HIGH COURT OF AZAD JAMMU AND KASHMIR

(1) Writ Petition No. 4216/22.
Date of Institution 14.12.2022.
Date of decision 20.08.2024.

Bilal Nawaz S/o Sardar Muhammad Nawaz Khan R/o village Pothi Bala, Post Office Rawalakot, Tehsil Rawalakot, District Poonch, Azad Kashmir.

….Petitioner

Versus

1. Azad Government of the State of Jammu and Kashmir through Chief Secretary Azad Govt. of the State of Jammu & Kashmir having office at New Secretariat Muzaffarbad.
2. President of Azad Jammu and Kashmir through Secretary presidential Affairs, Muzaffarabad.
3. Azad Jammu and Kashmir Election Commission through Chief Election Commissioner, New Secretariat, Lower Chatter, Muzaffarabad.
4. Department of Law, Justice, Parliamentary Affairs & Human Rights through its Secretary having his office at New Secretariat Muzaffarabad.
5. Department of Local Government & Rural Development through its Secretary having his office at New Secretariat Muzaffarabad.
6. All Youth Councilors of Local Bodies above the age of 35 years through Rizwan Khadim S/o Khadim Hussain R/o Green Town, Tehsil Rawalakot, District Poonch, Azad Kashmir.

…..Respondents

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(2) Writ Petition No. 441/2023.
Date of Institution 30.01.2023.
Date of decision. …….2024.

Bilal Nawaz S/o Sardar Muhammad Nawaz Khan R/o village Pothi Bala, Post Office Rawalakot, Tehsil Rawalakot, District Poonch, Azad Kashmir.

….Petitioner

Versus

1. Returning Officer Municipal Corporation Rawalakot/Civil Judge Court NO.1, Rawalakot Azad Kashmir.

2. Appellate Tribunal/District & Sessions Judge, Rawalakot, Azad Kashmir.
3. Azad Govt. of the State of Jammu and Kashmir through Secretary Law, Justice, Parliamentary Affairs & Human Rights Department having his office at New Secretariat Muzaffarabad.
4. Azad Jammu and Kashmir Election Commission through Chief Election Commissioner, New Secretariat, Lower Chatter Muzaffarabad.
5. Department of Law, Justice, Parliamentary Affairs & Human Rights through its Secretary having his office at New Secretariat Muzaffarabad.
6. Department of Local Government & Rural Development through its Secretary having his office at New Secretariat Muzaffarabad.
7. President of Azad Jammu and Kashmir through Secretary Presidential Affairs, Muzaffarabad.
8. Rizwan Khadim S/o Khadim Hussain R/o Green Town, Tehsil Rawalakot, District Poonch, Azad Kashmir.
9. Sarfraz Khan S/o Tassadaq Hussain R/o Cherh, Tehsil Rawalakot, District Poonch, Azad Kashmir.
10. Muhammad Mehfooz Shafique S/o Muhammad Shafique Khan R/o Kharick Tehsil Rawalakot, District Poonch, Azad Kashmir.

*.....**Respondents***

WRIT PETITION

Before**:-** ***Justice Syed Shahid Bahar, J.***

PRESENT:
Barrister Humayun Nawaz Khan, Advocate for the petitioner.
Pirzada Muhammad Sajjad, Assistant Advocate General, for the official respondents.
Ch. Amjad Ali, Advocate for respondents No.8 and 10 in writ petition No.441/2023.

Judgment:-

Unless we protect democracy, democracy cannot protect us[1]. Justice McLachlin [2] has rightly said that in democracies the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of profound respect for the other. We are not adversaries. We are all in the justice business together. Separation of powers is the backbone of a constitutional system[3]. The Legislature, the Executive and the Judiciary have no authority beyond

[1]. The Purposive Interpretation in Law by Aharon Barak @ P. 236.
[2]. Chief Justice of Canada (2000-2017).
[3]. Cooper v. Canada [1996] 3, S.C.R. 854, @ 867.

that granted to them under the Constitution. None of them is omnipotent.

2. Wisdom of the Executive behind the sunset legislation was ultimately to be revisited and relooked by the legislative fora (Assembly). In that sense, wisdom of the Assembly is yet to be exposed when the Bill through proper channel is brought for consideration before the esteemed legislative fora.

SUNSET PROVISION AND ITS ORIGIN:-

3. A sunset provision or sunset clause is a measure within a Statute that provides for the law to cease to be effective after a specified date, unless further legislative action is taken to extend it, i.e. sunset provisions have a specified expiration date.

4. The roots of sunset provisions are laid in Roman law of the mandate but the first philosophical reference is traced in the laws of Plato[4]. Sunset provisions are based on the maxim **"Ad tempus concessa post tempus censetur denegata"** which is translated as *"what is admitted for a period will be refused after a period."* It is also called 'periodic review' of the law/Statute. The main reason behind having the sunset clause is to prevent legislative inertia from setting in. This way, unwanted laws will not accumulate.

5. Strict Legislation suggests that all efforts should be made to save the legislation because there is always a presumption in favour of the constitutionality of a Statute [5], but Ordinance and Act of the legislative body for the purpose of testing on the touchstone of its

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[4]. Antonios Kouroutakis, "The Constitutional Value of Sunset Clauses" Routledge 2017.
[5]. R.K. Garg v. Union of India (1981) 4 SCC 675.

validity, as Ordinance is a temporary, time being and sunset legislation in a time limited oxygen tent based upon wisdom of the Executive while on other hand the Act of the Assembly is fully dressed up in the attire of wisdom of the legislative fora.

6. Impugned Ordinance is not say of the legislative fora. It transpires wisdom of the Executive. In middle of the election process, by defusing and disregarding the orders of this Court, promulgation of Ordinance qua substituting the upper age limit for youth candidates, cannot be regarded a good piece of legislation.

(underlining is mine)

7. Facts of the petition No.4216/2022, as per petitioner Bilal Nawaz are that he is 1st Class State Subject of the Azad Government of the State of Jammu and Kashmir and permanent resident and voter of village Pothi Bala, District Poonch and is a member of Leadership Council of Jammu & Kashmir Peoples Party, Azad Kashmir and former Chief Organizer of Jammu and Kashmir People Students Organization. He contended that he is 32 years of age and having qualification of B.Com/M.B.A and as such is qualified to be elected as Youth Councilor of Local Bodies against reserved seats of Youth under **Azad Jammu and Kashmir Local Government Act, 1990 (Act VII of 1990)**. The petitioner contended that respondents promulgated **Azad Jammu and Kashmir Local Government (Amendment) Ordinance, 2022** (Ordinance VII of 2022) whereby through its Section 2, clause (Ixviii) of section 2 of in Azad Jammu and Kashmir Local Government Act, 1990 (Act VII of 1990) has been amended, by substituting the figure “35”

with the figure “40” for qualification of reserved seats of Youth in local bodies. Petitioner alleged that impugned Ordinance has snatched the vested rights of the petitioner especially those enshrined in Article 4(4)(15) read with Article 3-D of Interim Constitution, 1974, therefore same is not maintainable being in direct conflict with the Interim Constitution, 1974. Counsel for the petitioner averred that through AJ&K Local Govt. (Amendment) Act, 2021 (Act. XXVII) of 2021) dated 28.06.2021, clause (Ixviii) of Section 2 was inserted in Azad Jammu and Kashmir Local Govt. Act, 1990 (Act VII of 1990) in the following manner:-

> *2. Definition.- In this Act, unless the context otherwise requires:-*
> (Ixviii) “Youth” means a person having age between 18-35 years

Petitioner contended that the election schedule was announced on 14.10.2022 / 21.11.2022 whereupon Local Bodies Election process was started and direct voting was conducted in three stages on 27.11.2022, 03.12.2022 and 08.12.2022, therefore indirect elections of reserved seats were going to be held as per law, however, suddenly, in order to accommodate some blue eyed persons, at the cost of accrued rights of petitioner alongwith many others, impugned Ordinance have been promulgated whereby the persons of 36-40 years age have included in the definition of “Youth” through impugned Ordinance namely Azad Jammu and Kashmir Local Government (Amendment) Ordinance, 2022 (Ordinance VII of 2022) in following manner:

> “2. Amendment in section 2, Act VII of 1990.- In the Azad Jammu & Kashmir Local Government Act, 1990, in

> Section 2, clause (Ixviii), for the figure “35” the figure “40”, shall be substituted.”

Petitioner contended that the respondents repealed/amended the law after passage of election schedule/conduct of direct elections, whereby the qualification of candidates for reserved seats of Youth has been changed which is not permissible under law, hence, impugned Ordinance is liable to be struck down. Learned counsel for the petitioner laid stress upon the point that as per Section 6 of the General Clauses Act, 1897 and Section 4(1) of the W.P. General Clauses Act, 1956, if any law is going to be repealed it will have no effect upon accrued rights already created in favour of the beneficiaries by virtue of repealed law. The learned counsel for the petitioner zealously contended that nowhere in the world a person of 36-40 years is considered as Youth; as the basic purpose of law is to provide representation to the Youth from the younger generation and in no way a person of 40 years can represent the Youth therefore, basic purpose of law is being frustrated through impugned Ordinance which is not sustainable under law. The learned counsel vehemently argued that the impugned Ordinance has been issued without approval of the Cabinet and it has conclusively been settled by the Apex Court of Pakistan while interpreting Article 89 of the Constitution of Islamic Republic of Pakistan, 1973 that any Ordinance, promulgated without approval of Cabinet is ultra vires of Constitution and has no value in eyes of law in case titled “Mustafa Impex vs. Government of Pakistan & others reported as PLD 2016 SC 808. He contended that Article 41 of AJ&K Interim Constitution, 1974 is a ditto copy of the

Article 89 of Constitution of Pakistan, therefore, the law laid down by Supreme Court of Pakistan is equally applicable under AJ&K Constitution. Finally the learned counsel prayed that by accepting the petition, the impugned Ordinance i.e. Azad Jammu and Kashmir Local Government (Amendment) Ordinance, 2022 through which clause (lxviii) of section 2 of AJ&K Local Government Act, 1990 (Act VII of 1990) has been amended, may be quashed.

8. In writ petition No.441/2023, the petitioner averred that the respondents promulgated AJ&K Local Government (Amendment) Ordinance, 2022, (impugned Ordinance), whereby through its Section 2, clause (lxviii) of Section 2 of Azad Jammu and Kashmir Local Govt. Act, 1990 (Act VII of 1990) has been amended by substituting the figure “35” with the figure “40” for qualification of reserved seats of Youth in local bodies. The petitioner challenged the said Ordinance through writ No.4216/2022, upon which by admitting the said writ petition, the operation of the impugned Ordinance was suspended vide order dated 14.12.2022, which was also delivered to the office of the Election Commission, forthwith, however, despite knowledge of the order dated 14.12.2022, the official respondents failed to discharge their duty under law. The petitioner averred that he objected the nomination papers of private respondents before Returning Officer on the ground that they are disqualified under law to contest for the reserved seats of youth being over the age of 35 years in light of order of this Court dated 14.12.2022 but the Returning Officer did not accept the petitioner’s contention and accepted the

nomination papers of private respondents. The petitioner filed an appeal before the Appellate Tribunal/Authority under Section 125G of Elections Act, 2020 which was dismissed vide order dated 28.01.2023 by declaring the same as incompetent on the basis of an expired Ordinance dated 25.07.2022. Petitioner claimed that the acceptance of the nomination papers of private respondents is without lawful authority, amounts to colorable exercise of powers, ultra vires to the Constitution, contra-jus, arbitrary, illegal and unjust, hence, liable to be set at naught.

9. After admission of amended writ petition, amended written statement has been filed on behalf of respondents No.8 and 10 whereby the stance of the petitioner has been negated. They raised preliminary objections wherein they contended that the petitioner has also participated in the election process, hence he has got no locus standi to file the instant writ petition. Neither any fundamental guaranteed right of petitioner is affected nor any violation of law is committed by the official respondents, so, petitioner is not an aggrieved person in the eye of law. They alleged that the necessary parties i.e. Returning Officer as well as Secretary Election Commission have not been impleaded in the line of respondents, thus, petition is not maintainable. The private respondents further took a stance in written statement that the order of this Court dated 14.12.2022 was suspended by the Apex Court to the extent of answering respondents, moreover, the petitioner has not challenged the notification dated 12.01.2023, whereby only appeal is provided against rejection of

nomination papers and no any remedy is mentioned against acceptance of nomination papers, even otherwise appeal before respondent No.1 was also time barred.

10. Whereas the stance of the Legal Advisor for Election Commission, Mr. Tahir Aziz Khan, Advocate, is that Election Commission is a statutory body who performs its functions according to law and as per direction of the State/Govt. as well as according to law enforced, thus, they acted accordingly and did not commit any violation of law and rules, therefore, the petition at hand merits dismissal.

10-A. Assistant Advocate General representing the State furnished arguments in a traditional way by contending that impugned Ordinance was placed upon the Cabinet before its issuance and same is within jurisdictional powers and no illegality or perversity is pointed out by the petitioner.

When asked whether temporary legislation afterward was brought before the Assembly or not? I got no plausible reply.

11. I have scrupulously brooded over the instant case's record besides taken stock of the arguments advanced pro and contra.

12. In writ petition No.4216/2022, the main stance of petitioner Bilal Nawaz is that he has challenged the Local Govt. (Amendment) Ordinance, 2022, whereby age limit of 35 years has

been enhanced to 40 years for the purpose of selection of Youth Councilor.

13. In 2nd writ petition, the petitioner Bilal Nawaz prayed that the writ petition may be accepted and nomination papers of private respondents vide serial No.4, 6 and 9 at Form IV (Annex. PD") for the reserved seats of Youth at Municipal Corporation Rawalakot may be rejected and decisions of respondents No.1 and 2 may be set aside. He further prayed that all nomination papers for reserved seats of Youth in all local bodies throughout Azad Jammu and Kashmir who have crossed age limit of 35 years may be rejected in compliance of this Court order dated 14.12.2022 as well as he prayed that any extension/reenactment of Ordinance dated 25.07.2022 may be quashed by declaring the same as illegal.

14. Initially the writ petition was admitted for regular hearing by this Court and operation of the impugned Ordinance i.e. Ordinance VII of 2022 dated 12.12.2022 was sent to sleep, vide order dated 14.12.2022 as well as order dated 30.01.2023 to the extent of private respondents No.8 to 10. The said orders were challenged by private respondents Muhammad Mahfooz Shafique and others before the Hon'ble Apex Court. The Hon'ble Apex Court vide order dated 03.02.2023 suspended the aforesaid orders passed by this Court and later on direction was also issued to this Court for expeditious disposal of the lis, vide its order dated 14.03.2023.

15. The main question arises in the case is that whether the impugned piece of legislation i.e. Local Govt. (Amendment) Ordinance, 2022, whereby age limit of 35 years has been enhanced to 40 years for the purpose of selection of Youth Councillors is affecting the right of the petitioner or the same is against the constitutionally fundamental guaranteed rights and whether the same is in conflict with the law and Interim Constitution, 1974, or not?.

16. Be that as it may, the worthy President of State of Azad Jammu and Kashmir has power to make Ordinance. In this regard, Article 41 of the Azad Jammu and Kashmir Interim Constitution, 1974 is relevant to reproduce as under:-

> **41. Power to make Ordinance.-** (1) The President may, except when the Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.
>
> (2) An Ordinance promulgated under this (Article) shall have the same force and effect as an Act of the Assembly and shall be subject to like restrictions as the power of the Assembly to make law, but every such Ordinance.
>
> (a) shall be laid before the Assembly and shall stand repealed at the expiration of four months from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution.
>
> Provided that the Assembly may by a resolution extend the Ordinance for a further period of four months and it shall stand repealed at the expiration of the extended period.

> (b) may be withdrawn at any time by the President.
>
> (3) without prejudice to the provisions of [sub-Article] (2), an Ordinance laid before the Assembly shall be deemed to be a Bill introduced in the Assembly.
>
> ……

17. The plain reading of Article 41 of Interim Constitution, 1974 shows that the President on the advice of the Prime Minister and after the approval of the Cabinet[6] is empowered to promulgate the Ordinance; (a) when the Assembly is not in session; (b) when the President is satisfied that circumstances exist which require immediate action, then he may make and promulgate an Ordinance. The powers vested in the President under Article 41(1) are not unfettered. The powers of the President are subject to same restrictions which apply to the Assembly to make the laws. Further restriction is imposed that the Ordinance shall be laid before the Assembly and at the expiration of a period of four months from its promulgation it shall automatically stand repealed. Further power is vested in the President that he may withdraw the Ordinance at any time. The conditions for issuing an Ordinance, thus, may be summarized that when the Assembly is not in session and the President is satisfied that the circumstances exist which render immediate action, he may promulgate an Ordinance. The existence of circumstances for satisfaction of the President taking immediate action is necessary.

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[6]. Article 7 of the Azad Jammu and Kashmir Interim Constitution, 1974, read with Messrs Mustafa Impex, Karachi v. The Govt. of Pakistan PLD 2016 SC 808.

18. Main plank of the arguments of the counsel for the petitioner Barrister Humayun Nawaz Khan is that impugned legislation is malafide besides without lawful authority which amounts to colourable exercise of powers, ultra vires to the Constitution, arbitrary and unjust, thus sought annulment of the Ordinance as well as prayed for reversal of the nomination of those candidates who took advantage of the impugned Ordinance (meaning thereby who are above the age of 35 years).

19. As it reflects from the record that AJ&K Local Govt. Amended Act, 2021 (Act VII of 2022) dated 28.06.2021, clause (lxviii) of Section was inserted in AJ&K Local Government Act, 1990 (Act VII of 1990) in infra manner:-

> 2. Definition.- In this Act, unless the context otherwise requires:- (lxviii) “Youth” means a person having age between 18-35 years;

20. It transpires from the record that election schedule was announced on 14.10.2022/21.11.2022 whereupon local bodies election process was started and direct voting was conducted in three stages i.e. on 27.11.2022, 03.12.2022 and 08.12.2022. Soon after indirect elections of reserved seats were required to be held as per existing laws, abruptly, the relevant quarters had brought the impugned Ordinance through which already prescribed age limit for youth was enhanced / substituted from 35 to 40 years. Obviously, the law was modified purposely and in haste to add the persons of 36 to 40 years age in the definition of youth. Plain reading of the impugned Ordinance 2022, AJ&K Local Govt. (Amendment) Ordinance, 2022

[Ordinance VII of 2022] (hereinafter to be called impugned Ordinance), makes it abundantly clear in the infra wording too:-

> Amendment of Section 2, Act Vii of 1990.- In the Azad Jammu and Kashmir Local Government Act, 1990 (Act VII of 1990), in Section 2, in clause (lxviii), for the figure "35", the figure "40" shall be substituted.

21. Age of Youth fixed in the original Act carries wisdom of highest legislative body, thus brining abrupt change through temporary legislation should have been equipped with rationale and reasoning for doing so in order to justify the amendment, particularly when a matter is pertaining to Medical Sciences like Biology, Arthrology and Osteology. No search paper or for that matter medical opinion has been brought by the respondents.

22. It is with legislative province of the Assembly to symmetrize the wisdom exposed in the temporary expired legislation when a Bill is brought on the floor of the Legislative House, but if an Ordinance has not been brought before the House for consideration thereby comes to an end, it cannot be approved mere on the presumption of tacit acceptance.

23. Sunset legislation in the middle of election process meant for removing age barrier by paralyzing the original Statute at least can be held an attempt to disparaging the Act of the Assembly (holding the field) that too when the temporary legislation was not afterwards brought for consideration and debate before the legislative Assembly, thus, in such like situation temporary legislation is nemesis and directly comes in conflict with the wisdom of upper legislative fora.

24. It is crystal clear that the respondents repealed/amended the piece of legislation after passage of election conducted by Election Commission, whereby qualification of the candidates for reserved seats has been changed. It can safely be held that when the election process was started and election schedule was already announced quo conducting direct election, certain rights have already stood created in favour of the desirous candidates for the seats of youth councilors (having age of 35 years).

25. It is reflecting from Article 56-C of Interim Constitution that any change in law cannot affect any right or privilege, acquired, accrued or incurred in any enactment so repealed. It is useful to reproduce the Article 56-C of the Interim Constitution, 1974, as infra:-

> "56-C. Effect of repeal of law.- Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of this Act, the repeal shall not, except as otherwise provided in this Act, -
>
> (a) revive anything not in force or existing at the time at which the repeal takes affect;
> (b) affect the previous operation of the law or anything duly done or suffered under the law;
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, any and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.]

26. In connection with the above controversy the moot point is that according to Section 6 of the General Clauses Act, 1897 and 4(1) of the W.P. General Clauses Act, 1956, if any law is going to be repealed it will have no effect upon accrued rights already created in favour of the beneficiaries by virtue of repealed law. Section 6 of the General Clauses Act, 1897 is reproduced as infra:-

> **Effect of repeal. –** *Where* this Act, or any Central Act or Regulation made after the commandment of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not –
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
> (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

27. So far as the arguments of the counsel for the petitioner that the impugned Ordinance was issued on back of the petitioner, meaning thereby without giving the opportunity of hearing to the petitioner is concerned, coupled with the argument that the impugned Ordinance (legislation) is malafide attempt. Both the arguments are not tenable in the eye of law, thus, repelled and discarded as it is trite

law that malafide cannot be attributed to the legislation (particularly primary legislation) while prior right of hearing is not available to anywhere against the primary legislation.

28. Now coming back to the controversy at hand; as it is an admitted position that the impugned legislation/Ordinance is no more in the field and the same has already expired, whereas, no permanent legislation in this regard has been made so far, thus, moreover the sunset legislation/Ordinance has met its natural fate, so, question arises for amalgamation of the same but the question remains there, whether consequential acts/proceedings in light of sunset legislation are sustainable in the eye of law or for that matter are in conflict with the scheme of Constitution is a question of pivotal importance to resolve the controversy in the instant lis before concluding the points, I deem it proper to somehow elaborate the scope of judicial review of primary legislation.

Judicial review of primary legislation

29. Primary legislation is legislation made directly by the legislature or the authority in whom the power to legislate for the time being vests; subordinate legislation on the other hand is law made by an authority acting under a power granted or delegated by a primary legislation.[7]

30. As per Dicey's point of view, Parliament has the right to make and unmake any law whatever.

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[7]. Judicial review of Public Actions—Second Edition—Justice Fazal Karim.

31. The Constitution is the fundamental law of the State in opposition to which any other law, regulation or identical legal instrument must be inoperative and void. This may be called higher Law doctrine.

32. The essential point is that the Constitution is the paramount law and the authority of the Parliament is a derived authority i.e derived from the Constitution. The law making function is merely this that the Constitution is carried into effect through the instrumentality of the legislature.[8]

Justification for judicial review of primary legislation. Doctrine of Judicial review.

33. Power of judicial review of legislation in every sense is democratic. The power of judicial review of legislative enactments is essentially an American doctrine. This doctrine was debated in the Federalist papers, and one of the earliest and best statements on this subject is to be found in Alexander Hamilton's Federalist paper No.78.

34. The complete independence of the Courts of Justice is peculiarly essential in a limited Constitution, by a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority, such for instance, as that it shall pass no bills of attainder, no Ex post facto laws, and this like, limitations of this kind can be preserved in practice no other way than through the medium of Courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

[8]. Shabir Shah vs. Shad Ahmed PLD 1995 SC 66.

reservations of particular rights or privileges would amount to nothing.

35. Some perplexity respecting the rights of the Courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the Judiciary to the legislature's power. It is urged that the authority which can declare the acts of another void. As the doctrine is of great importance in the American Constitution, a brief discussion of the ground on which rests cannot be unacceptable. There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the Constitution under which it is exercised, is void. No legislative act therefore contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than this principal; that the servant is above his master, that the representatives of the people are superior to the people themselves, that men acting by virtue of power may do not only what their power do not authorize; but what they forbid.

36. If it is said that the legislature body is per se the Constitutional Judges of their own powers, and that the construction they put upon them is conclusion upon the other departments it may be answered, that it cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend

to enable the representatives of the people to substitute their will to that of their Constitutions. It is far more rational to suppose, that the Courts were designed to be an intermediate body between the people and the legislature, in order among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is proper and peculiar province of the Courts. A Constitution is in fact and must be regarded by the Judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceedings from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course to be preferred to the statute, the intention of the people to the intention of their agents.

37. Nor does this conclusion by any means suppose a superiority of the Judicial to the legislature power. It only supposes that the power of the people is superior to both, and that where the will of the legislature declared in its statutes, stand in opposition to that of the people declared in the Constitution, the Judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

38. The exercise of judicial discretion in determining between two contradictory laws is exemplified in a familiar instance. It not un commonly happens that there are two statues existing of one time,

clashing in whole or in part with each other and neither of them containing any repealing clause or expression.

39. In such a case it is province of the Courts to legislate and fix their meaning and operation, so far as they can, by any fair construction, be reconciled to each other, reasons and law conspire and dictates that this should be done, where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the Courts for determining their relative validity is, that last in order of time shall be preferred to the first but this is mere a rule of Construction, not derived from any positive law but form the nature and reason of the thing. It is a rule not enforced upon the Courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interprets by the law. They thought it reasonable that between the interfering act of EQUAL authority that which was the last indication of its will should have the preference, but in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of the rule as proper to be followed. They taught us that the prior Act of a superior ought to be preferred to the subsequent act of an inferior or subordinate authority and that accordingly, whenever, a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

40. It can be of no weight to say that the Courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intention of the legislature. This might as well happen in every adjudication upon any single statute. The Courts must declare the sense of the law and if they should be disposed to exercise will instead judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation if it proves anything, would prove that there ought to be no judges distinct from the body. If then the courts of justice are considered as the bulwarks of a limited construction against legislative encroachments, this consideration will afford strong argument for the permanent tenure of the judicial offices, since nothing will contribute so much as this to that independent spirit in the Judges which must be essential to the faithful preference of so arduous duty.

41. Supra views were re-echoed in the famous case Marbury vs. Madison [5 US (Cranch) 137].

42. The importance of the above case from American jurisdiction lies in the fact that there is no express grant of the power of judicial review in the US Constitution.

43. Three grounds for the justification of this power can be gleaned from Marbury vs. Madison (supra discussed).

i. **The Theory of the Supremacy of a written Constitution**. [9]

[9]. Judicial review of Public Actions. Justice Fazal Karim (Late) second edition page – 1742.

Certainly all those who have written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such govt. must be that an Act of the legislature, repugnant to the Constitution, is void, this theory is essentially attached to written Constitutions, to be considered by this Court as one of the fundamental principles of our society.

ii. **The Legal extension of the exercise of judicial power;**

Chief Justice John Marshall explained that the power of Judicial review is judicial power in action, to quote his trite words:

"It is emphatically province and duty of the Judicial department to say what the law is. Those who apply the rule to particular cases must if necessity expound and interpret that rule, if two law conflicts with each other the Court must decide on the operation of each, so if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformable to the law, disregarding the Constitution or conformable to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case, this is the very essence of the judicial duty."

As Chief Justice Robert Explained in Daimler Chrysler vs. Cuno (2006) 547 US 332 Chief Justice Marshall grounded the

necessity to do so in course of carrying out the judicial function of deciding cases.

(iii) **Judges Oath to support the Constitution**

It was apparent to CJ Marshall that the framers of the Constitution contemplated that instrument as a rule for the government of Courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in a special manner, so their conduct, in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, to violating what they swear to support."

Contra view of Justice Gibson

44. Justice Gibson of Pennsylvania Supreme Court one of the ablest of American Judges later CJ of that State went against the verdict of the CJ Marshall by saying that it is a fallacy to suppose that judiciary can embark upon an Act of legislature to overturn the same having in opposition with Constitution. Constitution is a law of superior obligation and consequently if it were come into collision with an Act of the legislature the latter would have to give way. As per his estimation if there is a problem with a Statute that is for the legislature to correct and resolve.

Developing progressive, pragmatic approach qua constitutionality of the laws (impugned) is required to be

adopted, Constitution is a fundamental law of the State, equipped with a complete road map and scheme of rights and obligations that too portraying a concept of troika, indicating proper tracks like traffic signals, thus in case if any organ cross the red signal in a way to bypass the Constitution or introduce any law, legal instrument or policy in arbitrary mod, Superior Courts as being custodian of the Constitution are burdened with heavy duty to come in aid of the Constitution.

(Underling is mine)

Grounds on which primary legislation can be challenged.

45. As Constitution is the fundamental law of the State, thus, any statue or subordinate law coming in opposition with Constitution by any way cannot be allowed to remain in field to mock the fundamental law.

46. We have a written Constitution and that Constitution is the supreme law of the land. Pakistan has adopted many of the principles of English parliamentary system, but it has not accepted the English doctrine of the absolute supremacy of Parliament in matters of legislation in this respect. It has followed the American Constitution and other systems modeled on it. Notwithstanding the representative character of their political institutions, the American regard the limitation imposed by their Constitution upon the actions of the govt. both legislative and executive as essential to the preservation of public and private rights, they serve as a check upon what has been

described as the despotism of the majority and as was observed in the case of Hurtodo vs. The People of California.[10]

47. This view has been reaffirmed in a number of cases.[11]

Natural Justice doctrine.

48. The general rule is that the principles of natural justice do not apply to legislative process, in other sense a legislation cannot be invalidated on the ground of the principles of natural justice, but this exception is only attached to the legislation whether primary or delegated but this immunity is not available to the legal instruments on part of quasi judicial fora.

RELEVANCE OF UNREASONABLENESS, MALA-FIDES:-

52. Trite that malafides cannot be attributed to the Legislature [12] particularly in case the only ground on which the validity of a primary legislation can be determined is that it is repugnant to the Constitution. Therefore, the grounds of unreasonableness and mala-fides which are available to strike down sub-ordinate legislation are not available to strike down primary legislation.[13] Similarly a Statute cannot be struck down on the ground that it is harsh or absurd or contrary to common sense.[14] No mala-fides can be attributed to the Parliament as it is a sovereign body to legislate on any subject. The

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[10]. (1884) 110 US 516.
[11]. Doctor Mubasher Hussain vs. Federation of Pakistan PLD 2010 SC 265; Zaffar Ali Shah case PLD 2000 SC 869 which expressly relied upon Marbury vs. Madison 5 U.S. 137; Wattan Party case PLD 2006 SC 697 and Wukla Mahaz case PLD 1998 SC 1263.
[12]. Fauji Foundation v. Shamim ur Rehman PLD 1983 SC 457; Mehr Zulfiqar Ali Babu v. Government of Punjab PLD 1997 SC 11; Sh. Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 and Ali Azhar Khan Baloch v. Province of Sindh 2015 SCMR 456.
[13]. Govt. of Pakistan v. Akhlaque Hussain PLD 1965 SC 527 @ 554 by Cornelius, CJ.
[14]. Zulfiqar Ali Babu v. Govt. of Punjab PLD 1997 SC 11.

Court cannot strike down a Statute to legislate on any subject. The Court cannot strike down a Statute on the ground of mala-fides.[15]

CATEGORIES OF CONSTITUTIONALLY INVALID LEGISLATIONS

49. The topic of constitutionally invalidity of primary legislation can be divided into following broad categories:-

I. Laws inconsistent with or in contravention of Fundamental Rights;
i. Discussion of the rules of interpretation of the Fundamental Rights;
ii. A discussion on the enforcement of the Fundamental Rights;
II. Laws made by a Legislative body which under the Constitution it has no power to make; and
III. Laws invalid on account of their inconsistency with or contravention of any other express or implied provision of the Constitution.

DOCTRINE OF PITH AND SUBSTANCE:-

50. The doctrine of pith and substance means that the true nature and character of the legislation in question must be determined in order to ascertain the class of subject to which it really belongs.[16] The question of pith and substance does not arise unless the Court is inquiring whether a particular Act falls within one legislature list or another.[17]

51. **Wrapping up discussion on the issue the impugned primary legislation in attire of the opinion of the Executive was brought for accommodating some pampered candidates at the nick of time when election process was already on its way, thus it can**

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[15]. Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 and Fauji Foundation v. Federation of Pakistan PLD 1983 SC 457.
[16]. Russell vs. Queen (1881-82) 7 AC 829.
[17]. United Provinces v. Atiqa Begum AIR 1941 FC 16 @ p. 26.

safely be held that it was a person specific legislation which offends the very scheme of the Interim Constitution, particularly against the fundamental rights enshrined in the Constitution, specially right No.4(4)1 and 15 of the Interim Constitution, 1974, that too by operating the impugned law retrospectively at odds with Article 56-C of the Constitution.

52. It is in the fitness of things to mention that the larger Bench of this Court had also dealt with somehow akin proposition in the case of Ayan Ali Raja[18] wherein the word "youth" has amicably been defined and the impugned law was put in hibernation leaving the matter for final say of Legislative Assembly without any geometric progression of the age limit of youth.

53. A temporary legislation/impugned Ordinance after expiry of its fixed life has evaporated without getting a relook and wisdom of the Legislative Assembly, although it is prerogative of the Legislative Assembly to discuss, ponder and divulge its wisdom upon any proposed legislation and wisdom of the Legislature is always regarded as a final say in this regard unless the same is not at odds with the basic structure [19] of the Constitution i.e. Fundamental Rights. Thus in this sense, by showing judicial restraint, I am not embarking upon the factum of plausible age for youth and rely upon the age already fixed

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[18]. Muhammad Ayan Ali Raja v. Azad Jammu and Kashmir Legislative Assembly through its Secretary PLD 2023 High Court (AJK) 55.

[19]. It is the doctrine which holds that certain fundamental features of the Constitution, such as the supremacy of the Constitution, the rule of law, and the independence of the judiciary, cannot be amended or abrogated by the Parliament/ Legislature even by bringing a constitutional amendment. This doctrine was developed in the case of Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461; which is also known as the Fundamental Rights case.

in the parent Statue in vogue. It can safely be held that wisdom of Executive cannot be preferred over the wisdom of Legislative Assembly. Ordinance is based upon the wisdom of Executive while Act is the outcome of the wisdom oriented debate of the Legislative fora.

(Underlining for emphasis)

54. If a temporary piece of legislation appeared for a while in the arena (for the time being and aimed to acquire certain goal) but subsequently vanished from Statute (The law) neither laid before the Assembly nor could become part of the Statute permanently, thus in this sense, decluttering technique can be used to energize the permanent Statute and it can legitimately be presumed that the impugned Ordinance was neither promulgated, nor enacted.

55. Maximum age limit in the Act is definitely a qualifying word in absence of any relook by the legislature itself.

56. Before parting with the judgment it deems proper to reiterate that sacrosanctity of the Constitution cannot be overlooked. No one can be allowed to sabotage the scheme of the Constitution and saboteur of the Constitution has to face the music. It is a sacred object of the superior Courts to supervise the boundaries of the Constitution and to curb the sacrilegious acts as it is rudder for the Courts of law.

(Underlining is mine)

57. In matrix of above, the writ petition is **disposed of** with the following directions:-

i. The election of seats of Youth Councilors/ (beneficiaries of the impugned Ordinance) having age of above 35 years is overturned, resultant of which, the seats held by the respondents No.8, 9 and 10 are declared vacant, however, it will not affect the election of other Councillors duly elected under the previous law, having qualification of upper age limit under permanent Statute/ law i.e. 35 years.

ii. The respondents are directed to do needful qua conducting fresh elections against the seats declared vacant within 15 days. File be kept in record room after necessary requisite proceedings.

Muzaffarabad,
20.08.2024. **JUDGE**

Approved for reporting

JUDGE