legislative field, which tends or is calculated to curtail or deprive a citizen of any of the fundamental rights.

Suspension of fundamental rights

Human rights are so fundamental and inalienable that they can-not be denied to any human being on any ground. Moreover, they are always available to everyone at all times. Few are available to citizens only, and few are subject to reasonable restrictions imposed by law. In addition, they are not available when life of a nation is jeopardized, particularly, in exceptional circumstances of an emergency or Civil Martial Law. The International Covenant on Civil and Political Rights 1966 as well provides human rights both in normal and abnormal situations of a State. It permits to derogate their availability. Not only the Covenant permitted derogation of human rights, in exceptional cases but the Constitution of Pakistan also authorized the government to suspend them, during the promulgation of emergencies. However, right to life was saved from the clutches of a Government, by granting its protection, under Article 4 of the Constitution of Pakistan 1973, compelled the Government to keep its hands off to suspend it during the promulgation of an emergency. Justice Munir, in his commentary on the Constitution of Islamic Republic of Pakistan 1973 extra-cordially opined that a proclamation of emergency was a disastrous action, but unavoidable step to be taken only because of the perilous condition in which the country found itself by reason of actual or threatened war or external aggression or internal disturbance, so intense and wide spread that provincial governments found themselves unable to control them. Therefore, during the emergency, he observed, the country practically came under a unitary form of government. After a Constitutional amendment, the Constitution of Pakistan 1973 recognizes the ground of 'internal disturbance, as a constitutional justification for the proclamation of emergency and suspension of human rights, including right to life. The suspension of few fundamental rights is auto- triggered with the declaration of proclamation of emergency, and the suspension of other fundamental rights, needs a special Order by the President after the proclamation of emergency. There are many fundamental rights, the suspension of which is attached with the proclamation of emergency, including right to life. Those fundamental rights are freedom

of movement, freedom of assembly, freedom of association, freedom of trade, business and profession, freedom of speech, and protection of property rights. The Pakistan Constitution enumerates the fundamental rights, which are suspended with the proclamation of emergency and do not require a separate Presidential Order namely Articles 15, 16, 17, 18, 19, and 24, but they resurrects after the emergency is ceased. Moreover, the laws inconsistent with them, during emergency, would also cease immediately. Although right to life, under Article 9, may be suspended, during the promulgation of emergency, but it remains available due to Article 4(2), inserted in the Chapter of Fundamental Rights, containing similar provisions like Article 9 of the Constitution. These grounds of emergency in the Constitution, which have been abused more than the other grounds with reference to human rights. The new ground of proclamation of emergency is that the President can proclaim an emergency, when he is satisfied that the provincial government is not being carried on in accordance with the provisions of the Constitution. However, there is no bar on the jurisdiction relating to the powers of a High Court, prohibiting the suspending authority of the judicial power, which extends to the whole Constitution of Pakistan. The Proclamation Order cannot be challenged in any Court of Pakistan. The Constitution, while protecting the Order, says that 'the validity of any Proclamation issued or Order made under this Part shall not be called in question in any court. Due to judicial activism, apart from these provisions, the Supreme Court of Pakistan, in a recent case on the validity of Proclamation Order, held that judiciary had right to review it under the powers of judicial review. Therefore, the proclamation of the emergency was validated, but the suspension of the fundamental rights was declared unjustified (Farooq Ahmad Leghari v. Federation of Pakistan, PLD 1999 SC 57).

Delegating the powers of judicial review, now, the power to issue writ of Habeas Corpus is also available to the Sessions Judges, in charge of Sessions Divisions Section (Section 491 Criminal Procedure Code). Constitution expressly mentions the role of Armed Forces, if called for the purpose to maintain law and order (Article 245). Although the word Civil Martial law has not been used in Article 245 intentionally, but its exercise is almost of the same nature of Civil Martial law. The language of Article 245 (3) does not spell out a naked ouster of jurisdiction of the High-Courts under Article 199 of the Constitution.

If a proclamation of emergency has been issued by the President under Article 232, the consequence will be that nothing contained in Article 15 to 19 and 24 relating to rights of freedom of movement, of assembly, of association, of trade, business or profession, of speech and of protection of property shall 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 provision in the said Articles, be competent to make or take. Any law so made shall, to the extent of inconsistency, cease to have effect as soon as the Proclamation is revoked. Not only this, the President under Article 233 may by order, declare that the right to move any court for the enforcement of such of the fundamental rights as may be specified in the order and any proceeding pending in the court for the enforcement of such rights, shall remain suspended for the period proclamation remained in force. It will be noted that by the aforesaid provisions of the Constitution the fundamental rights are merely suspended and they are not abrogated and after the conclusion of the period of emergency, proceedings can be commenced for the enforcement of these rights.

Fundamental rights contained in Article 8 can be suspended in an emergency. In Rifat Parveen's case (PLD 1980 Quetta 10) it was held that the limitation imposed by Article 8(2) of the Constitution upon the state not to promulgate laws in contravention of the rights other than those enumerated in Article 232(1), is not removed by virtue of imposition of emergency. Emergency powers of Article 233 to suspend some of the fundamental rights does not extend to Article 22 and 25 of the Constitution and therefore, the State cannot under any circumstances make laws in violation of such rights. Land Reforms (Balochistan Patfeeder Canal) Regulation No.117 was declared to be impervious to all challenges under Article 8 of the Constitution on the ground that the regulation has been included in the First Schedule as provided in clause (3) of this Article.